# A DIGEST OF INDIAN LAW CASES

CONTAINING

## HIGH COURT REPORTS, 1862-1886,

AND

## PRIVY COUNCIL REPORTS OF APPEALS FROM INDIA 1836-1886,

WITH AN INDEX OF CASES.

COMPILED UNDER THE ORDERS OF THE GOVERNMENT OF INDIA

BY

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*IN FIVE VOLUMES.*

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**OUDH ESTATES ACT, I OF 1869.**

——— s. 2.

——— s. 8.

——— s. 10.

——— s. 13.

——— s. 22.

**OUDH SUB-SETTLEMENT ACT (XXVI OF 1866).**

**OUDH TALOOKDARS' RELIEF ACT (XXIV OF 1870).**

——— s. 3.

——— s. 10.

——— s. 25.

Owners and occupiers, Fine imposed on—

Ownership, Intention as to joint— or several—

**OWNERSHIP, PRESUMPTION OF—**

Ownership, Transfer of—

Ownership in the soil.

# CORRIGENDA.

COL. 2979.—*Line 9 from top, for* "Ind. Jur., O. S." *read* "1 Ind. Jur., O. S."

COL. 2989.—*Case 96, reference to case, for* "W. R., Act X" *read* "2 W. R., Act X."

COL. 3019.—*Case 236, reference to case, for* "32 Agra" *read* "3 Agra"

COL. 3041.—*Case 334, reference to case, for* "487" *read* "847"

COL. 3228.—*Under section 23, for* "Art. 144—Interest in immoveable property" *read* "Art. 145"

COL. 4114.—*After heading* "OATHS ACT" *for* "IV of 1872" *read* "VI of 1872."

COL. 4124.—*From the last line, omit the reference* "I. L. R., 2 All., 876"

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L

**LABOUR, CONTRACT TO SUPPLY—**

*See* ACT XIII OF 1859.
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**LABOURERS.**

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——— **Wages of—**

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[3 B. L. R., A. Cr., 39

**LACHES.**

*See* ACQUIESCENCE . I. L. R., 1 All., 82
[2 Mad., 114, 270
22 W. R., 267

*See* LIMITATION ACT, 1877, ART. 113.
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*See* PRIVY COUNCIL, PRACTICE OF—REHEARING . . 2 B. L. R., P. C., 10

*See* SALE IN EXECUTION OF DECREE—PURCHASERS, RIGHTS OF—GENERALLY.
[11 Bom., 193

*See* SUMMONS . 15 B. L. R., Ap., 12

*See* SUPERINTENDENCE OF HIGH COURT—CHARTER ACT, S. 15—CIVIL CASES.
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**LACHES**—*continued.*

1. ——— **Doctrine of laches, Application of.**—*Suits for which period of limitation is provided.*—The equitable doctrine of *laches* and acquiescence does not apply to suits for which a period of limitation is provided by the Limitation Act. RAM RAU *v.* RAJA RAU . 2 Mad., 114

TARUCK CHUNDER BHUTTACHARJEE *v.* HURO SUNKUR SANDYAL . . 22 W. R., 267

2. ——— *Suits for which period of limitation is provided.*—Mere *laches*, or indirect acquiescence short of the period prescribed by the Statute of Limitations, is no bar to the enforcement of a right absolute vested in the plaintiff at the time of suit. *Semble,*—The doctrine of acquiescence or *laches* will apply only to cases, if such there are, in which they can be regarded as a positive extinguishment of right. When they go merely to the remedy, the Courts have no power arbitrarily to substitute an extinguishing prescription different to that determined by the Legislature. REDDAMUTHULATY *v.* TIMMA PEDDY
[2 Mad., 270

3. ——— *Mortgagor.—Limitation Act, 1859, s. 1, cl. 15.—Estoppel.*—The *laches* of a mortgagor in taking no steps for many years to enforce his alleged rights may afford evidence against the existence of those rights, but cannot estop him from asserting them, if they do exist, at any time within the period of sixty years allowed by section 1, clause 15, Act XIV of 1859. On account of the plaintiff's *laches* the Judicial Committee disallowed mesne profits prior to the date of the institution of the suit, which had been allowed by the High Court. JUGGURNATH SAHOO *v.* SHAH MAHOMED HOSSEIN
[14 B. L. R., 386: L. R., 2 I. A., 49
23 W. R., 99

4. ——— *Reversioners suing within period of limitation but after delay in knowing their rights.*—When reversioners bring their suit within the period of limitation allowed by

**LACHES.—Doctrine of laches, Application of—*continued.***

law, delay in asserting their rights is not by itself sufficient to justify a finding that they have assented to the invasion of the right which necessitates their applying for relief. DULLEEP SINGH *v.* SEEKISHOON PANDAY . . . . **4 N. W., 83**

5. ——————— *Delay in suing.—Suit not barred by limitation.*—A suit in which plaintiff claimed to have a drain closed on the ground that it passed through his land, having been dismissed because the delay in bringing it amounted to consent,—*Held* that the Courts of this country have no power to refuse relief on the ground of mere delay, where the plaintiff establishes a right not affected by limitation. RAMPHUL SAHOO *v.* MISREE LALL **[24 W. R., 97**

6. ——————— *Delay in execution of decree.—Interest, Right to.*—As long as a decree-holder does not incur the loss of right by limitation, he cannot be deprived of the interest which his decree gave him, on the ground of his dilatoriness in taking out execution. MODHOO SOODUN ROY CHOWDHRY *v.* BHIKAREE ROY CHOWDHRY **[5 W. R., Mis., 11**

7. ——————— *Delay in execution of decree.—Debt barred by limitation.—Admission of debtor.*—The decision of the Full Bench, *Bissessur Mullick* v. *Dhiraj Mahatab Chand Bahadoor, B. L. R., Sup. Vol., 967 : 10 W. R., F. B., 8,* that a decree once barred is always barred, for the reason that no proceedings in execution can be valid if instituted after three years from the date of the last proceeding, was held to apply in a case where the admissions of a judgment-debtor were pleaded in condonation of the decree-holder's *laches* in executing his decree. BHOOPUTTY LALL TEWAREE *v.* SOOOHEE SEEKHUR MOOKERJEE . . . . . **12 W. R., 255**

8. ——————— *Delay in suing.*—Where a plaintiff sued to recover certain property as wuqf, on the ground that the mutwali and his ancestor (a former mutwali) had misconducted themselves by selling to some of the defendants the property which was the subject of the endowment, and where it appeared that the plaintiff lay by for nearly twelve years from the time when the vendees purchased and were put into possession, it was held that he was not entitled to the assistance of the Court. BHUBUCK CHUNDRA SAHOO *v.* GOLAM SHURUFF . . **10 W. R., 458**

9. ——————— *Right of person guilty of laches against subsequent purchaser without notice.*—*A.* bought land from *B.* in 1848, entered into possession, and in 1852 went abroad. In 1853 *C.* bought the same land from *B.* without notice of *A.'s* purchase, the land being then registered in *B.'s* name. *Held,* in a suit brought in 1859, *A.* could not eject *C.,* having forfeited his right by his own *laches.* CHIDAMBARA NAYINAN *v.* ANNAPA NAYKKAN **[1 Mad., 62**

But *see* VIRABHADRA PILLAI *v.* HARI RAMA PILLAI . . . . . **3 Mad., 38**

**LACHES.—Doctrine of laches, Application of—*continued.***

10. ——————— *Contract Act, 1872, ss. 13, 20.—Bill of exchange.—Mistake.—Void agreement.*—On the 3rd March 1881 *N.* drew a bill in English at Cawnpore in favour of *F.* on a Calcutta firm and gave it to *F.'s* agent, who did not understand English. *F.'s* agent kept the bill till the 10th March 1881 without ascertaining its nature. On that date the Calcutta firm on which the bill was drawn became insolvent. *F.* subsequently sued *N.* for the money he had paid for the bill, on the ground that his agent had asked *N.* for a bill drawn on himself and not one drawn on the Calcutta firm. *N.* asserted in defence to the suit that *F.'s* agent had not asked for a bill drawn on himself, but merely for a bill on Calcutta. *Held* that, assuming that the sale of the bill was void by reason of both parties being under a mistake as to the bill, yet *F.* could not recover the amount of the bill from *N.* because his agent had been guilty of gross negligence in taking the bill and keeping it so long without ascertaining its nature and applying for redress. NIGHTINGALE *v.* FAIZ-ULLA **[I. L. R., 4 All., 334**

11. ——————— *Mortgagee not taking possession after usufructuary mortgage.*—An usufructuary mortgage of lands was executed in 1846, but the mortgagee did not enter into possession. In 1852 his representative, the plaintiff, commenced a suit to obtain possession, but allowed it to drop. In 1854 he commenced the present suit for the same object. *Held* that *laches* could not be imputed to the plaintiff from the date of presenting the plaint in 1852, and that the produce from that date should be accordingly awarded him. LAKSHMI NARAYANA *v.* RAMAPA CHAKKIRA . . . . . **1 Mad., 70**

12. ——————— *Mortgage, Suit for redemption of.—Neglect in applying in time for execution of decree for possession.—Fresh suit for redemption.*—The plaintiff in this suit claimed possession of certain property by redemption of a usufructuary mortgage of it which he had given the defendants. The plaintiff had previously sued the defendants for possession of the property by redemption of the mortgage and had obtained a decree for possession of it, but had not applied for execution of such decree within the time allowed by law. *Held* that the plaintiff, having obtained in the former suit a decree for possession of the property, and having by his own neglect lost his right to execution of such decree, could not be permitted to revert to the position which he held before the institution of that suit, and to bring a fresh suit for possession. *Golam Hossein v. Alla Rukhee Beebee, 8 N. W., 62,* followed. ANRUDH SINGH *v.* SHEO PRASAD **[I. L. R., 4 All., 481**

13. ——————— *Application to amend decree.—Delay.*—Where a decree-holder came in, after the lapse of some three and a half years, and when one of the Judges who made the order ceased to be a Judge of the Court, to ask for an amendment of the decree by allowing her the costs of all the remands that took place in the case,—*Held* that, after such a delay, the Court could not make such an order,

**LACHES.—Doctrine of laches, Application of—*continued.***

or even say whether the decree-holder was entitled to these costs. ODDAY TARA CHOWDRAIN *v.* JONAB ALI CHOWDRY . . . . **17 W. R., 358**

14. ——————— *Omission to appeal from order.—Acquiescence, Presumption of.*—Where the Assistant Commissioner in execution in 1857 acted without jurisdiction in giving interest when the decree did not award it, and the claim for interest was disallowed by the Deputy Commissioner in execution in 1865, and the Deputy Commissioner's order was reversed in appeal by the Judicial Commissioner, on the ground that the Assistant Commissioner's order was a judicial one from which no appeal had been preferred,—*Held*, by the High Court, that it was too late now to interfere with an order passed so long ago as 1857, as the judgment-debtor, by neglecting to appeal, must be presumed to have acquiesced in that order. RAM KERAN DEO *v.* FUHIMA BIBEE . . . . **7 W. R., 37**

15. ——————— *Defence showing great delay on part of defendant.—Suit for arrears of rent.*—Plaintiffs (putnidars) sued the defendants (dur-putnidars) for arrears of rent. The defendants alleged that a part of the land had been taken by the Government, twenty-four years previously, for the purposes of railway, and they claimed an abatement on that ground. *Held* that the Limitation Act does not in terms prevent a defendant from setting up such a defence; but that the great delay in this case, combined with other circumstances, disentitled the defendants to any relief in a Court of Equity. RAM NARAIN CHUCKERBUTTY *v.* POOLIN BEHARI LALL SINGH . . . . **2 C. L. R., 5**

16. ——————— *Ignorance of Ameen's proceedings in demarcating land.—Delay.*—In execution of a decree for possession of land, an Ameen having been deputed to demarcate the land, the defendant pleaded, nearly a year after the demarcation, that he had been entirely ignorant of the Ameen's proceedings. *Held* that an opportunity should be given to the defendant of substantiating his plea; but that if plaintiff could prove that defendant had even indirect notice of what was transpiring, the lower Court should refuse to go into the question after so long a delay. COLLECTOR OF MONGHYR *v.* BHOBANY PERSHAD . **25 W. R., 183**

17. ——————— *Loss of Government promissory notes.—Suit on agreement to obtain duplicate, or restore value.*—Plaintiff's relative borrowed money from defendant on the security of a Government promissory note which was stolen from defendant in 1865, and defendant advertised the loss. In 1865 an ikrar was executed between the parties, whereby defendant was bound to take steps, assisted by plaintiff, to procure a duplicate. The note was endorsed, not in defendant's, but in plaintiff's name, and no steps whatever were taken by plaintiff until 1869, when the note turned up in the Currency Office. Defendant being unable therefore to perform his part of the contract,—*Held* that any neglect that had taken place in obtaining a duplicate was entirely owing to the plaintiff's *laches* and that he was not entitled to recover on the ikrar. KAMINEE DEBIA *v.* RADHA SHAM KOONDOO . . **18 W. R., 58**

**LACHES.—Doctrine of laches, Application of—*continued.***

18. ——————— *Omission to register certificate of sale.—Right to second certificate for purposes of registration.—Quære,*—Whether the Subordinate Judge should have issued a new certificate of sale after the original one had been rejected by the Court as being unregistered in order that the plaintiff might register it, the plaintiff having already lost, by his own *laches*, the right to register the original certificate. LALBHAI LAKHIMDAS *v.* KAMALUDIN HUSEN KHAN . **12 Bom., 247**

19. ——————— *Presumption against persons who do not enforce their rights.—Unexplained delay.—Disturbance of long possession.—Dispute as to chur lands.*—The presumption that usually arises against those who slumber on their rights is the stronger when applied to rights, the subject-matter of which (as in the case of churs) is in a constant state of change, and the proof of which is rendered more than usually difficult by lapse of time. In this case plaintiff sought to oust from possession persons who had enjoyed the property in question from 1835 to the present time; and as he was responsible for nearly twenty years of that delay, the Privy Council required to be satisfied by clear proof of the grounds which he alleged for disturbing a possession of such long continuance, and were of opinion that plaintiff had failed to prove his case, inasmuch as he had not proved the lands which had re-formed (if lands had re-formed in the bed of the river) to have been the same as those which belonged to his predecessors and had been diluviated, nor had he proved his title upon the ground of the *locus in quo* being an accretion to any lands of which he was possessed. SHAM CHAND BYSACK *v.* KISHEN PROSAUD SURMA

**[18 W. R., 4: 14 Moore's I. A., 595**

**LAND ACQUISITION.**

*See* STATUTES, CONSTRUCTION OF—

**[12 Bom., 250**

**LAND ACQUISITION ACT (VI of 1857).**

*See* CASES UNDER ARBITRATION—ARBITRATION UNDER SPECIAL ACTS AND REGULATIONS—ACT VI OF 1857.

*See* DAMAGES—MEASURE AND ASSESSMENT OF DAMAGES—TORTS.

**[6 Bom., A. C., 116**

*See* DAMAGES—SUITS FOR DAMAGES—BREACH OF CONTRACT . **8 W. R., 327**

*See* CASES UNDER LAND ACQUISITION ACT (X OF 1870).

*See* LIMITATION ACT, 1877, s. 19 (1859, s. 4)—ACKNOWLEDGMENT IN RESPECT OF OTHER RIGHTS **11 W. R., 1**

LAND ACQUISITION ACT—*continued.*

——— (X of 1870).—*High Court.—Powers of superintendence.*—The Courts established under Act X of 1870 are Courts subject to the appellate jurisdiction of the High Court, and not the less so because an appeal lies to the High Court from their decisions in certain cases only. The High Court consequently has the power of superintendence over those Courts under section 15 of 24 and 25 Victoria, Cap. 104. IN THE MATTER OF THE PETITION OF ABDOOL ALI [15 B. L. R., 197

S. C., ABDOOL ALI *v.* VERNER. VERNER *v.* ABDOOL ALI . . . 23 W. R., 73, 239

——— s. 15.

*See* SPECIAL APPEAL—ORDERS SUBJECT TO APPEAL . I. L. R., 9 Calc., 838

——— *Reference by Collector to District Court.—Land claimed by Collector on behalf of Government or Municipality.*—The scope and object of the Land Acquisition Act (X of 1870) is to provide a speedy method for deciding the amount of the compensation payable by the Collector, when such amount is disputed, and the person or persons to whom it is payable. Section 15 of the Land Acquisition Act contemplates a reference when the question of the title to the land arises between the claimants who appear in response to the notice issued under section 9, and who set up conflicting claims one against another as to the land required, which the District Judge as between such persons can determine. The Collector has no power to make a reference to the District Judge under section 15 in cases in which he claims the land in question on behalf of Government or the Municipality, and denies the title of other claimants, and the District Judge has no jurisdiction to entertain or determine such reference. IMDAD ALI KHAN *v.* COLLECTOR OF FARAKHABAD [I. L. R., 7 All., 817

——— ss. 16 & 17.—*Act VI of 1857, s. 8.—Acquisition of land by Government.—Right of way.*—When land is taken by the Government under Act VI of 1857, the land is absolutely vested in the Government under section 8, free from any right of way previously enjoyed by the public over such land. IN THE MATTER OF THE PETITION OF FENWICK [6 B. L. R., Ap., 47: 14 W. R., Cr., 72

——— *Act VI of 1857, s. 8.—Right of way.*—A right of way cannot by the provisions of Act VI of 1867 continue to exist over land acquired by a railway company under that Act with the aid of Government. If, however, the railway company by their representations and conduct lay themselves under legal obligation to provide a way, such obligation may be enforced. COLLECTOR OF THE 24-PERGUNNAHS *v.* NOBIN CHUNDER GHOSE [3 W. R., 27

——— s. 19.—*Assessor.—Qualified assessor.—Bias.*—The Municipality of Poona wishing to take up the applicant's land, the Collector of Poona determined the amount of compensation, and tendered it to the applicant, who declined to accept it. The Collector thereupon referred the matter to the District Judge. Two assessors were appointed to aid him, one by the applicant and another by the Collector. The nominee of the Collector was the mamlatdar of Poona, a rate-payer and *ex-officio* member of the Municipality, who, whilst a member of the managing committee, had unsuccessfully negotiated with the applicant for the purchase of the ground. The District Judge made an award upholding the Collector's valuation. *Held* that the award was bad and must be set aside, as the Collector's nominee had, under the circumstances, a real bias, and was not a qualified assessor within the meaning of section 19 of the Land Acquisition Act, X of 1870. KASHINATH KHARGIVALA *v.* COLLECTOR OF POONA [I. L. R., 8 Bom., 553

1. ——— s. 24.—*Valuation of land.—Annual rental.—Market value.*—In assessing the market value of house property, situated in the town of Bulsar, acquired for public purposes under Act X of 1870, the Court awarded a capital sum which, at the rate of six per cent. per annum, would yield interest equal to the ascertained annual rental of the premises after deducting the amount necessarily expended for annual repairs. CAREY *v.* BANU MIYA. CAREY *v.* KALU MIYA . . . 10 Bom., 34

2. ——— *Compensation.—Determination of value.—Occupied and unoccupied land.*—In determining the compensation to be allowed for land taken for public purposes, the Court distinguished between the occupied and the unoccupied land. In the case of the former the income yielded was taken into account with a view to consider the number of years' purchase to be allowed for the land, and, in estimating the value of the godowns yielding rent, a deduction was made for the chance of some of them being unoccupied for part of the year, as well as for periodical repairs and municipal taxes. In the case of unoccupied land, it was held that the thing to be looked at was not the cost of what had been done to preserve the land or the money spent on improvements, but the market value at the time, with an allowance for the manner in which the land was taken from the claimant. COLLECTOR OF HOOGHLY *v.* RAJ KRISTO MOOKERJEE [22 W. R., 234

3. ——— *Principle on which compensation is given.—Market value of property.*—Where Government takes property from private persons under statutory powers, it is only right that those persons should obtain such a measure of compensation as is warranted by the current price of similar property in the neighbourhood, without any special reference to the uses to which it may be applied at the time when it is taken by the Government, or to the price which its owners may previously have given for it. In accordance with this principle, the question for enquiry is, What is the market value of the property, not according to its present disposition, but laid out in the most lucrative way in which the owners could dispose of it? IN THE MATTER OF

**LAND ACQUISITION ACT (X of 1870), s. 24**—*continued.*

THE LAND ACQUISITION ACT (X OF 1870). PREMCHAND BURRAL *v.* COLLECTOR OF CALCUTTA [I. L. R., 2 Calc., 103

4. ——— *Principle on which compensation is given.—Land subject to mokurrari lease in favour of Government.*—When in a Land Acquisition case it was shown that the land to be acquired was subject to a mokurrari lease in favour of the Government, and the Court in estimating the compensation had deducted 5 per cent. from the rent on account of collection charges,—*Held* that such deduction was excessive, and that, having regard to the fact that the amount was R85-4, and was collected only once in a year, 4 annas was all that should have been deducted. SECRETARY OF STATE FOR INDIA *v.* SHAM BAHADOOR . I. L. R., 10 Calc., 769

1. ——— s. 35.—*Appeal.—Difference of opinion between Judge and assessors.—"Amount of compensation."*—The "amount of compensation" in section 24, Act X of 1870, must be taken to mean the whole amount of the award, and not the amount of the different items to be taken into consideration separately under that section; therefore, where the Judge differed wholly from one assessor, and differed from the other assessor in the amounts awarded for the different items, but agreed with him in the total amount awarded,—*Held*, there was not such a difference of opinion between the Judge and both assessors as to give a right of appeal from the Judge's decision under section 35. ANANDAKRISHNA BOSE *v.* VERNER . 13 B. L. R., 300: 22 W. R., 305

2. ——— *Appeal.—Appeal from decision of Judge and assessors.—Collection charges, Amount of, to be deducted in cases of mokurrari lease.*—In a case under the Land Acquisition Act, if there be a difference of opinion between the Judge and the assessors, or any of them, upon a question of law or practice or usage having the force of law, but ultimately they agree upon the amount of compensation, section 28 must be taken to apply, and no appeal will lie against the decision of the Court with reference to the point upon which the Court and the assessors differed. If, however, in addition to differing upon any question of law, &c., they ultimately differ also as to the amount of compensation to be awarded, section 28 does not apply, but under section 35, coupled with section 30, in such a case an appeal will lie, and in such appeal all questions decided by the lower Court, whether the opinion of the assessors coincided with that of the Judge or not upon these questions, are open to the parties in the Appellate Court. SECRETARY OF STATE FOR INDIA *v.* SHAM BAHADOOR . . I. L. R., 10 Calc., 769

3. ——— *Appeal.—Difference of opinion between Judge and assessors.—Compensation.*—Under section 30, Act X of 1870, an appeal lies from the decision of the Judge where he differs from the assessors, whether the assessors agree with one another or not. IN THE MATTER OF THE LAND ACQUISITION ACT (X OF 1870). HEYSHAM *v.* BHOLANATH MULLICK. BHOLANATH MULLICK *v.* HEYSHAM . 11 B. L. R., 230: 17 W. R., 221

**LAND ACQUISITION ACT (X of 1870), s. 35**—*continued.*

4. ——— *Appeal.—"District Judge."—Officer specially appointed under Act X of 1870.—Costs.*—An appeal from the decision of a judicial officer appointed to exercise the functions of a Judge under Act X of 1870 within the town of Calcutta, lies to the High Court sitting to hear appeals from decisions by the Court in its original civil jurisdiction. The words "District Judge" in section 35, Act X of 1870, include the High Court in its appellate jurisdiction, and there is nothing in the definition of those words given in Act I of 1868, section 2, clause 12, opposed to this meaning. No appeal lies on a question of costs in a case under Act X of 1870. In this case the costs of the appeal were allowed by the High Court on scale 2. BAMASOONDEREE DOSSEE *v.* VERNER . 13 B. L. R., 189 [22 W. R., 136

——— s. 39.

*See* RES JUDICATA—ADJUDICATIONS. [I. L. R., 7 Calc., 406

*See* SPECIAL APPEAL—ORDERS SUBJECT TO APPEAL . I. L. R., 9 Calc., 838

1. ——— *Appeal.—Apportionment of compensation.—Judcial officer appointed as Judge in town of Madras.—Appeal.*—No appeal lies to the High Court from a decision apportioning compensation by a judicial officer appointed to perform the functions of a Judge within the town of Madras, under Act X of 1870, the Land Acquisition Act. AROONACHELLA GRAMANY *v.* VELLIAPPA GRAMANY [8 Mad., 103

2. ——— *Compensation, Apportionment of.—Right of suit.*—A decree which apportions compensation made under section 39 of the Land Acquisition Act (X of 1870), by a Court to whom such matter has been referred under section 38 of the same Act is final, and cannot be questioned otherwise than by the appeal permitted under section 39. NILMONEE SINGH DEO *v.* RAMBUNDHOO ROY [I. L. R., 4 Calc., 757: 3 C. L. R., 211

3. ——— *Act VI of 1857, s. 14.—Apportionment of compensation.*—The compensation should be divided by the parties in the ratio of their respective interests in the land. The zemindar of ghatwali lands is entitled to a share, in retaining, under Regulation XXIX of 1814, an interest in such lands. BHAGEERUTH MOODEE *v.* JABUR JUMMAH KHAN . . . . . 18 W. R., 91

4. ——— *Apportionment of compensation.—Claim and title to.*—When land is taken for public purposes, the party *primâ facie* entitled to compensation is the proprietor. Any party claiming it against him by virtue of a right created by him, must prove his title to it. ISSUR CHUNDER BANERJEE *v.* SUTTYO DYAL BANERJEE . 12 W. R., 270

5. ——— *Compensation, Apportionment of.—Party in possession.—Land taken for railway.*—When a railway company takes land for public purposes, the party in possession at the time is *primâ facie* entitled to the money paid for it, until

**LAND ACQUISITION ACT (X of 1870), s. 39—*continued.***

some one else establishes a prior claim. CHUNDER CHURN CHATTERJEE *v.* BIDOO BUDDEN BANERJEE [10 W. R., 48

6. ——— *Compensation, Apportionment of.—Land taken for railway.*—Where lands are taken compulsorily, the principle upon which the amount of compensation is divisible amongst the zemindar and the holders of several subordinate tenures is by ascertaining the value of the interest of each holder of a tenure, and to give him a sum equivalent to the purchase-money of such interest. GORDON, STUART, & Co., *v.* MOHATAB CHUNDER [Marsh., 490: 2 Hay, 565

7. ——— *Compensation, Apportionment of.—Land taken for railway.—Deduction from rent by tenant.*—When land is taken for railway purposes and compensation is made which is divided between the zemindar and those holding under him, any deduction of rent claimed from the zemindar must be reckoned with reference, not to the gross amount of compensation, but to the proportion which passed into his hands. DHERAJ MAHTAB CHAND *v.* CHITTRO COOMAREE BIBEE . 16 W. R., 201

8. ——— *Compensation, Apportionment of, for land.—Owner under grant by zemindar retaining reversionary interest.*—It was held that, assuming that possession of certain plots of land had been granted by the zemindars to persons to build thereon, and to hold so long as the buildings subsisted, the zemindars being only entitled to a reversionary interest in the land contingent on the owner of the buildings allowing them to fall into ruin, the owner of the buildings would be entitled to the bulk of any compensation awarded under the provisions of Act X of 1870 in respect of the sites. GUR PARSHAD *v.* UMRAO SINGH . 7 N. W., 218

9. ——— *Compensation, Apportionment of.*—A putnidar is entitled to compensation on account of lands in his putni taken for public purposes, although there was no agreement to that effect. JOY KISHEN MOOKERJEE *v.* RHAZOONISSA BEEBEE . . . . . 4 W. R., 40

10. ——— *Compensation, Apportionment of.—Held* that the principle laid down in the case published at page 328 of the Sudder Decisions for 1860 (*vide* foot-note) to regulate compensation for land taken for public purposes, is not applicable to the division of compensation in every case. It would not provide for the case of several putnis where the land is taken from the holder of the lost tenure, and where the grantors of the several intermediate tenures have received a sum of money as a bonus for the grant. MAHATAB CHAND BAHADOOR *v.* BENGAL COAL COMPANY . 10 W. R., 391

11. ——— *Compensation, Apportionment of.—Compensation for land taken for public purposes.—Distribution of compensation.*—Where land held in putni is taken by Government for public purposes, the proper mode of settling the rights of the parties interested is to give the putnidar an abatement of his rent in proportion to the quantity of land which has been taken from him, and to compensate the zemindar for the loss of rent which he sustains. Accordingly the compensation awarded was held to have been very fairly distributed where the zemindar received a little more than sixteen years' purchase of the rent abated, and the putnidar received the remainder. When the compensation-money was in deposit with the Collector without specification of shares, the putnidar's cause of action against the zemindar was held to have arisen when the former sought to obtain his share and was prevented by the latter's not joining him or enabling him to get it. RAYE KISSORY DOSSEE *v.* NILCANT DEY [20 W. R., 370

12. ——— *Apportionment of compensation-money.—Zemindar.—Putnidar.—Dur-putnidar.—Construction of document.*—Where a putni and a dur-putni has been given of land, which is afterwards acquired by the Government for public purposes, under the provisions of the Land Acquisition Act, the zemindar is, generally speaking, entitled to as much of the compensation-money as the putnidar is. As a rule, ryots having a right of occupancy in such land, and the holders of the permanent interest next above the occupancy ryots are the persons entitled to the larger portion of the compensation-money. The principles on which compensation-money should be apportioned among the different holders discussed and explained. Construction of dur-putni lease. GODADHAR DASS *v.* DHUNPUT SING [I. L. R., 7 Calc., 585: 9 C. L. R., 227

13. ——— *Act VI of 1857.—Compensation for land taken.*—A portion of the area of two villages having been taken under Act VI of 1857, and compensation deposited in the Collectorate, the dur-putnidar sued for the same, contending that the zemindar was entitled to twenty times the rental payable by the dur-putnidar, less expenses of collection. The zemindar claimed twenty times the profits he derived from the putnidar, less revenue paid to Government. *Held* that, as the plaintiff's calculation secured to the zemindar a more favourable result than that for which the latter himself contended, it was sufficient to decree the suit without determining the proper principle on which compensation should be allowed. BENGAL COAL COMPANY *v.* MAHTAB CHUND BAHADOOR . 12 W. R., 340

14. ——— *Distribution of compensation allowed.—Mirasidar.—Allowance for expenses of cultivation.*—No general rule can be laid down as to the tenure and rights of persons called "Ulkudi Sukhavasis" or "Payakaris," but, where land is taken under the Land Acquisition Act, they are clearly entitled to a proportion of the compensation granted. In ascertaining the proportionate interest of the mirasidar and ulkudi tenant, allowance must be made for the mirasidar's reversionary right; and when the rights of the parties are calculated on the basis of the value of the produce, allowance must be made for the expenses of cultivation. APPASAMI MUDALI *v.* RANGAPPA NATTAN [I. L. R., 4 Mad., 367

**LAND ACQUISITION ACT (X of 1870), s. 39—*continued.***

15. ——————— *Accretion to parent tenure.—Beng. Reg. XI of 1825, s. 4, cl. 1.—Rate of rent.—Apportionment of compensation awarded.*— The words "increase of rent to which he may be justly liable" contained in clause 1, section 4, Regulation XI of 1825, were not intended to lay down an inflexible rule applicable to all cases, and in the absence of any special circumstance the rate of rent to be assessed upon an accretion should be in proportion to that paid for the parent tenure. Where, therefore, such accreted land is taken up under the Land Acquisition Act, the compensation awarded should be divided by giving the landlord the value of the rent payable in respect thereof, with 15 per cent. for compulsory sale, and the balance to the tenure-holder. *Golam Ali* v. *Kali Krishna Thakur, I. L. R., 7 Calc., 479*, commented on. CHOORAMONI DEY *v.* HOWRAH MILLS COMPANY

[I. L. R., 11 Calc., 696

16. ——————— *Compensation, Award of.—Frontage and back sites.—Parties.—Lessees of such land, Right of, to be joined in suit by the owner.*—The claimant, Kashinath, owned certain land, measuring 179,436 square feet, situated in the city of Poona. This land was originally devoted to agricultural purposes, and contained, also, a number of fruit trees and some buildings, and was in the form of a square enclosed and surrounded by houses on all sides, except towards the south, on which side it opened upon a large unoccupied area of garden land, also belonging to the claimant. The second and third claimants were the lessees of Kashinath. The said land was taken up by the Collector of Poona on behalf of the municipality of that city for the purposes of erecting a central market. The claimant, having declined to receive R12,880 offered to him as compensation, the Collector referred the matter to the District Judge, who, after deducting 21,532 square feet from the measurement of the whole land for roads, divided the rest, on the principle of frontage and back sites, in the proportion of one to three, appraising it at the average rate of eighteen sales enumerated in certain sale deeds at ten annas per square foot, and some at less than one anna. His award for the land was R30,674 for the land alone, R2,517 for the materials of buildings, R400 for trees, and R700 for severance. The sum total was made subject to R3,000 awarded to the second and third claimants for their unexpired leases. On appeal by the Collector to the High Court,—*Held* that neither the principle of frontage applied by the District Judge nor the proportion of one to three for frontage and back sites was applicable to the claimant's land, which was surrounded on all sides by buildings, which shut it out from communication with the town, except by opening a passage of ten feet wide. As there was no evidence to show that there was any particular demand for land for building speculation, one and a half annas per square foot was to be regarded as the adequate value of such a large area as 179,436 square feet, subject to the lessees' compensation for their interest. The claimant was not entitled to the award of R700 on account of severance. The decree was accordingly varied by awarding R19,739-2 as compensation for the property, to which 15 per cent. was to be added, as provided by section 42 of the Land Acquisition Act, X of 1870. *Held*, also, that the claim of the claimants Nos. 2 and 3 was not triable in this suit. It was one exclusively between the co-respondents, and properly fell under section 39 of the Act. In so far as it was not objected to its being tried in appeal, they could be awarded reasonable damages, and R1,200 was ample compensation to them. COLLECTOR OF POONA *v.* KASHINATH KHASGIWALA

[I. L. R., 10 Bom., 585

**LAND ACQUISITION ACT (X of 1870), s. 39—*continued.***

17. ——————— and s. 40.—*Proceedings under.—Finality.*—In proceedings under the Land Acquisition Act (X of 1870), sections 38 and 39, the persons entitled to take land compulsorily deal only with those who are in possession of it, or who are ostensibly its owners. It may happen that the real owner, being an infant, or a person otherwise under disability, does not appear, and is not dealt with in the first instance. There is, therefore, a proviso in section 40 to the effect that nothing contained in that or the preceding sections "shall affect the liability of any person who may receive the whole, or any part, of any compensation awarded under the Act to pay the same to the person lawfully entitled thereto." This applies only to persons whose rights have not been dealt with in adjudications in pursuance of sections 38, 39, and 40; and does not permit a person whose claim has been disposed of in the manner pointed out in the Act, to have that claim reopened, and again heard, in another suit. NILMONI SINGH DEO BAHADUR *v.* RAM BANDHU RAI

[I. L. R., 7 Calc., 388: 10 C. L. R., 393
L. R., 8 I. A., 90

*Contra*, DWARKA SINGH *v.* SOLANO

[22 W. R., 38

18. ——————— *Settlement of amount of compensation.—Apportionment of compensation, Notice of proceedings for.—Right of suit to recover share of compensation.*—The apportionment of the compensation under section 39 of Act X of 1870 is intended to be a proceeding distinct from that of settling the amount of compensation under the previous provisions of the Act, and any dispute as to the apportionment is only decided as between those persons who are actually before the Court. A separate notice therefore of the apportionment proceedings is requisite to bind any person by those proceedings, and where such a notice has not been served, any party interested, although served with notice of the proceedings for settling the amount of the compensation, cannot be considered a party to the proceedings for apportioning it, and is not barred, by the decision in the latter proceedings, from bringing a suit under the proviso to section 40, to recover a share of the money so apportioned. HURMUTJAN BIBI *v.* PADMA LOCHUN DOSS . . . . . I. L. R., 12 Calc., 33

19. ——————— *Power to award compensation.—Judge and assessors sitting together.*—There is nothing in Act X of 1870 which gives the

**LAND ACQUISITION ACT (X of 1870), s. 39 and s. 40**—*continued.*

Judge and assessors sitting together power to determine the right to compensation or the title to the land for which compensation is to be assessed. Where, therefore, the Collector tendered compensation in respect of land, some of which was above, and some below, high-water mark, and made an offer for each separately,—*Held* that the Judge and assessors had no power to award the whole sum tendered by the Collector as compensation for the land above high-water mark; but they should have determined what was a proper compensation for each description of land. IN THE MATTER OF THE PETITION OF ABDOOL ALI . . . **15 B. L. R., 197**

S. C. ABDOOL ALI *v.* VERNER. VERNER *v.* ABDOOL ALI . . . **23 W. R., 73, 239**

**20.** ——————— *Award of compensation.—Question of title.*—Where, in a suit for the recovery of the money awarded by Government for some land acquired for public purposes, the Judge, instead of deciding as between the parties in possession the money value of their respective rights, determined as between the persons in possession and others whose claims had remained dormant until the acquisition of the land the relative strength of their titles,—*Held* that the order of the Judge was *ultra vires*, his duty under the Land Acquisition Act being to determine the money value of ascertained interests, and not to try questions of title. GOUR RAM CHUNDER *v.* SONATUN DOSS . . **25 W. R., 320**

**21.** ——————— *Apportionment of compensation.—Question of title.*—Under section 39 of the Land Acquisition Act, it is the duty of the Judge in apportioning the compensation-money which he is directed to apportion to decide the question of title between all persons claiming a share of the money. *Semble,*—No decision under the Land Acquisition Act should be treated as *res judicata* with respect to the title to the other parts of the property belonging to persons who may come before the Judge under section 39. NOBODEEP CHUNDER CHOWDHRY *v.* BOOPENDRO LALL ROY . **[I. L. R., 7 Calc., 406 : 9 C. L. R., 117**

**22.** ——————— *Judge appointed under s. 3—Power of Judge to give costs.*—A Judge appointed under section 3 of Act X of 1870, to perform the functions of a Judge under the said Act generally within the local limits of the ordinary original jurisdiction of the High Court, has no power to award costs in respect of proceedings under section 39, Part IV of the Act. RAMANJEM NAIDOO *v.* RUNGIAH NAIDOO . . . . . **8 Mad., 192**

——————— **s. 55 (Act VI of 1857, s. 32).**

*See* ARBITRATION—ARBITRATION UNDER SPECIAL ACTS AND REGULATIONS—ACT VI OF 1857.

——————— **s. 58.**—*Award of compensation.—Effect on award of suit to recover compensation from person to whom it has been awarded.*—An award under the Land Acquisition Act cannot be affected by a suit to recover from the party to whom compensation has been awarded and to have plaintiff's title declared to the land concerned. KAMINEE DEBIA *v.* PROTAP CHUNDER SANDYAL . **25 W. R., 103**

**LAND BELONGING TO GOVERNMENT.**

*See* BOMBAY ACT I OF 1865, ss. 35, 48. **[I. L. R., 1 Bom., 352**

**LAND COVERED WITH BUILDINGS, SUIT FOR RENT OF—**

*See* CASES UNDER ENHANCEMENT OF RENT—LIABILITY TO ENHANCEMENT—LANDS OCCUPIED BY BUILDINGS, &c.

*See* CASES UNDER RENT, SUIT FOR—

**LAND FOR BUILDING PURPOSES.**

*See* CASES UNDER ENHANCEMENT OF RENT—LIABILITY TO ENHANCEMENT—LANDS OCCUPIED BY BUILDINGS, &c.

**LAND HELD BY JOINT OWNERS.**

*See* MISCHIEF . **I. L. R., 3 Calc., 573**

*See* POSSESSION, ORDER OF CRIMINAL COURT AS TO—CASES WHICH MAGISTRATE CAN DECIDE AS TO POSSESSION. **[I. L. R., 3 Calc., 573**
**17 W. R., Cr., 9, 33**
**25 W. R., Cr., 16**
**I. L. R., 5 All., 607**

**LAND RECLAIMED FROM THE SEA.**

——————**Dock, Construction of.**—The plaintiff demised to the defendants for a term of 999 years certain lands, a portion of which, A., was liable to an annual rent of R500 per acre. For the other portion, B., which was described in the lease as "being at times covered by the sea," a nominal rent of R1 per acre per annum was reserved. The lease contained a power to the lessees "to reclaim from the sea" the whole or any portion of B., and provided that upon such reclamation the lessees should pay for any portion of B. which they might "reclaim from the sea" an enhanced rent at the rate of R500 per acre per annum. The lessees also had power under their lease to dig or excavate any portion of the demised lands, and to remove the soil therefrom. The lessees thereupon excavated a portion of B., and thus turned it into a dock, at the entrance of which they constructed gates, by means of which they could in a measure, but not entirely, control the flow of sea-water into the dock. The defendants charged nothing for the use of the dock, but for the use of the wharves round it they charged a fee. *Held* that the expression "to reclaim from the sea" signifying, in its primary and ordinary sense, the conversion of the reclaimed land into dry land, by rendering it secure from the ingress of the sea, with the view to its being used as such, the construction of the dock was not such a reclamation as was contemplated in the lease, and, therefore, the enhanced rent of R500

**LAND RECLAIMED FROM THE SEA. —Dock, Construction of—*continued.***

per acre could not be charged for the water area of the dock. SECRETARY OF STATE FOR INDIA *v.* SASSOON . . . I. L. R., 1 Bom., 513

**LAND, RE-FORMATION OF—**

*See* CASES UNDER ACCRETION.

**LAND REGISTRATION ACT (BENGAL ACT VII OF 1876).**

*See* DECLARATORY DECREE, SUIT FOR—DECLARATION OF TITLE. [12 C. L. R., 139

*See* EVIDENCE ACT, S. 35. [I. L. R., 9 Calc., 431

*See* JURISDICTION OF CIVIL COURT—REGISTRATION OF TENURES. [I. L. R., 10 Calc., 350

*See* LANDLORD AND TENANT. [I. L. R., 9 Calc., 517: 2 C. L. R., 141

*See* LIMITATION ACT, 1877, ART. 14. [I. L. R., 10 Calc., 525

*See* ONUS PROBANDI—POSSESSION AND PROOF OF TITLE. [I. L. R., 8 Calc., 923

*See* POSSESSION—EVIDENCE OF POSSESSION . . I. L. R., 8 Calc., 853 [I. L. R., 9 Calc., 431

*See* RELIEF . I. L. R., 10 Calc., 525

*See* TITLE—EVIDENCE AND PROOF OF TITLE—GENERALLY. [I. L. R., 8 Calc., 853

——— ss. 52, 55.—*Effect of orders under the Act.—Possession, Confirmation of.*—An order made under section 55 of Bengal Act VII of 1876 prevents the person against whom it is made from relying on his previous possession, in a subsequently instituted suit for confirmation of possession. An order made under section 52 of the same Act has not that effect. OMRUNISSA BIBEE *v.* DILAWAR ALLY KHAN . . . I. L. R., 10 Calc., 350

**LAND SEPARATED BY CHANGE IN COURSE OF RIVER.**

*See* CASES UNDER ACCRETION—NEW FORMATION OF ALLUVIAL LAND—RIVERS OR CHANGE IN COURSE OF RIVERS.

*See* CUSTOM . 3 B. L. R., P. C., 5 [11 B. L. R., 265

**LAND SUBMERGED.**

*See* CASES UNDER ACCRETION.

*See* RIGHT OF OCCUPANCY—LOSS OR FORFEITURE OF RIGHT. [I. L. R., 4 Calc., 894

**LAND TAKEN FOR PUBLIC PURPOSES.**

*See* CASES UNDER LAND ACQUISITION ACT, 1870.

*See* RAILWAY COMPANY. [10 B. L. R., 241

**LAND TAKEN IN EXCESS IN EXECUTION OF DECREE.**

*See* CIVIL PROCEDURE CODE, 1882, S. 244—QUESTIONS IN EXECUTION OF DECREE. [12 B. L. R., 201, 203, note: 207, note

**LANDHOLDER.**

*See* CASES UNDER MADRAS RENT RECOVERY ACT, VIII OF 1865, S. 1.

**LAND REVENUE.**

*See* CASES UNDER N.-W. PROVINCES LAND REVENUE ACT, XIX OF 1873.

1. ——— **Liability of lands in Kanara district to revenue.**—*Maxim, "Nullum tempus occurrit regi."—Bom. Act VII of 1863, s. 21.—Bom. Reg. XVII of 1827, ss. 4 and 7.—Bom. Act I of 1865, ss. 25 and 49.*—The mulavargdar, a holder of land on muli tenure in Kanara, enjoys an hereditary and transferable property in the soil and cannot be ousted so long as he pays the land revenue assessed upon his land. In the absence of special terms to the contrary, Government may enhance the land revenue payable in respect of land so held. The history of the land revenue in Kanara narrated. The question of the cultivating ryots' property in the soil considered both with reference to the Hindu and the Mahomedan law. Similarity of the mirasi, kani yatchi, the janmakari, the swasthyan, and the muli tenures mentioned. The rule of the Hindu and Mahomedan as well as of the English law is *nullum tempus occurrit regi.* The extent to which that maxim has been restrained by legislation in the Presidency of Bombay considered. Construction of Bombay Act VII of 1863, section 21, and Bombay Act I of 1865, sections 25 and 49. The revenue system of Akbar under Todar Mul and of Aurangzeb discussed. If there be no specific limit, either by grant, contract, or law, to the right of Government to assess land for the purpose of land revenue, the Civil Courts have no jurisdiction under Bombay Regulation XVII of 1827, sections 4 and 7, to entertain a suit to rectify the assessment made by the Collector or other competent Revenue authority. VYAKUNTA BAPUJI *v.* GOVERNMENT OF BOMBAY [12 Bom., App. 1

2. ——— **Liability to land revenue of village of Kabilpur in district of Surat.**—*Maxim, "Nullum tempus occurrit regi."—Bom. Act VII of 1863, s. 21.—Bom. Act I of 1865, ss. 25 and 49.—Bom. Reg. XVII of 1827, ss. 2 and 8.*—The jurisdiction of the Civil Courts, in the Presidency of Bombay, in matters of revenue and land assessment considered and defined. The enactments limiting the operation, in the Presidency of Bombay, of the maxim *nullum tempus occurrit regi* consi-

**LAND REVENUE.—Liability to land revenue of village of Kabilpur in district of Surat**—*continued.*

dered. The land tenures of the district of Surat described. The village of Kabilpur in the district of Surat is an udhad bandhijama village, settled for hereditarily and of right, by the co-sharers in it, in the gross at a fixed immutable rent, independent of the quantity of land under cultivation, payable to Government, and, as such, falls, in respect of the joint liability of the holders for the revenue in gross, within section 8 of Regulation XVII of 1827. The village of Kabilpur is land, situated in a district ceded by the Peishwa in 1802 to the British, held by the co-sharers in it and their predecessors in title partially exempt from payment of land revenue, under a tenure recognised by the custom of the country, for more than thirty years, and, therefore, falls within the claims for exemption mentioned in Bombay Act VII of 1863, section 21. Whether section 2, clause 1, and section 8 of Regulation XVII of 1827, and section 21 of Bombay Act VII of 1863 are or are not controlled by Bombay Act I of 1865, the village of Kabilpur is liable to assessment to the extent of R1,089-13-1 only, inasmuch as it falls within the concluding proviso in Bombay Act I of 1865, saving from further assessment a village entered in the land register as partially exempt from payment of land revenue. Comparison of this (the Kabilpur) case with that of Kanara—*Vyakunto Babuji* v. *Government of Bombay, 12 Bom., Ap., 1.* GOVERNMENT OF BOMBAY *v.* HARIBHAI MONBHAI . . . . **12 Bom., Ap., 225**

3. ——— **Exemption from assessment.**—*Wanta or rent-free lands.—Summary settlement.—Bom. Act VII of 1863.—Talookdari settlement.—Bom. Act VI of 1862.—Right to hold wanta lands free.*—The lands in dispute, now forming part of the hamlets of Hirapur or Rasulpur, originally formed part of the talookdari village of Kuwar. About the year 1843 the talookdar mortgaged the lands to *P.*, and two years afterwards, in order to pay off *P.*, the talookdar mortgaged the same lands to the plaintiff's father, and in or about 1858 gave him a deed of sale. On the passing of the Talookdari Settlement Act (Bombay Act VI of 1862) the village of Kuwar was brought under its operation, and placed under Government management. While the village was under Government management, the Summary Settlement Act (Bombay Act VII of 1863) was passed, and the talookdari settlement officer, acting apparently under section 3 of the Act, made an order directing the plaintiff to pay assessment to the extent of R2,000. Part of the lands held by the plaintiff were entered in the Government khardas as wanta. In a suit brought by the plaintiff to establish his right to hold all the lands rent-free, the District Judge held that the plaintiff had failed to prove that the lands were rent-free, and that he was liable to pay the assessment, and he therefore rejected the plaintiff's claim. *Held*, on appeal, that the Government was bound by the statements in its own khardas, which admitted that part of the land was wanta, which must be regarded as meaning rent-free or tax-free land, and that it lay upon Government to prove that land so denominated was assessable, which it had failed to do; the plaintiff, therefore, as to so

**LAND REVENUE.—Exemption from assessment**—*continued.*

much of the land as was entered in the Government khardas as wanta, was entitled to hold it free of Government assessment. But as to the residue of the land in the hands of the plaintiff, and to which as against the talookdar the plaintiff was entitled, the Court could not interfere with the rate of assessment fixed upon it by the Government. There not being any specific limit fixed by law, grant, sanad, contract, or otherwise, to the assessment of that residue for the purpose of land revenue, the Civil Courts had no jurisdiction to regulate such assessment, even if, having regard to the value of the land, it were excessive. GULAM MOHIDIN *v.* COLLECTOR OF AHMEDABAD **[12 Bom., Ap., 276**

*See* also GOVERNMENT OF BOMBAY *v.* SUN DARJI SAVRAM . . . **12 Bom., Ap., 275**

4. ——— **Mode of realisation.**—*Bom. Reg. XVII of 1827, s. 5.—Bombay Survey Act (I of 1865), ss. 2 and 48.—"Occupant."*—Regulation XVII of 1827, section 5, enables the Government, and therefore the holder of the rights of Government, on failure of the superior holder to pay the land-revenue, to realise it from the inferior holder. The laws for realising the land revenue establish a kind of privity of estate between the superior and inferior holders, by which the latter, taking the profits of the land, must satisfy the obligations of the former to Government, independently of, and even in opposition to, any agreement between the two contracting parties. The liability to pay adheres to the occupation and enjoyment, and cannot be got rid of, except through its resignation by the Sovereign or the Sovereign's representatives. *Held*, accordingly, that when the person, who was the "occupant" of certain land within the meaning of the Bombay Survey Act, failed to pay the revenue due thereon, the kabuliatdar khot might recover the amount from that person's mortgagee in possession. KRISHNAJI RAVJI GODBOLE *v.* RAMCHANDRA SADASHIV **[I. L. R., 1 Bom., 70**

5. ——— **"Farmers."**—*Bom. Reg. XVII of 1827.*—The word "farmer," as used in Regulation XVII of 1827, is used, not as a cultivator of the ground, but as a farmer of public revenue, a person who would stand between the Government and the ryots as possessors of the ground. RUTTONJEE EDULJEE SHET *v.* COLLECTOR OF THANNA **[10 W. R., P. C., 13 11 Moore's I. A., 295**

6. ——— **Assessment of land revenue.**—*Bom. Reg. XVII of 1827, s. 3.—Right of Government to enhance.—Foras or foras-toka land—Proof of right to hold at fixed rate.*—The plaintiff was the holder of certain land in the Island of Bombay, called foras or foras-toka land. He and his predecessors in title had held the said land for upwards of sixty years, and had paid a certain fixed assessment to Government. On the 31st July 1882, the Collector of Bombay, claiming to act under powers conferred by Bombay Act II of 1876 and under the order and with the sanction of Government contained in a Government Resolution, dated the 14th August

**LAND REVENUE.—Assessment of land revenue—*continued.***

1879, gave notice to the plaintiff that the assessment payable in respect of the said lands was enhanced. He claimed the increased rent not merely for the future, but also for two previous years (1879-80 and 1880-81) subsequent to the date of the Government Resolution of the 14th August 1879. The plaintiff paid under protest, for the said two years, the sum of R442-8-2 in excess of his previous assessment, and now sued to recover that amount from the defendant. The plaint prayed for a declaration that there was "a right on the part of the plaintiff in limitation of the right of Government, in consequence of a specific limit to assessment having been established and preserved, in respect of the said lands, to possess and hold the same at the rent or assessment hitherto paid by the plaintiff; and that the Collector of Bombay had no right to increase the plaintiff's rent or assessment beyond such specific limit; and that the defendant should be ordered to repay to the plaintiff the said sum of R442-8-2." *Held* that no grant, contract, or law emanating from Government being proved to have emanated from Government conferring on the lands in question a right to a fixed and permanent rate of assessment, the assessment on these lands was liable to enhancement. *Held*, also, that the plaintiff was only liable to the enhanced rate of assessment from the time at which it was actually made by the Collector, and that he (the plaintiff) was, therefore, entitled to be repaid the sum sued for. Strict proof must be given of any right set up in derogation of the inherent right of the Sovereign to assess the land at his discretion; and the facts that the lands in question were waste lands reclaimed from the sea which the inhabitants were invited to cultivate, or that a very small rent has been paid for many years, do not show that the Government has forfeited its right to enhance the assessment in respect of such lands. SHAPURJI JIVANJI *v.* COLLECTOR OF BOMBAY . I. L. R., 9 Bom., 483

**LAND-REVENUE ACT (BOMBAY).**

*See* BOMBAY LAND REVENUE ACT, V OF 1879.

**LAND TENURE IN BOMBAY.**

——— *Real and chattel property.—Husband and wife.—Agreement by husband alone for renewal of lease.—"Pension and tax."—Nature of Bombay land tenures.—Fergusson's Act IX, Geo. IV, c. 33.—Act IX of 1837.*—Immoveable property situated in the Island of Bombay, conveyed in 1859 to *N.* and his wife (Parsis), their heirs, executors, administrators, and assigns, was subsequently mortgaged by *N.* and his wife, but the mortgagee did not enter into possession. Afterwards, in 1861, *N.* alone entered into an agreement with the plaintiffs to give them a lease of that property for five years, the plaintiffs being willing to accept that lease with such title as *N.* could confer. *Held* that it was unnecessary, under such circumstances, to consider whether the estate of *N.* and his wife in the property was chattel real or real estate; for if it were chattel real, *N.* by his marital right, according to English law (which in this case applied), might dispose, either wholly or in part, of her interest; and if the property were realty, the lease by *N.* would at all events bind her for the term of five years, if *N.* should so long live. Assuming the property to be realty, *semble*,—that on *N.'s* death before the expiration of the term of five years the lease would, as against the wife surviving, be voidable only, and not void The proposition laid down by the Judge of the Division Court, that all immoveable property in Bombay was of the nature of chattel real, and that there was not any property of the nature of freehold of inheritance in that island, disapproved of and denied as being irreconcileable with Royal Charters, Acts of Parliament, and of the Legislative Council of India, decisions of the Courts, both in India and England, and the tenures of land and practice of conveyancers in Bombay. The nature and results of Governor Aungiers' convention stated; and the origin of "pension and tax" in Bombay traced. The tenure of land in Bombay under the Portuguese was of a feudal character. Creation and tenure of the ancient manor of Mazagon described. Doctrine that the fief of the Middle Ages has sprung from the Roman tenure in emphyteusis mentioned. Ceremonies of enfeoffment and livery of seisin in Bombay. Statement of the circumstances which led to the passing of Statute 9 George IV., Cap. 33 (Fergusson's Act), and also of those which led to the passing of Act IX of 1837 (relating to the immoveable property of Parsis). NAOROJI BERAMJI *v.* ROGERS . . . . . 4 Bom., O. C., 1

**LAND TENURE IN CALCUTTA.**

1. ——— *Lands held in fee-simple.—Unattested will, Devise by.*—Lands in the East Indies held by a tenure of the nature of fee simple do not pass by an unattested will, but descend to the person who would be heir-at-law in England. *A.* by an unattested will devised lands to *B.* *B.* received the rents and by a will, also unattested, gave the lands together with a legacy to the heir-at-law of *A.* *Held* that the heir might receive the legacy and also call for an account of the rents received by *B.* GARDINER *v.* FELL . . . . . 1 Moore's I. A., 299

2. ——— Freehold land.—*Unattested will, Devise by.*—The tenure of land in Calcutta was of the nature of freehold, and real estate would not therefore pass by an unattested will. FREEMAN *v.* FAIRLIE . . . . 1 Moore's I. A., 305

**LAND TENURE IN KANARA.**

1. ——— Liability to land revenue.—*Maxim, "Nullum tempus occurrit regi," considered.*—The mulavargdar, a holder of land on muli tenure in Kanara, enjoys an hereditary and transferable property in the soil, and cannot be ousted so long as he pays the land revenue assessed upon his land. The question of the cultivating ryot's property in the soil considered both with reference to the Hindu and Mahomedan laws. Similarity of the mirasi, kaniyatchi, the jannakari, the swasthyan, and the muli tenures mentioned. The rule of Hindu and Mahomedan as well as of the English law is *nullum tempus occurrit*

**LAND TENURE IN KANARA.—Liability to land revenue—*continued.***

*regi.* The extent to which that maxim has been restrained by legislation in the Presidency of Bombay, considered. VYAKUNTA BAPUJI *v.* GOVERNMENT OF BOMBAY . . . . . **12 Bom., Ap., 1**

2. ——————— *Nature of kumri cultivation.—Kumri assessment.—Rights of vargdars.—Korlaya.*—The plaintiff sued to recover possession of four specified tracts of forest land situated in the district of North Kanara from which he alleged he had been wrongfully ejected under an order made by the Collector in 1861, and to recover certain sums of money exacted from him between 1849 and 1861 by the Revenue authorities as a tax or rent for the exercise, by him, of his proprietary rights by way of kumri cultivation. As to three of the tracts of the land in question, the plaintiff based his claim on certain sanads alleged to have been granted by the officers of Tippu Sultan to his ancestors; and as to the fourth, he claimed a title by prescription, alleging that the land had been in the possession of his family for forty years prior to 1870, the date of the institution of the suit. The plaint contained no indication of a claim which was put forward during the argument of the appeal, that the payment, to the Government, of assessment in respect of kumri, pepper, and farmaish, or in particular of kumri assessment, and the entry of such charge in the chitta of a vargdar muli or geni, gives to such vargdar, or at least is a recognition by Government that such vargdar has, a right of ownership in the forests in respect of which it was contended such assessment was imposed. The plaintiff admitted a right on the part of Government to take certain kinds of timber from the forests; but, subject to this, he contended that the timber, as the soil and produce of the forests generally, belonged to him, subject also to the right of Government to levy an increased assessment thereon. Subject to these rights on the part of Government the plaintiff claimed an absolute right to have kumri cultivation carried on within the limits specified; that he and no other had a right to cultivate and give in cultivation as rice land jungle land within those limits, and an exclusive right to cut down and dispose of timber within those limits. *Held* by GREEN, *J.*, on the evidence, that the sanads put forward were not proved to have been, in fact, executed by any person having authority to execute such documents, and that, even if genuine, they had never been recognised by the British Government as valid and binding or been made the foundation of the revenue relations between the British Government and the plaintiff's family or those under whom they claimed. The fact, however, that the plaintiff put forward those sanads as the root of his title, so far at least as concerned the greater portion of the property claimed, was an admission that at the date of those sanads the then Government had the power to make the grants they purported to evidence, and the sanads being out of the way, the plaintiff had to establish that he had at the institution of the suit succeeded to rights of property which by his own case, at the dates respectively of the sanads, belonged to the then Government, and would, in the absence

**LAND TENURE IN KANARA.—Liability to land revenue—*continued.***

of any private right shown then to exist therein, have vested in the East India Company after the taking of Seringapatam in May 1799, and the subjugation of the country under the rule of Tippu Sultan. The primary meaning of the word "varg" was "account," and it was only by an extension of the original meaning that it came to be used as indicating the property, to the assessment on which such account relates. Kumri assessment was in its origin an assessment upon, or having reference to, the actual number of labourers employed cutting down forest, and not with reference to any particular portion or quantity of land or its produce. Originally, kumri assessment was inserted in vargs only as incidental to rice or garden cultivation, and the entry of such assessment in the plaintiff's vargs and its payment for a long series of years did not show or manifest any estate or permanent right at all in the forests, as such, as being vested in the plaintiff, even as to such ground as he might have been able to show had been at former times kumried by his labourers, and whether or not the Government may have had, or, having had, may have ceased to have, any right to collect korlaya (tax on bill-hooks) direct from the cutters so long as kumri cultivation at all is or was carried on; yet it has a right to stop the cultivation altogether (remitting the kumri assessment entered in the vargs) in all the forests of North Kanara, including those in question in the present case, not shown to be private property, on some other ground than the mere entry of kumri assessment in a particular varg or number of vargs. The plaintiff's suit, therefore, which was to recover possession of particular tracts of forest on the ground of ownership, shown or evidenced only (apart from the question of the sanads) by such entry in his vargs of kumri assessment, was rightly dismissed. But even assuming that the plaintiff had established a right, exclusive of others and permanent as against the Government, to have kumri cultivation carried on in such places as he could show had theretofore been kumried by him or by his permission, or even throughout the limits claimed in the plaints, such a right, having regard to the incidents of the cultivation, itself did not necessarily involve general ownership of the soil. Such general ownership, not being in the plaintiff, was with the Government; and the plaintiff, if his right, supposing he had any, were disturbed, either by a stranger or by the Government, ought to have asserted it by a suit for damages for the disturbance of a right in *alieno solo*, and not by a suit to recover possession. Even had the plaintiff, therefore, established a permanent and exclusive right to carry on kumri cultivation within the limits specified in his plaint, yet his suit, which was directed to recover possession on the ground of general ownership, should have been dismissed. That was the case he put forward to the last, and to which his evidence was directed, and it would be quite inadmissible for him to fall back on another case, which, if established, would have, as its result, a relief wholly different to that which and which alone he had all along asked for. *Held*, also, that the plaintiff's claim was barred by limitation.

**LAND TENURE IN KANARA.—Liability to land revenue—*continued.***

*Per* West, *J.*—Though the introduction of British rule did not extinguish private rights already fully acquired, the principle to start from is, that waste lands belong to the State. The mere fact that a vargdar is charged in the village accounts with an assessment for kumri, cannot of itself make him the owner of all the forests within its boundaries. He could not become the owner, in fact, without the active or passive assent of the Government passing its proprietary right to him. Such assent is not be inferred, as to an extensive tract of forest, from the payment and receipt of some insignificant sum—*e.g.*, a moiety of the rent realised on a small number of acres—which may most naturally be referred to rateability, or the mere participation by the State, according to an immemorial rule, in all profits arising from the land. As there must be certainty in a grant as to the area conferred, so there must be certainty as to the area, or, at least, as to identity of the object occupied, if the occupation is to raise the presumption of a grant, or of acquiescence in a definite occupation. It is not inconsistent with this principle, but rather as complementary to it, that the further rule is accepted, that the possession and the ownership springing from possession of a farm or varg as a whole, and within the limits as to which certainty is attainable, are not prevented or destroyed by an undoubted encroachment, or by a want of certainty as to some particular plot of ground or as to the precise delimitation here or there of its proper boundary line. A suit to ascertain boundaries does not imply that either of the owners of contiguous estates has no property at all: and as there may be an effective grant of lands in possession though occupied of wrong, so may distinct acquiescence give a like right in the like case; but there can be no grant, no acquiescence in a possession, unless the essential elements of possession, a fixed, a definable, and an exclusive possession, exists, and are present to the perception of the parties. In the case of a private owner even the allowance of acts which do not necessarily involve any denial of his ownership, or a grant from him, do not suffice to create an ownership against him; and the mere non-interference of the State, to which neglect is not to be imputed, is not to be accounted for, if it can otherwise be accounted for, on a presumption of a surrender of its ownership. Such a transaction must be evidenced by an undisguised and effective appropriation assented to or submitted to by some one having due authority, or else fortified by an equivalent law of prescription. Under these conditions a true ownership even of the forests might arise, but the mere payment of the kumri assessment would not create it in the case of a vargdar. Upon the evidence held that the sanads were not proved, nor had the plaintiff established any exclusive possession of, or proprietary right in, any part of the forest claimed; while the evidence showed a continued and consistent exercise, on behalf of the Government, of its proprietary right over the timber and even the firewood in the forests in dispute from the time that the assertion of the right became a matter of appreciable consequence, and that the plaintiff's family knew this, and submitted to it, and themselves applied

**LAND TENURE IN KANARA.—Liability to land revenue—*continued.***

repeatedly for timber to the Revenue officers. From the year 1842 downwards there was no instance which effectively disproved the acquiescence of the plaintiff's family in the ownership of Government. That ownership had not been parted with at all in the opinion of the parties most interested. If it had been parted with and become vested in the plaintiff's ancestors as an integral portion of the estate in the land which the plaintiff claimed was theirs, then the assumption and the exercise of ownership by the Government over the trees from 1841 down to the filing of the suit, was itself a perpetual ouster of the family from a portion of their estate, and would constitute a complete eviction of the owner as such. If there was such an ouster proved as to the whole by a multiplicity of acts bearing on the several parts of the estate, but all referrible to the same principle or purpose, then the plaintiff had a cause of action in the nature of ejectment so soon as he was disturbed in his possession by any of these acts, in their legal nature such as to contradict and annihilate his right throughout the estate, even though their immediate physical incidence was on but particular parts of it—a cause of action extending, as to its physical object, to the whole property, because his power over the whole was invaded and overthrown. Regarding the plaintiff's right, therefore, to land, to timber, to kumri cultivation, and to reclamation and disposal, at his own mere will, as parts, so far as the right was concerned, of a single legal unit, the cause of action had arisen more than twelve years before the institution of the suit. The plaintiff's right, so far as it rested on the sanads, was not supported but contradicted by the active enjoyment assumed, on behalf of the Government thirty years almost before the institution of the suit, of an important part of the advantages conferred by the grants, and on an assertion of rights which, if the grants were to be construed as the plaintiff desired, called for immediate action in the Court on his part. The claim was also contradicted by a series of transactions in which the Government officers disposed, from time to time, of portions of land included within the confines of the estate which the plaintiff claimed. His claim, therefore, on the sanads was untenable. Setting aside the sanads, then, the mere payment of kumri tax, however it may have indicated that some land was beneficially occupied by the vargdar, afforded by itself no certain evidence either of the place of that occupation, or of its nature as temporary or permanent, as held on proprietary right, or as merely casual and precarious. It is the possibility of referring the exaction levied to some particular area, shown to have been actually and exclusively held by the tax-payer, either by extrinsic evidence, or by that of the Government accounts themselves, that makes the payment and receipt of a tax a practical assertion and admission of private ownership of the space thus rendered distinguishable. But private ownership being established, it still remains true that a property in the soil must not be understood to convey the same rights in India as in England. It may be subject to restrictions and qualifications varying according to the peculiar laws of each country; and those acts which

**LAND TENURE IN KANARA.—Liability to land revenue—*continued.***

under one system would be necessarily regarded as contradictions of any ownership over the object on which they were exercised except that from which they spring, may, under another system, be quite compatible with an ownership subsisting unimpaired side by side with the limited right to which they would be attributed. The reserve of timber generally, as of particular kinds of timber, may be referred to as an instance of this divided dominion. What the Government intended, and practically intimated through its officers, constituted the bounds which it set to the plaintiff's acquisition through its acquiescence, both as to the extent of the rights to be exercised and the local limits within which they were to be exercised. As to the former point, whether the plaintiff's predecessors gained a general ownership of the soil or not, they either did not gain an ownership of the timber, or were wholly ousted from the exercise of that ownership from 1842 downwards. As to the latter point, the evidence showed that the plaintiff's family as vargdars exercised rights over forest tracts in all the estates to which the present claim extended, though as to some of these tracts these rights could not be referred to any particular space. But, even though there had been no interference on the part of the Revenue officers with the plaintiff's free use of the forest, that free use without an exclusive appropriation would not in itself constitute an exclusive right against the State. The right arising from the State's eminent domain is not extinguished by its mere non-exercise, and its exercise was not called for until some public injury or inconvenience arose. The exercise of the plaintiff's dominion had been prevented, except within such limits as the executive officers prescribed, at any rate from 1842; while the ownership of the Government over the forest trees and its proprietary right in the soil had been during the same time at least uniformly asserted, and the plaintiff's suit was, therefore, barred by limitation. BHASKARAPPA *v.* COLLECTOR OF NORTH KANARA . . I. L. R., 3 Bom., 452

3. ——————— *Mula-vargdars, Power of, to raise rent of mul-gainidar.—Enhancement of assessment by Government.—Power of State.*—The plaintiff, who was a mula-vargdar (superior holder) of certain land situated in a village in the district of Kanara, sued to recover from the defendant, his mul-gainidar (permanent tenant), the enhanced assessment levied on the land by Government, and the local cess. Plaintiff also claimed rent for one year. The plaint alleged that the assessment had been enhanced, because of the defendant's encroachment on the adjoining land. The defendant denied his liability for the enhanced assessment, as he was a mul-gainidar, and only liable to pay the fixed annual rent reserved in the lease. He also denied having made any encroachment, and contended that the land, alleged to have been acquired by encroachment, had been included in the lease. Both the lower Courts allowed the plaintiff's claim with respect to the enhanced assessment and local cess, together with rent for one year. On an issue being sent to the District Judge by the High Court on second appeal, it was found that defendant was in

**LAND TENURE IN KANARA.—Liability to land revenue—*continued.***

possession of land other than that which he held under the lease; that he had acquired this other land by encroachment subsequently to the date of the lease; that both the lands were entered in the plaintiff's name in the Government survey, at which the assessment on the land originally demised to the defendant was raised to R36-12-0 (the original assessment being R12), while the land subsequently acquired by defendant was assessed at R5. *Held* that the plaintiff could not recover from the defendant any more than the rent reserved in the lease in respect to the land originally demised, but that he was subject to no such restriction in respect to the land subsequently acquired by encroachment. *Held*, also, that the defendant was liable for the local cess in respect of both the lands. It is not within the power of a Court of law, in the face of the contracts originally made between the mula-vargdars (superior holders) and their mul-gainidars (permanent tenants), to relieve the former from the hardship caused to them by reason of the enhancement, by Government, of the assessment on their lands to an amount exceeding or equal to the rent received by them (mula-vargdars) from the mul-gainidars. It is doubtful whether Government, in its executive capacity, has any more power than Courts of law to interfere with contracts made between private persons. The remedy lies rather in the hands of the Legislature. RANGA *v.* SUBA HEGDE . . I. L. R., 4 Bom., 473

*See* also BABSHETTI *v.* VENKATARAMANA [I. L. R., 3 Bom., 154

And RAM KRISHNA KINE *v.* NARSHIVA SHANBOG [I. L. R., 4 Bom., 478, note

**LAND TENURE IN ORISSA, TRANSFER OF—**

——————— *Maurasi survarakari tenure, The mode of succession to.—Consent of the zemindar to the transfer.*—The tenure known in Orissa as maurasi survarakari, although recorded in the name of a single member, is descendible to all the heirs as joint heritable property, and cannot be transferred without the consent of the zemindar. BHUBAN PARI *v.* SHAMANAND DEY . I. L. R., 11 Calc., 699

**LAND TENURE IN SURAT.**

——————— *Village of Kabilpur.—Maxim, "Nullum tempus occurrit regi."*—The enactments limiting the operation in the Presidency of Bombay of the maxim *nullum tempus occurrit regi*, considered. The land tenures of the district of Surat described. The village of Kabilpur in the district of Surat is an udhad bandhiyama village, settled for hereditarily and of right by the co-sharers in it in the gross at a fixed immutable rent independent of the quantity of land under cultivation, payable to Government, and as such falls in respect of the joint liability of the holders for the revenue within section 8 of Regulation XVII of 1827. The village of Kabilpur is land situated in a district ceded by the Peishwa in 1802 to the British, held by the co-sharers in it and their predecessors in title partially exempt from payment of land revenue, under a tenure recognised by the

**LAND TENURE IN SURAT**—*continued.*

custom of the country for more than thirty years, and therefore falls within the claims for exemption mentioned in Bombay Act VII of 1863, section 21. GOVERNMENT OF BOMBAY *v.* HARIBHAI MONBHAI [12 Bom., Ap., 225

**LANDLORD AND TENANT.**


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*See* CASES UNDER CO-SHARERS.


**LANDLORD AND TENANT**—*continued.*


*See* CASES UNDER ESTOPPEL—LANDLORD AND TENANT—DENIAL OF TITLE.

*See* CASES UNDER KABULIAT.

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## 1. CONTRACT OF TENANCY, LAW GOVERNING—

**1. ——— Rules applicable to relation of landlord and tenant.**—The rules applicable to the relation of landlord and tenant in England are applicable to India, whenever no precise rule regarding the subject is to be found in Hindu or other laws. TARACHAND BISWAS *v.* RAM GOPAL CHOWDHRY . . . . . I. L. R., 4 Calc., 781

**2. ——— Contracts of tenancy between Hindus in Calcutta.**—*Stat. 21 Geo. III., c. 70, s. 17.*—A tenancy created by express contract between Hindus in Calcutta is within the words "matters of contract and dealing between

LANDLORD AND TENANT—*continued.*

1. CONTRACT OF TENANCY, LAW GOVERNING—*continued.*

**Contracts of tenancy between Hindus in Calcutta—*continued.***

party and party" in 21 George III., Cap. 70, section 17, and the right of the parties and the incidents of the tenancy must be governed by Hindu law. RUSSICKLOLL MEDDUCK *v.* LOKENATH KURMOKAR . I. L. R., 5 Calc., 688: 5 C. L. R., 492

2. CONSTITUTION OF RELATION.

(*a*) GENERALLY.

3. ——— **Contract to pay rent.**—*Omission to obtain kabuliat.*—Where two parties bind themselves under an indenture, drawn up in the English form, the one to lease and the other to pay rent for certain land, the contract is complete, and a suit for arrears of rent due under it will lie under Act X of 1859, although no separate kabuliat is executed. KISHEN DOSS *v.* HURRY JEEBUN DOSS [10 W. R., 324

4. ——— **Implied relationship of landlord and tenant.**—*Absence of express condition.*—Where *A.* avowedly holds and cultivates *B.'s* land, *A.* is, by the universal custom of this country, *B.'s* tenant (even without express permission to cultivate on *B.'s* part, or express condition to pay rent on *A.'s* part), and while so holding and cultivating is bound to pay *B.* a fair rent and to give him a kabuliat. NITYANUND GHOSE *v.* KISSEN KISHORE [W. R., 1864, Act X, 82

5. ——— **Grant of pottah by zemindar to sub-tenant.**—*Non-assignment of rights to intermediate tenant.—Suit for kabuliat.*—The defendant was under-tenant in respect of lands which his lessor held under a modafut from the zemindar. Subsequently the lessor left, and the zemindar gave to the defendant a pottah for part of the lands covered by the modafut, and to the plaintiff a pottah for the whole land covered by the original modafut; but did not assign any of his rights as zemindar to the plaintiff to recover or enhance the rent reserved in the pottah he had granted to the defendant. *Held,* in a suit for a kabuliat at an enhanced rate, that the plaintiff and defendant were not in the position of landlord and tenant, so as to enable the plaintiff to maintain his suit. KALAM SHEIKH *v.* PANCHU MANDAL [2 B. L. R., A. C., 252

S. C. KALLAM SHEIKH *v.* PANCHOO MUNDUL [11 W. R., 128

6. ——— **Grant retaining portion of land rent-free but subject to house tax.**—*Holder under sanad under Bombay Act VII of 1863.*—The plaintiffs were the registered holders of the village of Mankoli, in the Ahmedabad Collectorate, for which they obtained a sanad in 1864 under Bombay Act VII of 1863. The defendants were the descendants of the original owners of the village, who, about 1768, finding themselves unable to meet the expenses attaching to the village, gave up their title

LANDLORD AND TENANT—*continued.*

2. CONSTITUTION OF RELATION—*continued.*

(*a*) GENERALLY—*continued.*

**Grant retaining portion of land rent-free but subject to house tax—*continued.***

to it to the ancestors of the plaintiffs on condition of retaining a third of the lands rent-free as their wanta, or share, subject to no other condition but a house-tax. *Held* that the circumstances did not constitute the relationship of landlord and tenant between the parties. JESINGBHAI *v.* HATAJI [I. L. R., 4 Bom., 79

7. ——— **Instrument not fixing permanent rent.**—Where a written instrument purported to create the relation of landlord and tenant for five years the lessor's tenure being that of a mirasidar,—*i.e.,* a hereditary tenancy under Government determinable on default in payment of the proportion of the motha faisal assessment payable for the land. *Held* that the instrument did operate to create the relation of landlord and tenant notwithstanding that the assessment was not permanently fixed. SAMINATHAIYAN *v.* SAMINATHAIYAN . 4 Mad., 153

8. ——— **Payment of revenue by one co-sharer through another.**—*Interest.—Act X of 1859, s. 20.*—By a deed between *A.* and *B.*, *B.* purchased from *A.* a fractional share of a pergunnah, the Government revenue payable on which was R43-12; and it was stipulated that *B.* was to apply to the Collector for mutation; and that until the mutation was completed he should pay the above quota of the Government revenue through *A.*; and that after the mutation the relation between *A.* and *B.* should be an independent one. *Held* that the relation of landlord and tenant was not created by the deed, and consequently that section 20 of Act X of 1859 did not apply to entitle *A.* to interest upon the recovery of a quota of revenue payable by *B.* under the deed. GOLUCK CHUNDER ROY *v.* JUGGERNAUTH ROY CHOWDHRY . Marsh., 146: W. R., F. B., 47 [1 Hay, 346

9. ——— **Decree for kabuliat.**—*Evidence of relationship of landlord and tenant.*—A decree which directs that a kabuliat shall be given by the defendant at a certain rent amounts to an adjudication that there is between the parties the relation of landlord and tenant, and is important evidence on that point in any subsequent suit against the same defendant. SHURUF JAN *v.* FUTTEH ALI [22 W. R., 389

10. ——— **Assessment after resumption.**—*Position of lakhirajdar after resumption.*—To create the relation of landlord and tenant between a zemindar and lakhirajdar after resumption, it is necessary for the zemindar to assess the rent. The holding of a lakhirajdar, after a decree of resumption, is not that of a trespasser, and he is fully entitled to remain in possession of the land without paying rent until the zemindar assesses rent upon him. HUREEBUNS BURHAL *v.* JOYKISHEN MOOKERJEE . . . . . 6 W. R., 92

LANDLORD AND TENANT—*continued.*

2. CONSTITUTION OF RELATION—*continued.*

(*a*) GENERALLY—*continued.*

**Assessment after resumption**—*continued.*

BROJONATH DUTT *v.* JOYKISHEN MOOKERJEE [4 W. R., 69

BHOOPAL CHUNDER BISWAS *v.* MAHOMED MOLLAH . . . . . 6 W. R., 286

11. ——— **Decree declaring right to assessment.**—*Resumption of invalid lakhiraj.—Beng. Reg. II of 1819, s. 30.—Beng. Reg. XIX of 1793, s. 10.—Decree of Civil Court.*—A decree of a Civil Court in a suit (the plaint of which referred to section 30 of Regulation II of 1819, and section 10 of Regulation XIX of 1793) which declared the right of the zemindar to assess rent on land not proved to have been held under a grant prior to 1st December 1790, was sufficient to establish the relationship of landlord and tenant between the zemindar and the party against whom the right of assessment was declared. SAUDAMINI DEBI *v.* SARUP CHANDRA ROY [8 B. L. R., Ap., 82: 17 W. R., 363

SHAMASUNDARI DEBI *v.* SITAL KHAN [8 B. L. R., Ap., 85, note: 15 W. R., 474

MADHUSUDAN SAGORY *v.* NIPAL KHAN [8 B. L. R., Ap., 87, note: 15 W. R., 440

ROHINI NANDAN GOSSAIN *v.* RATNESWAR KUNDU [8 B. L. R., Ap., 89, note: 15 W. R., 345

12. ——— **Decree for resumption.**—*Resumption of invalid lakhiraj.—Beng. Reg. II of 1819.—Suit for kabuliat.—Act X of 1859, s. 23, cl. 1.*—The having obtained a decree for resumption of invalid lakhiraj lands, held on tenure prior to 1st December 1790, under Regulation II of 1819, did not create the relationship of landlord and tenant between the plaintiff and defendant so as to enable the plaintiff to sue for a kabuliat under clause 1, section 23, Act X of 1859. That relationship could not come into existence until the lakhirajdar had agreed to pay the revenue assessed by the Collector. MADHAB CHANDRA BHADORY *v.* MAHIMA CHANDRA MAZUMDAR . 8 B. L. R., Ap., 83, note: 12 W. R., 442

13. ——— **Position of occupiers in village granted to inamdar.**—*Suti tenure.*—An inamdar to whom a village has been granted by Government, though bound to respect all existing tenant-rights, is under no obligation to grant unoccupied lands in "suti" or other permanent tenure, or to regrant on the same tenure lapsed suti lands; nor does the mere taking up of lands in such a village constitute the occupiers suti tenants. NASARVANJI HORMASJI *v.* NARAYAN TRIMBAK PATIL [4 Bom., A. C., 125

14. ——— **Relationship depending on validity of adoption.**—*Status pending appeal to Privy Council.*—In a suit for rent the plaintiff sued as the adopted son of the deceased landlord and the defendant (who was the adopted son of the deceased tenant and in possession) denied the relationship of landlord and tenant between them. It appeared that the defendant disputed the validity of the plaintiff's

LANDLORD AND TENANT—*continued.*

2. CONSTITUTION OF RELATION—*continued.*

(*a*) GENERALLY—*continued.*

**Relationship depending on validity of adoption**—*continued.*

adoption and had brought a suit to set it aside in which he had failed, but had appealed to the Privy Council; that the plaintiff had not received rent for many years, and had brought a suit to eject the defendant and recover mesne profits which was dismissed, it being found that the defendant was entitled to retain possession. *Held* that, so long as the decision that the plaintiff was the adopted son of the deceased landlord held good, the relationship of landlord and tenant existed between the parties, and the plaintiff was therefore entitled to recover rent from the defendant. HURONATH ROY CHOWDHRY *v.* GOLUCKNATH CHOWDHRY . . 19 W. R., 18

(*b*) ACKNOWLEDGMENT OF TENANCY BY RECEIPT OF RENT, &c.

15. ——— **Right to recover rent, Establishment of.**—*Assessment.—Agreement to pay rent.*—To establish a right to recover rent a zemindar must show that either by assessment in due course of law or by agreement the tenant is liable to pay it. GAYASOODEEN *v.* KHUDA BUKSH [1 N. W., 87: Ed. 1873, 139

KRISHNA GHOSE *v.* RAM NARAIN MOHAPATTUR [25 W. R., 214

16. ——— **Right to recover rent.**—*Sharer in undivided talook.—Agreement to pay rent.*—A sharer of an undivided talook may be entitled to recover his share of the rent due from the talook generally, but it does not follow that he is entitled to recover from the jotedar of a particular jote in the talook unless there is an agreement to that effect. SHAMA SOONDUREE DEBIA *v.* KRISTO CHUNDER ROY [13 W. R., 316

17. ——— *Purchase of land.—Contract, express or implied, for payment of rent.*—*Held* that the plaintiff, not having been put into the possession of land purchased by him, and holding no contract, express or implied, from the holder of the land for payment of rent, was not competent to sue the defendant (occupant of the land) for rent thereof. RAM DASS SINGH *v.* RAM NARAIN [2 Agra, Rev., 9

18. ——— **Liability to pay rent.**—*Occupation after deprivation under decree.*—A party stripped by a decree or order of proprietary interest in land does not by mere subsequent occupation of it become vested with the character of a tenant, and therefore he is not liable to distraint for rent. He must have become a tenant by agreement or act of law to render him liable for rent. MUKURDHOOJ SINGH *v.* RAM CHURN [1 N. W., 14: Ed. 1873, 12

19. ——— **Implied contract to pay rent.**—Under certain circumstances a contract to pay rent to the zemindar on the part of the tenant

LANDLORD AND TENANT—*continued.*

2. CONSTITUTION OF RELATION—*continued.*

(*b*) ACKNOWLEDGMENT OF TENANCY BY RECEIPT OF RENT, &c.—*continued.*

**Implied contract to pay rent**—*continued.*

will be implied, but no implication of a contract to pay rent to the zemindar on the part of the tenant can arise in a case in which the defendant has been paying rent to another zemindar than the one suing for a kabuliat. DIGAMBUR MITTER *v.* HUROPERSHAD ROY CHOWDHRY . . **7 W. R., 126**

20. ——— **Transferee of landlord.**—*Attornment, Necessity of.*—In a suit for rent where the defendant held under a lease from a party who subsequently gave a lease to plaintiff which gave him the right to collect rents from the defendant in accordance with the terms of the former (the defendant's) lease,—*Held* that no attornment was necessary, and that the relationship of landlord and tenant existed between the parties so that the suit could be instituted in a Revenue Court under the Rent Act. SEEE CHAND *v.* BUDHOO SINGH **[13 W. R., 301**

21. ——— **Ex-proprietary tenant.**—*Suit for arrears of rent.—Determination of rent.—Act XII of 1881 (N.-W. P. Rent Act), ss. 14, 95 (l).—Act XIX of 1873 (N.-W. P. Land Revenue Act), s. 190.*—Except where there has been an arrangement or agreement between the parties a landholder cannot sue his ex-proprietary tenant for rent until, as a condition precedent, he or the tenant has obtained a determination of the amount thereof, either by application to the Settlement Officer under section 14, or to the Revenue Court under clause (*l*), section 95, of the Rent Act, or it has been fixed by the Collector or Assistant Collector according to section 190 of Act XIX of 1873. PHULAHRA *v.* JEOLAL SINGH . . . . **I. L. R., 6 All., 52**

22. ——— **Extinguishment of proprietary right by partition.**—*Contract for payment of rent.*—Where a partition was made and the proprietary right of one of the co-sharers in a portion which fell to another was consequently extinguished and he became a mere tenant,—*Held* that, though the rent was exigible, the claim for arrears of rent could not be decreed in the absence of express or implied contract for the same. ZALIM RAI *v.* DOORGA RAI . . . . **1 Agra, Rev., 69**

23. ——— **Claim to rent.**—*Arrears of rent.—Failure, to prove liability to pay rent.*—A claim for arrears of rent cannot be sustained where the claimant fails to prove that rent has ever been paid. SHEO SAHAI *v.* ATA HOSSEIN **[2 Agra, Rev., 10**

*See* GUNNI KAZI *v.* HURRYHUR MOOKERJEE **[B. L. R., Sup. Vol., 15**

Or proves a contract to pay rent. LUCHMEEPUT DOSS *v.* ENAET ALI . . **22 W. R., 346**

24. ——— *Assessment and determination of rate of rent.—Rent-free lands.*—A suit for arrears of rent cannot be maintained in

LANDLORD AND TENANT—*continued.*

2. CONSTITUTION OF RELATION—*continued.*

(*b*) ACKNOWLEDGMENT OF TENANCY BY RECEIPT OF RENT, &c.—*continued.*

**Claim to rent**—*continued.*

respect to rent-free land until the land has been assessed and the rate of rent determined. NOOR ALI *v.* IMTEAZOODEEN KHAN . **3 Agra, Rev., 2**

25. ——— *Suit for arrears of rent.—Non-payment of rent for long period.—Allegation of rent-free tenure.*—A landlord cannot maintain a suit for arrears of rent where a claim to hold the land rent-free by some title of exemption is set up, and the question for enquiry in such a suit is not whether the land is or is not subject to assessment, but whether, referring to the circumstances under which rent has been withheld, the land can be regarded as rent-paying land. The mere fact of the land being entered in the settlement papers as assessed, or that the annual papers contain entries, is not sufficient to justify a decree for arrears of rent. CHOONEELAL *v.* CHITOWLA . . . **2 Agra, 137**

26. ——— *Decree for kabuliat.—Suit for arrears of rent previous to kabuliat.*—Where a party, after obtaining a decree establishing his title to land, sues for and gets a decree for a kabuliat against another who was holding the land adversely to him without any contract, express or implied, for the payment of rent, he cannot maintain a suit for arrears of rent for a period previous to the kabuliat, which cannot have retrospective effect. JAN ALI *v.* GOOROO DAS ROY **[8 W. R., 338**

27. ——— *Mortgagor after redemption and grantee of mortgagee.*—No such relation as that of landlord and tenant exists between a mortgagor (after redemption) and the grantee of the mortgagee, and such mortgagor must establish his right to collect rent before he can sue to have the amount thereof ascertained. ADJOODHYA SINGH *v.* GIRDHAREE . . . . **2 N. W., 197**

28. ——— *Purchaser of rent-paying tenure.—Privity with zemindar.*—There is sufficient privity of estate between the purchaser of a rent-paying holding and the zemindar to entitle the latter to claim rent. KOLOO MISR *v.* BHYRO KULWAR . . . . **2 N. W., 258**

29. ——— *Liability of heir of deceased lessee for rent:—Mokurrari lease—Kabuliat.*—The heir of a lessee is liable to the lessor for rent payable by virtue of a kabuliat, notwithstanding he is not in possession of the land. TARINEEPERSAD GHOSE *v.* SREEGOPAL PAUL CHOWDHRY **[Marsh., 476: 2 Hay, 593**

30. ——— *Registered owner, Suit by, where the relationship of landlord and tenant is not shown to exist.—Bengal Act VII of 1876, s. 78.*—The mere fact of a person being registered under the provisions of Bengal Act VII of 1876 as proprietor of the land in respect of which he seeks to recover rent is not sufficient to entitle

LANDLORD AND TENANT—*continued.*

2. CONSTITUTION OF RELATION—*continued.*

(*b*) ACKNOWLEDGMENT OF TENANCY BY RECEIPT OF RENT, &c.—*continued.*

**Claim to rent**—*continued.*

him to sue for it. Where a landlord who was registered as owner of the land in respect of which he claimed rent, sued the occupier for such rent, but was only able to prove the fact that he was the registered owner, and was unable to show that the relationship of landlord and tenant existed, or that he had a good title to the estate of which he was the registered owner,—*Held* that the suit was rightly dismissed. RAMKRISTO DASS *v.* HARAIN [I. L. R., 9 Calc., 517 : 12 C. L. R., 141

31. ——————— *Presumption of relationship of landlord and tenant.*—Where a defendant in a suit for enhancement of rent admits that he has paid for many years and is still paying a sum of money to the holders of the putni in plaintiff's possession, without being able to show it was paid as anything but rent, there is sufficient to raise the presumption that the parties stand to each other in the relation of landlord and tenant. BEHAREE LALL MOOKERJEE *v.* MODHOO SOODUN CHOWDHRY [8 W. R., 474

32. ——————— *Beng. Regs. V of 1799, s. 5, and V of 1827, s. 3.—Sub-tenure taken charge of by Collector.*—Under the provisions of Regulation V of 1799, section 5, and Regulation V of 1827, section 3, the Collector took charge of a sub-tenure as administrator of a deceased person to whom the sub-tenure belonged. *Held* the Collector was in no sense the tenant of the superior landlord, and consequently no suit would lie against him under Act X of 1859 for rent alleged to be due in respect of the sub-tenure. COLLECTOR OF BOGRAH *v.* DWARKANATH BISWAS . 4 B. L. R., Ap., 80 : 13 W. R., 194

33. ——————— *Occupation by trespasser.*—Occupation by a trespasser does not create a claim to rent, though it may give grounds for an action for damages. BICHOOK PANDEY *v.* NARAIN DUTT . 1 N. W., 26 : Ed. 1873, 24

34. ——————— *Right of persons in possession under decree against person with subsequent decree for possession.—Attornment, Absence of.*—Where *A.* and *B.* were in possession of lands by virtue of a decree of Court, their tenants could not be called upon to pay rent to *C.*, to whom they had not attorned, but who subsequently obtained a decree for the lands in suit, so long as no decree of Court had declared the title of *C.* to be superior to that of *A.* and *B.* *C.'s* remedy in such case is an action against the persons who were wrongfully in possession for mesne profits, and not in a suit for rent against their tenants, who had in good faith dealt with the persons who were the ostensible proprietors in possession under a decree. Lands may be cultivated by a mere trespasser, and in that case the cultivator would not be liable to a suit for rent, but to a suit for mesne profits. Owners of land may take advances for the cultivation of indigo, and the persons by whom the advances were given may find it necessary to enter on the land and look after the cultivation and harvesting of the crop, but if they did so they could not be sued as tenants for rent. To render a person liable to pay as a tenant, it must be proved that he has by an express or implied agreement promised to pay rent, or that he has been assessed with rent in due course of law. MUNOHUR DOSS *v.* DEEN DYAL . . . 3 N. W., 179

35. ——————— *Liability for rent from use and occupation without registration.*—Parties in possession make themselves tenants by use and occupation, and may be sued for rent even though not registered by the zemindar. LALUN MONEE *v.* SONA MONEE DABEE . 22 W. R., 334

36. ——————— *Person in possession of land served with notice to quit or pay rent and remaining.*—When a person is in possession of land without paying rent, and is served by the landlord, under whom he previously held, with notice that he must either quit or pay a reasonable rent, and chooses to remain in possession, he must be taken to have assented to become a tenant and is liable to pay rent. SREEGOPAUL MULLICK *v.* DWARKA NATH SEIN . . . . . 15 W. R., 520

But *see* BURODA KANT ROY *v.* RADHA CHURN ROY . . . . . 13 W. R., 163

37. ——————— **Receipt of rent.**—*Ratification of lease.*—If a person being aware that another is in possession claiming to hold under a lease accepts rent from him, he thereby ratifies the lease so far as he has the power to do so; and if he wishes to protect himself from the ordinary inference that he recognises the lease, he is bound to give distinct notice to the tenant that he intends to dispute its validity, so as to leave the tenant an opportunity of refusing payment. JUGGESHUR BUTTOBYAL *v.* ROODRO NARAIN ROY . . 12 W. R., 299.

*See* NUBO KISHEN MOOKERJEE *v.* KALA CHAND MOOKERJEE . . . 15 W. R., 438

RAM GOBIND ROY *v.* DUSHOOBHOOJA DEBEE [18 W. R., 195

38. ——————— *Transferee of intermediate tenure.*—Where rent is recovered without objection by successive landlords from the transferee of an intermediate tenure from the date of transfer, such receipt acts as a full and complete acknowledgment by the proprietor that he accepts the new tenant in the place of the old one. ALLENDER *v.* DWARKANATH ROY . . 15 W. R., 320

39. ——————— *Creating new tenancy.*—The receipt of rent for 1268 by the landlord bars his right to eject the tenant for non-payment of rent due up to the end of 1267, the receipt for rent being an affirming of tenancy for that

LANDLORD AND TENANT—*continued.*

2. CONSTITUTION OF RELATION—*continued.*

(*b*) ACKNOWLEDGMENT OF TENANCY BY RECEIPT OF RENT, &c.—*continued.*

**Receipt of rent**—*continued.*

period. The receipt of rent for 1268 has the same effect as if the landlord had at the commencement of 1268 created a new tenancy. PEERBUX *v.* MOWZAH ALLY . **W. R., F. B., 10; Ind. Jur., O. S., 7 [Marsh., 25 : 1 Hay, 89**

40. ——————— *Suing for arrears of rent.*—A landlord, by taking rent from a party, and by suing him for arrears of his predecessor's rent, acknowledges him as a tenant, and cannot eject him, or enhance the rent, except according to law. MAHOMED AZMUR *v.* CHUNDER LALL PANDEY **[7 W. R., 250**

41. ——————— *Acknowledgment of nature of tenancy.—Receipt of rent as from particular tenure.*—Where the nature of a tenant's tenancy and the right of his lessor to create it are in question, the genuineness of a pottah does not settle the question: and even where an owner has been receiving rents under a pottah granted by a predecessor in title, no such receipt can make the lease valid and binding against him as to the nature of the tenancy if it were not originally so, unless the receipts were signed by him acknowledging the nature of the tenant's tenancy. BHOLANATH MITTER *v.* KALOO **[25 W. R., 222**

42. ——————— *Permitting occupation of land and taking rent.—Right to resume land so taken.*—By permitting a putnidar to take a quantity of land in addition to what is already held by him in putni, and by receiving rents from him for such additional land for a series of years, a proprietor cannot, in the absence of any kabuliat from the putnidar or verbal agreement giving him the extra land in perpetual lease, be held to be debarred from resuming possession. KISHORE BULLUBH MITTER *v.* BISTOO CHUNDER GHOSE **[12 W. R., 188**

43. ——————— *Acquiescence in party holding after death of tenant having right of occupancy.*—The defendant had been associated in the occupation and cultivation of certain land with *I.*, a tenant with a right of occupancy, and after *I.'s* death continued the occupation, and paid rent to the plaintiffs for nine years. *Held* that this acquiescence in his occupation must be regarded as a recognition by the plaintiffs of his having been associated with *I.*, and in a suit to eject him held the plaintiffs were not entitled to succeed. CHATOOR SINGH *v.* HEERA KOOER . . . . . **5 W. R., 191**

44. ——————— *Acceptance of rent from agent.*—Acceptance of rent from a person acting as the agent of another is not a recognition of the agent as a tenant. BANEE LALL *v.* RAM BHUROSE CHOWBEY . **1 N. W., Ed. 1873, 63**

45. ——————— *Ratification of.—Grant prior to Beng. Reg. V of 1812.*—The acceptance of rent for forty years ratifies the original grant of a mokurrurec pottah granted prior to Regulation V of 1812. UMRITHNATH CHOWDHRY *v.* KOONJ BEHARY SINGH . **W. R., F. B., 34**

46. ——————— *Effect of acceptance of rent from tenant holding over.—Renewal of tenancy.*—By indenture, dated 1st February 1856, *A.* leased certain premises to *B* in Calcutta for a term of ten years from 1st November 1855, at a rent of R100 per month, payable monthly. *A.* covenanted with *B.* to grant her on her request, to be made within three months of the expiry of the term, a fresh lease on the same terms for three years. The defendant in August 1858 became the assignee of the lease without notice to *A.*, and continued to occupy the premises and paid the rent in the name of *B.* up to August 1866. No renewal of the lease (which expired on 31st October 1865) was ever demanded by *B.* or by any one claiming through her. The plaintiffs became *A.'s* representatives in June 1866, and gave notice to quit in September 1866, from the 1st November 1866. *Held* that the acceptance of rent by *A.* and his representatives from the defendant holding over after the expiration of the original term did not constitute a renewal of the lease for three years. BROJONAUTH MULLICK *v* WEBKINS **[2 Ind. Jur., N. S., 163**

47. ——————— *Assent by zemindar to transfer of tenure.*—By accepting rent the zemindar assents to the transfer of a tenure, whether the whole is sold or a part only. BHABUT ROY *v.* GUNGANARAIN MOHAPATTUR . **14 W. R., 211**

48. ——————— *Alienation by cultivators.—Acceptance of rent from alienee.*—Although in a mouzah cultivators may not possess the right of alienating their holdings, yet if, with a knowledge of such an alienation, the zemindar accepts rent from the alienee, he recognises the alienee's position, and is as much bound as if he had expressly assented to the alienation. RUMMUN SINGH *v.* ESHREE PERSHAD . . . . **2 Agra, 144**

49. ——————— *Admission of status of purchaser from ryots.—Held* that a zemindar, by taking the rent of the plaintiff's purchased lands after the rent was deposited by him in the Collector's treasury, virtually admitted the plaintiff's status as purchaser from the former ryots, and that he had attorned to him as landlord: and that as this payment was made long before the zemindar sued the former ryots for enhanced rent under Act X of 1859, the decrees obtained in that suit must have been collusive. GUDADHUR BANERJEE *v.* KHETTERMOHUN SURMAH . **7 W. R., 460**

50. ——————— *Transfer of tenure.—Acceptance of rent from transferee.*—Where a tenure is transferred by a ryot without

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**LANDLORD AND TENANT**—*continued.*

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(*b*) ACKNOWLEDGMENT OF TENANCY BY RECEIPT OF RENT, &C.—*continued.*

**Receipt of rent**—*continued.*

sanction of his landlord, and the latter nevertheless receives rent from the transferee, and gives him dakhilas for the year in which he is in possession, the landlord cannot oust him afterwards under a decree for the rent of previous years. ABDOOL KUREEM *v.* MUNSOOR ALI . **12 W. R., 396**

**51.** ———— *Purchaser at sale in execution of decree.—Leases made after decree.*—The purchaser at a sale in execution of a decree obtained by a mortgagee in satisfaction of his mortgage-debt, is not bound by leases executed by the mortgagor, after decree, unless he has recognised the leases after his purchase by receiving rent from the lessees as such. HUNOOMAN DOSS *v.* KOOMEROONISSA BEGUM

**[W. R., F. B., 40 : 1 Ind. Jur., O. S., 42**

S. C. KOOMEROONISSA BEGUM *v.* HUNOOMAN DOSS **[Marsh., 122 : 1 Hay, 266**

**52.** ———— *Evidence of confirmation of tenure.—Giving receipts for rent.*—The giving of receipts for rent, coupled with the fact of payment of rent at the old rate down to the present time, is evidence of confirmation of the tenure by the auction-purchaser and his successor. TARA CHAND DUTT *v.* WAKENOONISSA BIBEE

**[7 W. R., 91**

**53.** ———— *Lease by naib of zemindar.—Transfer of tenure.*—When a zemindar dispossessed the purchaser of a jungleboory tenure, the title of whose vendor was acquired from the zemindar's naib, who had no power to grant such a pottah,—*Held* that the receipt of rent by the zemindar from the plaintiff and his vendor did not amount to a ratification of the plaintiff's right to hold under the pottah transferred to him by the vendor. A zemindar is not bound to recognise tenures not created by himself, or by any authorised agent on his part. BISSUMBHUR POORKAET *v.* BHUGGOBUTTY CHURN POORKAET . . **W. R., 1864, 292**

3. OBLIGATION OF LANDLORD TO GIVE AND MAINTAIN TENANT IN POSSESSION.

**54.** ———— **Presumption of ability to give possession.**—When a zemindar gives a lease, the presumption is that he is in a position to give possession of the property leased. DONZELLE *v.* TEK NARAIN SINGH . . **2 W. R., Act X, 103**

**55.** ———— **Implied contract for possession.**—*Peaceable possession.*—In every agreement to lease land there is an implied contract that the lessor will give peaceable possession of the land leased to the lessee. MUNEE DUTT SINGH *v.* CAMPBELL . . . . . **11 W. R., 278**

Affirmed on review . . . **12 W. R., 149**

**LANDLORD AND TENANT**—*continued.*

3. OBLIGATION OF LANDLORD TO GIVE AND MAINTAIN TENANT IN POSSESSION—*continued.*

**56.** ———— **Lessee without possession.**—*Right to rent.—Condition precedent.*—A landlord cannot claim rent under a kabuliat where the lessee has never obtained possession, delivery of possession being ordinarily a condition necessary for the maintenance of an action for rent. HURISH CHUNDER KOONDOO *v.* MOHINEE MOHUN MITTER

**[9 W. R., 582**

ASHRUFOONISSA BEGUM *v.* TOSUDDUCK HOSSEIN **[22 W. R., 260**

**57.** ———— **Right of tenant to be continued in quiet possession.**—*Right to rent.*—The right of a landlord to receive rent from a farmer depends upon his securing to the latter quiet possession, and giving him proper and lawful means of realising rents from the tenants. KRISTO SOONDUR SANDYAL *v.* CHUNDER NATH ROY

**[15 W. R., 230**

**58.** ———— **Possession not obtained by lessee.**—*Right to rent.*—A suit for rent will not lie where the lessee has never obtained possession of the land leased to him. BULLEN *v.* LALIT JHA

**[3 B. L. R., Ap., 119**

**59.** ———— **Lessee kept out of possession.**—*Right to rent.—Dispossession by or through landlord.*—A suit for rent will not lie unless the relation of landlord and tenant be established, and a tenant cannot be made liable for rent if it be established that he has been kept out of the possession of the tenure by the landlord. ABDOOL GUNNEE *v.* KHERODE CHUNDER ROY . **2 Hay, 409**

ABDOOL GUNNEE *v.* POORNO CHUNDER ROY **[2 Hay, 524**

**60.** ———— **Dispossession of tenant.**—*Obligation of landlord to indemnify tenant.*—In the absence of any express agreement to the contrary, a landlord is under the implied obligation to indemnify his tenant against ouster or disturbance of possession by his own act, or by the acts of those who claim under him, or have a right paramount to his, but not against the wrongful acts of third parties. RASSAM *v.* DONZELLE . **23 W. R., 121**

**61.** ———— **Failure to give possession.**—*Agreement to give lease.—Procedure by tenant.*—When consideration-money has been paid for a putni lease, with a view to khas possession, and such possession is not obtained, the proper course is to repudiate the lease and bring an action immediately. MOKOOND CHUNDER ROY *v.* PRANKISSEN PAUL CHOWDHRY . . . **W. R., 1864, 287**

**62.** ———— **Lease given without authority and afterwards set aside.**—*Liability for rent after dispossession.*—Where a lease was granted by a Deputy Collector without authority, and his act set aside by the Collector, the tenant, who was turned out of possession without any

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LANDLORD AND TENANT—*continued.*

3. OBLIGATION OF LANDLORD TO GIVE AND MAINTAIN TENANT IN POSSESSION—*continued.*

**Lease given without authority and afterwards set aside**—*continued.*

beneficial occupation for the short period of his lease, was held not to be liable for rent. KALEE DOSS BANERJEE *v.* NUBEEN CHUNDER CHATTERJEE [24 W. R., 91

63. ——— **Dispossession by stranger.**—*Liability for rent.*—A tenant dispossessed by any person not claiming under the landlord is still liable for the rent; his remedy is against the wrong-doer for damages. GALE *v.* CHEDI JHA . 2 Hay, 591

64. ——— **Failure of lessor to protect possession of lessee.**—*Liability for rent.—Dispossession.*—If a lessor fails by remissness to do that which he alone can do to protect his lessee in possession, even independently of any protective provision in the lease, he cannot claim rent from the lessee in respect of the portion of the property from which the latter has been evicted. WAJED ALI *v.* CHUNDRABUTTY KOOERRE . . . 22 W. R., 542

65. ——— **Failure to keep tenant in entire possession.**—*Surrender by tenant on being partly dispossessed.—Liability for rent.*—Where a plaintiff brought a suit to recover the rents of some lands which he had leased out to defendant; but defendant pleaded that he had relinquished the lands because, in a suit brought against him by a third party, who claimed a portion of the lands, a decree had given the said party possession of the portion claimed by him; and the question arose whether defendant was justified in relinquishing the lands, seeing that this decree had been reversed on appeal, and that defendant, if he had waited, would have been put in possession of all the land covered by his lease,—*Held* that defendant was right in submitting to the decree of a Court of competent jurisdiction; that he could not be expected to content himself with the residue of the land left untouched by the decree, or to wait for a decree which might restore the portion taken away from him; and that, having given up his lease to the plaintiff, he was not liable for any rents. LALI KONWAR *v.* CARTER . . . 25 W. R., 492

4. OBLIGATION OF TENANT TO KEEP HOLDING DISTINCT.

66. ——— **Confusion of boundaries.**—*Person holding land on lease and land of his own.*—A tenant is bound to keep distinct from his own land during the tenancy, and to leave clearly distinct at the end of it, the land of his landlord. Where, owing to the negligence of the tenant, the land demised becomes confounded with his own, the tenant, unless he can ascertain the former, is bound to deliver to the landlord a portion of the lands of which the boundaries have been confounded equal in value to the land demised. DUGAPPA CHETTI *v.* VIDHIA PURNA TIRTHASAMI . . . I. L. R., 6 Mad., 263

DOORGA KANT MOZOOMDAR *v.* BISHESHUR DUTT CHOWDHRY . W. R., 1864, Act X, 44

LANDLORD AND TENANT—*continued.*

4. OBLIGATION OF TENANT TO KEEP HOLDING DISTINCT—*continued.*

**Confusion of boundaries**—*continued.*

67. ——— *Interference of Civil Court to fix them.*—In equity, if through the default of a tenant or a copy-holder, who is under an implied obligation to preserve the boundaries of separate estates which he holds, there arises a confusion of boundaries, the Court will interfere as against such tenant or copy-holder to ascertain and fix them. In a case in which the boundaries of three talooks had been found to be unascertainable, it was decreed that they should be defined and fixed in such a manner that the produce of the total land in each talook should bear the same proportion to the jumma payable by such talook as the produce of the whole of the said lands bore to the total of the jummas payable on account of the three talooks. KHEMAMOYEE *alias* KHEMESSUREE DEBIA *v.* SHOSHEE BHOOSUN GANGOOLY . . . . . 9 W. R., 95

68. ——— **Obliteration of boundary-marks by cultivation.**—*Effect of, on claim to rent.*—A claim to rent for certain land must not be dismissed merely because the defendant, by planting indigo, has obliterated the boundary-mark of that land. It must be ascertained who, by previous enjoyment, is entitled to receive the rents of the land, if the plaintiff is not so entitled. BROJONATH ROY *v.* GILMORE . . . . 2 W. R., Act X, 48

69. ——— **Tenant allowing encroachment on tenure.**—*Obligation of lessee to avoid dispossession or encroachment on lessor's property.*—It is a general principle of law that it is incumbent upon every lessee to protect his lessor's property from encroachment or unlawful eviction, and that if he fails to do so he exposes himself to an action for damages by his landlord. PROSUNNO MOYI DASI *v.* KALI DAS ROY . . . 9 C. L. R., 347

5. LIABILITY FOR RENT.

70. ——— **Proof of liability.**—*Production and proof of kabuliat.*—The production of a kabuliat and proof of its execution by the tenant is sufficient to charge him with rent without the production of the pottah. MAHOMED HYDER HOOSEIN *v.* JEEAWUN . . . 1 N. W., Ed. 1873, 43

71. ——— **Non-completion of contract.**—*Mad. Regs. XXX of 1802, s. 6, and V of 1822, s. 9.*—Where no pottahs and muchalkas have been exchanged between the parties, occupants of lands cannot, in accordance with Regulation XXX of 1802, section 6, and Regulation V of 1822, section 9, be sued for its proceeds, even though they have admitted the plaintiffs to be the proprietors. TANUVIYAN *v.* VALANAGANDA . . . . . 1 Mad., 3

72. ——— **Interruption of tenancy.**—*Interruption of occupation by landlord.*—No subsequent interruption by *A.* in *B.'s* occupation and enjoyment of land would be an answer to *A.'s* claim for rent which had previously accrued. *B.'s* eviction by *A.* will not relieve him from liability for rent which accrued due prior to the eviction. MADHUB

**LANDLORD AND TENANT**—*continued.*

5. LIABILITY FOR RENT—*continued.*

**Interruption of tenancy**—*continued.*

CHUNDER MOZOOMDAR *v.* SIDHEE NUZEER ALI KHAN . . . . . 8 W. R., 54

73. ——— *Dispossession of tenant in middle of year.—Right to rent accrued due on interruption of occupation.*—A landlord, by dispossessing his tenant in the middle of the year, does not, in all cases, forfeit his right to rents which have already accrued due. Whether he does or not must depend on circumstances,—*e.g.*, upon the question whether the ryot has enjoyed all the year's profits, or has been prevented from enjoying any by the landlord's act of interference. BUNSEE DHUR GHOSE *v.* BHEEM LALL SAHOO . 24 W. R., 219

74. ——— *Dispossession, and recovery of mesne profits for.*—In a suit for rent in which defendant pleaded that during the period for which rent was claimed the tenants had been out of possession of the land, having been ousted by a third party to whom the zemindars (plaintiffs) had given a lease of the land,—*Held* that the zemindars were precluded from suing defendants for rent on account of such period, even though the latter had recovered a decree with wasilat for the period of dispossession. KADUMBINEE DOSSIA *v.* KASHEENAUTH BISWAS . . . . . 13 W. R., 338

75. ——— *Wrongful act of superior tenure-holders.—Ouster.*—In a suit by a landlord to recover arrears of rent from tenants who had been forcibly compelled by the superior holders of a tenure over the plaintiff to execute a kabuliat to themselves and to pay rent accordingly,—*Held* that such wrongful act of the intervenor defendants (the superior holders) was not in law sufficient to constitute an ouster of the plaintiff, but gave the tenant defendants a cause of action against them for damages. CHUNDER NATH BHUTTACHARJEE *v.* JUGGUT CHUNDER BHUTTACHARJEE . 22 W. R., 337

76. ——— *Rent after loss of possession.—Ejectment by zemindar.*—A zur-i-peshgidar cannot compel his lessees to pay rent when both he and they are evicted by the zemindar. BISHEN DYAL SINGH *v.* PROBHOO DASS [1 W. R., 1

77. ——— **Assignment of right to recover rent.**—*Subsequent suit for arrears of rent.*—A tenant was authorised by his landlord to pay a certain portion of his rent to *T.*, a creditor of the landlord. *T.* afterwards obtained a decree against the tenant for the amount of rent he was required by his landlord to pay to him. The landlord brought a suit for the entire amount of the arrears. *Held* that he was entitled to recover only the surplus beyond the amount for which *T.* had obtained a decree, notwithstanding such decree was unsatisfied. LALLAH GOUR NARAIN *v.* KARRON LALL THAKOOR [Marsh., 363: 2 Hay, 447

78. ——— **Rent paid to some one else with landlord's acquiescence.**—*Subsequent suit for such rents.*—A tenant cannot afterwards be held

**LANDLORD AND TENANT**—*continued.*

5. LIABILITY FOR RENT—*continued.*

**Rent paid to some one else with landlord's acquiescence**—*continued.*

liable for rents which he pays to a third party (co-sharer) with the acquiescence of his landlord, expressed or implied; and where the relation of landlord and tenant ceases with the consent of the landlord, the landlord cannot again claim rent unless he shows how or when the relation revived. MUDDUN MOHUN ROY CHOWDHRY *v.* CHUNDER SEKHUR BHUTTACHARJEE . . . . . 25 W. R., 115

79. ——— **Rent between date fixed for leaving and actual previous departure.**—Where there were no terms of agreement settled between the parties, but the defendant after occupying the house for a time wrote that he would vacate the house on the 1st June,—*Held* that, though he actually left on the 16th May, he was liable for rent up to the 1st June. RUFF *v.* STOKOE [9 W. R., 213

80. ——— **Purchaser of house.**—*Notice of rate of rent.—Liability of tenant at fixed rent.*—Where the right, title, and interest of the owner of a house are purchased at a sale in execution, and the purchaser finds the house in the occupation of a lessee at a fixed rent, his giving the lessee notice that, after a certain date, he intends to charge him at a particular rate does not give him a right to rent at that rate. If not content with the rate fixed in the lease he can only get such sum as the Court finds to be a fair and reasonable rent for the use and occupation by the defendant; in deciding what rate is fair and equitable, the state of the house when he entered on the occupation and the reasonable and necessary repairs executed by him since his entry can be taken into consideration. FEGREDO *v.* MAHOMED MODDESSUR [10 W. R., 267

81. ——— **Auction-purchaser of orchard from zemindar.**—*Orchard included in settled area of village.*—An auction-purchaser of the rights and interest of the zemindar in an orchard cannot be treated by the latter as his ryot, because the area of the orchard is included in the settled area of the village of which he is the proprietor, and a suit by the latter to impose rent on the garden and for delivery of kabuliat is not maintainable. MOOTEE *v.* ROORA . . . . . 3 Agra, 159

82. ——— **Purchaser in execution of decree.**—*Payment for period subsequent to purchase.—Notice.*—An auction-purchaser, with notice of a payment in advance, made by the tenant to the former proprietors, of rent due for a period subsequent to the date of purchase, is bound by such payment. RAM LALL SHAW *v.* JOGGENDRO NARAIN ROY [18 W. R., 328

83. ——— **Purchaser of specific share.**—*Proportionate liability for rent.*—The purchaser of a specific share of a talook, which with other talooks was held by the same jotedar, can be held liable only for the rent due upon the share purchased; and there can be no difficulty in determining the rent payable

LANDLORD AND TENANT—*continued.*

5. LIABILITY FOR RENT—*continued.*

**Purchaser of specific share**—*continued.*

if each tenure has a separate jumma, and each shareholder holds a specific share. KHEMA MOYEE *alias* KHEMESSUREE DEBIA *v.* RADHA PEAREE DEBIA CHOWDHRAIN . . . . **8 W. R., 469**

**84. ——— Suit for balance of amount of decree against one tenant only.**—*Successful claim by another party after decree.*—Plaintiff, a putnidar, got a decree for rent against *B.'s* wife, the ostensible dur-putnidar. Shortly afterwards *B.'s* nephew brought a suit against *B.* for an 8 annas share of the dur-putni, which he claimed as joint family property, and obtained a decree. Before this last decree was executed, the dur-putni was sold to satisfy the rent decree, but the proceeds were insufficient. In a suit for the balance remaining due,—*Held* that *B.* and his nephew were jointly liable for the amount. PROMOTHO NATH BANERJEE *v.* JOGENDRO NATH ROY . . . **12 C. L. R., 15**

**85. ——— Assessment of rent.**—*Land covered with trees.—Act X of 1859, s. 23, cl. 1.*—*Held* that the defendants, whose proprietary title at the time of settlement was recognised in the land then covered with trees, were not liable to assessment by zemindars, under the provisions of clause 1, section 23, Act X of 1859, on account of the trees having since disappeared and the land having been brought into cultivation. JADOO RAI *v.* MAHOMED TUQUEE **[1 Agra, Rev., 24**

*See* MOOSEY KHULEEBY *v.* MAHOMED TUQUEE **[1 Agra, Rev., 3**

**86. ——— Misrepresentation by landlord.**—*Cross-suit.*—A plea that the defendant was deceived into taking a lease by the misrepresentation of the plaintiff cannot be pleaded as an answer to an action for rent. Such a defence should be made the subject of a cross-suit. ISHREE PERSHAD RAE *v.* BEHAREE LAL . . . . **2 N. W., 243**

6. RENT IN KIND.

**87. ——— Suit for share of rent or money-equivalent.**—*Valuation of crop.*—A landlord sued his tenant, paying rent in kind, for the share of the crop due to him, or rent, or for its money-equivalent. *Held* that the prices at which the landlord was entitled to have the crop valued were those which prevailed at the time the crop was cut, and when it should have been made over to him. LACHMAN PRASAD *v.* HOLAS MAHTOON **[2 B. L. R., Ap., 27: 11 W. R., 151**

7. TENANCY FOR IMMORAL PURPOSE.

**88. ——— Lodgings let to prostitute.**—*Suit for rent of.*—A landlord cannot recover the rent of lodgings knowingly let to a prostitute who carries on her vocation there. GAURINATH MOOKERJEE *v.* MADHUMANI PESHKAR . **9 B. L. R., Ap., 37**

S. C. GOUREENATH MOOKERJEE *v.* MODHOOMONEE PESHAKUR . . . **18 W. R., 445**

LANDLORD AND TENANT—*continued.*

8. PAYMENT OF RENT.

(*a*) GENERALLY.

**89. ——— Payment to co-lessors after distress.**—*Claim for rent.—8 Anne, c. 14.—Distress.—Co-landlords.*—Two daughters, as co-partners, were owners of certain property, each having an eight-anna share therein. On June 30th, 1868, they executed a lease of the property, in which it was provided that a monthly rent should be paid in separate payments to each of the two owners respectively, they giving separate receipts for the same. The tenant having failed to pay rent, one of the owners brought a suit for her share in her own name only, and obtained a decree. In execution of this decree she seized and sold property belonging to the tenant. The sale took place on the 12th of February 1869. On the 15th of February the other owner brought an interpleader suit, the tenant having likewise failed to pay rent to her. She claimed to have what was due to her paid out of the proceeds realised by the sale under the decree. *Held* that she was not entitled to have it so paid. *Held* also, *per* PEACOCK, *C. J.*—The Statute 8 Anne, Cap. 14, does not apply to this country. *Held* that it would not, at any rate, apply to a case in which a claimant seeks to enforce payment of her rent from another creditor for rent, even if it would where the claim was against an ordinary execution-creditor. PADAMANI DASI *v.* JAGADAMBA DASI . . . . **3 B. L. R., O. C., 56**

**90. ——— Payment to superior landlord after grant of intermediate lease.**—*Payment without notice of assignment.—Liability to intermediate tenant.*—A tenant paying rent to the superior landlord, after the grant of an intermediate lease, but without notice of it, is not liable to the intermediate lessee in respect of the same rent. ATTAPYEE MOWLAH *v.* SUKHAWUT ALLY **[Marsh., 102: W. R., F. B., 30: 1 Hay, 240**

**91. ——— Payment to a third person by landlord's directions.**—*Plea of payment.*—Payment by a tenant under the landlord's directions to another, or for a special purpose, of a sum equivalent to the amount claimed as rent, is tantamount to a payment to the landlord himself, and is a sufficient answer to the landlord's suit for rent. Such a defence, being rather one of payment than of a set-off, was open to a defendant in a suit under Act X of 1859. JOY KOOER *v.* FURLONG **[W. R., 1864, Act X, 112**

**92. ——— Payment by tenant of revenue to save estate from sale.**—*Payment or set-off in suit for rent.*—Where a tenant is left in that condition in which he is compelled to pay his landlord's debt to save his own security from forfeiture, the circumstances constitute a sufficient authority to make the payment,—*e.g.*, the payment of Government revenue to save the estate from sale,—and it will be treated as a payment to the landlord in a suit for rent. HILLS *v.* WOOMA MOYEE BURMONEE **[15 W. R., 545**

LANDLORD AND TENANT—*continued.*

8. PAYMENT OF RENT—*continued.*

(*a*) GENERALLY—*continued.*

**93. ——— Presumption of payment of rent for former years.**—*Suit for rent of current year.—Beng. Reg. VII of 1799.*—Under Regulation VII of 1790 a plaintiff could only sue for and recover the rent of the current year. No legal presumption arose from his doing so that the rent of prior years had been satisfied. MIRTHERJEET SINGH *v.* CHOKER NARAIN SINGH . . . **2 W. R., 58**

**94. ——— Presumption of payment of rent.**—*Payment of rent of subsequent year, Effect of.*—The payment of the entire rent of a subsequent year affords a presumption in favour of the payment of the rent for the previous year. SOLANO *v.* DOOLHIN UKRIT KOER . **W. R., 1864, Act X, 65**

SORUTH SOONDERY DABEE *v.* BRODIE **[1 W. R., 274**

**95. ——— Appropriation of payments.**—*Arrears and current rent.—Unspecified payment.*—A payment for rent should be credited to the oldest rents first, and not to current rent, unless so specifically stated by the party making it. SURNOMOYE *v.* SINGHROOP BIBEE **[W. R., 1864, Act X, 133**

**96. ——— Payment to one of joint lessors.**—Payment to one of several joint proprietors is a payment to all. OODIT NARAIN SING *v.* HUDSON . . . . . **W. R., Act X, 15**

RAMNATH SINGH *v.* GONDEE SINGH **[10 W. R., 441**

and payment by one of several joint lessees is payment by all. NILLUMBHUR MASTOPHY *v.* DOORGA CHURN BISWAS . . **2 W. R., Act X, 94**

**97. ———** *Discharge of debt.*—Payment of rent by the lessee to one of several joint lessors, and at his request, discharges the debt as to all, as also payment made at his request to one of several joint creditors. KRISHNARAV RAMCHANDRA *v.* MANAJI BIN SAYAJI **[11 Bom., 106**

**98. ——— Presumption of mode of payment.**—Where it does not appear that rent is payable in instalments, it must be assumed to be payable annually. SURRESHOOLLAH *v.* RAM COOMAR GOOPTA . . . . . **25 W. R., 556**

**99. ——— Obligation as to mode of payment.**—*Instalments.*—Where a putnidar's rent is payable in monthly instalments, he agreeing to pay the revenue out of the rent and to file the Collector's receipts as payment, he is not entitled to deduct from an instalment of rent any portion of the Government revenue which may not be payable until after the instalment is due. He is bound to pay either in cash or partly in revenue receipts; failing to pay in both shapes, he may be sued for an arrear of rent. RADHAMONEE CHOWDHRAIN *v.* GRAY **[12 W. R., 295**

LANDLORD AND TENANT—*continued.*

8. PAYMENT OF RENT—*continued.*

(*b*) NON-PAYMENT.

**100. ——— Appointment of sezawal on default in payment.**—*Determination of tenancy.*—It was stipulated in defendant's lease that, on his failing to pay any instalment of the rent, plaintiff might appoint a sezawal to collect direct from the under-tenants. *Held* that the appointment of such a sezawal did not determine defendant's lease, and that he was still liable for any deficiency in the rent after the sezawal's collections were credited. FAKIRUDDIN MAHOMED ASHAN *v.* PHILLIPS . . **3 B. L. R., Ap., 53 : 11 W. R., 464**

OMRITNATH TEWAREE *v.* BUGGOO SINGH **[W. R., 1864, 269**

*Contra,* DALRYMPLE *v.* BRAJAN SAHA **[3 B. L. R., Ap., 54, note**

JHOOMUCK CHOWDHRY *v.* ANDERSON **[6 W. R., Act X, 23**

**101. ———** A kubuliat, after the usual stipulations, provided for the cancellation of the lease on the tenant failing to pay any of the instalments, and left it optional with the zemindar to appoint a sezawal to collect the rents. The tenant having defaulted in payment of rent, a sezawal was appointed. *Held* that the lease having been cancelled by the default, the appointment of a sezawal had reference only to the back rents to be collected. RADHA PERSHAD SINGH *v.* BAJHAWUN OOPADHYA . . . . **24 W. R., 116**

**102. ——— Effect of non-payment.**—*Onus probandi.—Suit for rent.*—When the relationship of landlord and tenant has once been proved to exist, the mere non-payment of rent, though for many years, is not sufficient to show that the relationship has ceased; and a tenant who is sued for rent and contends that such relationship has ceased, is bound to prove that fact by some affirmative proof, and more especially is he so bound when he does not expressly deny that he still continues to hold the land in question in the suit. RUNGO LALL MUNDUL *v.* ABDOOL GUFFOOR **[I. L. R., 4 Calc., 314 : 3 C. L. R., 119**

**103. ———** *Adverse possession.*—Mere non-payment of rent to the landlord does not render possession by tenants adverse to the landlord. GANGABAI *v.* KALAPA DARI MAKRYA **[I. L. R., 9 Bom., 419**

**104. ———** *Onus probandi.—Suit for rent.—Adverse possession.*—Where the relation of landlord and tenant is proved to have existed, it lies on the defendant in possession of the land to prove that the relation was put an end to at such a period anterior to the suit as would entitle the defendant to rely on his possession as adverse to the plaintiff for twelve years. Non-payment of rent for upwards of twelve years and a grant of a pottah by Government to defendant for five years do not, when Government claims no interest adverse to plaintiff and plaintiff does not consent to defendant becoming

LANDLORD AND TENANT—*continued.*

8. PAYMENT OF RENT—*continued.*

(*b*) NON-PAYMENT—*continued.*

**Effect of non-payment**—*continued.*

tenant to Government, create any possession in defendant adverse to plaintiff. *Rungo Lall Mundul* v. *Abdool Guffoor, I. L. R., 4 Calc., 314,* approved. TIRUCHURNA PERUMAL NADAN *v.* SANGUVIEN [I. L. R., 3 Mad., 118

HARI VASUDEV *v.* MAHADAJI APPAJI [5 Bom., A. C., 85

**105.** ——— *Adverse possession.*—Non-payment of rent by a tenant for more than twelve years does not constitute adverse possession. When possession may be referred to the contract of tenancy under which the tenant entered, mere length of enjoyment without payment of rent. does not, under ordinary circumstances, affect the relation of the parties. DADOBA *v.* KRISHNA [I. L. R., 7 Bom., 34

MAHOMED INAYETOOLLA *v.* AKBAR ALI [2 Agra, 25

TROYLUKHO TARINEE DOSSIA *v.* MOHIMA CHUNDER MUTTUCK . . . 7 W. R., 400

DAVIS *v.* ABDOOL HAMED . . 8 W. R., 55

**106.** ——— *Adverse possession.*—The plaintiff sued for possession of a piece of ground, alleging that he was the owner of it. The defendants denied the plaintiff's title and claimed ownership in themselves. The Subordinate Judge found that the plaintiff had originally held the property from the defendants, but that as he had occupied it for more than twelve years without paying any rent or acknowledging the defendants as his landlords, he was entitled to be considered as owner by adverse possession. The District Judge, in appeal, upheld the decree of the first Court. On appeal to the High Court,—*Held* that the District Judge was wrong in holding that mere non-payment of rent was sufficient to constitute adverse possession. TATIA *v.* SADASHIV . . . . I. L. R., 7 Bom., 40

**107.** ——— *Non-payment of rent by occupancy ryot.—Title to land.—Admission by tenant of liability to pay rent.—Limitation.*—The non-payment of rent for a term of twelve years and more does not relieve an occupancy ryot from the status of a tenant so as to give him a title to the land. Rent falls due at certain periods, and the failure to pay it becomes a recurring cause of action, and therefore, where the right to take rent is admitted by the ryot, no question of limitation can arise. PORESH NARAIN ROY *v.* KASSI CHUNDER TALUKDAR . . . I. L. R., 4 Calc., 661

**108.** ——— *Adverse possession.—Determination of tenancy.*—The plaintiffs in this suit, alleging that *S.*, through whom they claimed, had given *B.*, who was represented by the defendants in July 1828, the lease of a certain house on the condition that *B.* should pay a certain annual rent for such house, and if he failed to pay such rent that he should vacate the house, such condition being contained in a keraianama executed by *B.* in *S.'s* favour, sued the defendants for the rent of such house for two years, and for possession of the same, alleging the breach of such condition. *Held* (SPANKIE, *J.*, dissenting) that, supposing that a tenancy had arisen in the manner alleged, the mere non-payment of rent by the defendants for twelve years prior to the institution of the suit would not suffice to establish that the tenancy had determined, and that the defendants had obtained a title by adverse possession, so as to defeat the claim; for if once the relation of landlord and tenant were established, it was for defendants to establish its determination by affirmative proof, over and above the mere failure to pay rent. PREM SUKH DAS *v.* BHUPIA [I. L. R., 2 All., 517

9. NATURE OF TENANCY.

**109.** ——— **Presumption as to nature of tenancy.**—*Yearly tenant.*—Where there is nothing to show on what tenure a tenant holds from his landlord, the presumption is that he is a yearly tenant. ENDAR LALA *v.* LALLU HURI [7 Bom., A. C., 111

GOORDIAL *v.* RAMDUT [Agra, F. B., 15: Ed. 1874, 11

**110.** ——— **Holding for long period with payment of rent.**—*Tenancy from year to year.*—In a suit to recover a village alleged by the plaintiff to have been let to defendant on service-tenure by the ancestor of the plaintiff, and to be resumable at the pleasure of a successor, the only facts proved in evidence were a holding for a long period of years, and a payment of rent to the plaintiff, the zemindar. *Held* that such facts established merely a tenancy from year to year. VASUDEVA PATRUDU *v.* SANYASIRAZ PEDDABALIYARA SIMHULU [3 Mad., 1

**111.** ——— **Construction of lease.**—*Monthly tenancy.*—By indenture, dated 1st February 1856, *A.* leased to *B.* certain premises in Calcutta for a term of ten years from 1st November 1855 at a rent of R100 per month, payable monthly. The defendant became the assignee of the lease without notice to *A.* from August 1858, and continued to occupy the premises and paid the rent in the name of *B.* up to August 1866, though the lease had expired on 31st October 1865. *Held* that the tenancy after the expiration of the lease was a monthly tenancy in the name of *B.* and terminable by a monthly notice to quit. BROJONAUTH MULLICK *v.* WESKINS [2 Ind. Jur., N. S., 163

**112.** ——— **Holding over after expiry of lease.**—*Monthly or yearly tenancy.—Notice to quit.*—*A.* and *B.* let a house and premises in Calcutta to *C.* under a Bengali lease, for a period of three

LANDLORD AND TENANT—*continued.*

9. NATURE OF TENANCY—*continued.*

**Holding over after expiry of lease—*continued.***

years, from 1st Assar 1273 (14th June 1866). Upon expiration of the term, *C.* continued in possession of the house, and *A.* and *B.*, after repeatedly calling upon him to deliver up possession, served on him, on 18th March 1873, in a letter written by their attorney, a notice to quit "on or before the 1st day of Jaishta 1280 B. S., corresponding with the 13th day of May next." *Held* that *C.*, after the end of his lease, held merely from month to month, and that the tenancy was terminable by a month's notice. *Held*, further, that the letter of the 18th March 1873 was a sufficient notice. There is nothing which makes it a necessary inference that a tenancy in Calcutta is a tenancy by the year, in the absence of any special agreement to the contrary. So far as there is any custom in Calcutta, or any inference of fact to be drawn from mere occupation accompanied by payment of a monthly rent, it is that the tenancy is a monthly one. NOCOORDASS MULLICK *v.* JEWRAJ BADOO . **12 B. L. R., 263**

10. HOLDING OVER AFTER TENANCY.

**113. ——— Terms of holding over after lease has expired.**—*Terms of lease.*—When a tenant holds on after the expiration of a lease, he does so at the same rent, and on the same terms and stipulations as are mentioned in the lease, until the parties come to a fresh settlement. ENAYATOOLAH *v.* ELAHEE BUKSH **[W. R., 1864., Act X, 42**

SHIB SAHAE *v.* MUKBOOL AHMED . **2 N. W., 204**

TARA CHUNDER BANERJEE *v.* AMEER MUNDOL **[22 W. R., 395**

ALLAH BIBEE *v.* JOOGUL MUNDUL **[25 W. R., 234**

**114. ——— *Current rates for similar land.***—A ryot who holds over after the expiry of his lease, in spite of his landlord, is liable to pay at the rates current for the same kind of land in the village. TOMMY *v.* SOOBHA KURIM LAL **[2 W. R., Act X, 73**

**115. ——— *Evidence of rate of rent.***—Where a tenant continues to hold land after his term, his pottah will be evidence of the rent at which he is holding over, in the absence of evidence to the effect that the rent was altered subsequently to its expiration. SHEO SAHOY SINGH *v.* BECHUN SINGH . . . . **22 W. R., 31**

**116. ——— *Conditions of tenure.***—Where on the expiration of a lease the lessee is allowed to continue in possession as a yearly tenant, he does so on the terms contained in the expired lease, so far as they are consistent with a yearly holding. SAYAJI *v.* UMAJI . **3 Bom., A. C., 27**

**117. ——— Right of tenant holding over.**—*Holding over by acquiescence of landlord*

LANDLORD AND TENANT—*continued.*

10. HOLDING OVER AFTER TENANCY—*continued.*

**Right of tenant holding over—*continued.***

*after lease has expired.—Notice to quit.*—A landowner who, after the expiration of a lease, continues to receive rent for a fresh period, must be considered to have acquiesced in the tenant continuing to hold upon the terms of the original lease, and cannot turn out the tenant, or treat him as a trespasser, without giving him a reasonable notice to quit. RAM KHELAWAN SINGH *v.* SOONDRA . . **7 W. R., 152**

**118. ——— *Liability to ejectment.—Notice to quit.***—A tenant holding over for some time without renewal of his lease is entitled, whether he has any right of occupancy or not, to retain possession of his tenure until either he resigns it or is ejected in due course of law. OOMA LOCHUN MOJOOMDAR *v.* NITTYE CHUND PODDAR **[14 W. R., 467**

**119. ——— *Notice to quit.***—Where a tenant has been allowed to hold over leases on the expiry of their terms, and has continued in possession under those leases, it must be supposed that there is an implied agreement between him and the landlord, and the tenant under such circumstances is entitled to hold on until served with a legal notice to quit. JUMANT ALI SHAH *v.* CHOWDRY CHUTTURDHAREE SAHEB . **16 W. R., 185**

**120. ——— *Notice to quit.***—There is no difference in law between the position of a ryot holding without a pottah and that of one holding over, after the expiry of the term covered by a pottah, with the consent of his landlord. Such a tenant cannot be evicted without a reasonable notice to quit being given; and the relationship does not come to an end at the expiration of each year, without some act on the part of the landlord and tenant jointly, or of either of them. *Ram Khelawan Singh v. Soondra, 7 W. R., 152,* followed. CHATURI SINGH *v.* MAKUND LALL **[I. L. R., 7 Calc., 710: 9 C. L. R., 240**

**121. ——— Liability of tenant holding over.**—*Ejectment, Liability to.*—If a tenant holds his land for a term of years, and no new tenancy is created by the zemindar on the termination of the original lease, either by receipt of rent or in any other way, and if the tenant has no other title to the land beyond that conceded in the original lease for a term of years, the zemindar is entitled to evict the tenant on expiration of the lease without the intervention of a Court. CHOWDHRY IZHAROOL HUQ *v.* BHOOBEE MAHTOON . . . . . **25 W. R., 201**

**122. ——— *Tenant-at-will, Rate of rent for.***—A zemindar who allows a tenant to remain on his land without express contract can only demand a fair rate of rent,—*i.e.*, the full market rate. MONEEROODDEEN MERDHA *v.* KENNIE **[4 W. R., Act X, 45**

GOPAUL LAL THAKOOR *v.* BUDUROODDEEN **[7 W. R., 28**

**LANDLORD AND TENANT**—*continued.*

10. HOLDING OVER AFTER TENANCY —*continued.*

**Liability of tenant holding over**—*continued.*

**123.** ——————— *Trespasser.*—Where a lessee whose lease has expired, and who is unwilling to give the increased rent demanded by the landlord, and retains possession in the hope of obtaining a new lease without such increase, parties entering upon the land as cultivators with the consent of the landlord are not called upon to show the ex lessee their authority. GALE *v.* MAHARANEE SREEMUTTY . . . . **15 W. R., 133**

**124.** ——————— *Increase of rent.*—*Agreement for specified period.*—The defendant being, under a settlement originally obtained from the Government, bound to pay a particular rent to the plaintiff, who had, subsequently to that settlement, obtained an ijarah from the Government, the plaintiff in 1879 sued to enhance that rent and obtained a decree upon which a compromise was made, the defendant agreeing to pay a higher rent for the years 1281 and 1282. The defendant having paid no rent for 1283 and 1284, the plaintiff sued for the arrears at the higher rent. *Held* that no proper proceedings for enhancement having been taken or fresh contract with the defendant entered into, the special arrangement came to an end at the expiration of 1282 and the original arrangement revived, and therefore the plaintiff was not entitled to demand more than the original rent payable. BURHUNUDDI HOWLADAR *v.* MOHUN CHUNDER GUHA . . **8 C. L. R., 508**

This case was distinguished where there was no agreement for a specified period. BURHUNUDDI HOWLADAR *v.* MOHUN CHUNDER GUHA **[8 C. L. R., 511**

**125.** ——— **Acquiescence of landlord in tenants holding over.**—*Right of occupancy.*—The mere fact of a landlord permitting a tenant to hold over for a year beyond the term of his lease cannot create any right of occupancy in the tenant's favour. The landlord's cause of action in such a case arises when he is refused the right to re-enter. KABEEL SAHA *v.* RADHA KISSEN MULLICK **[16 W. R., 146**

**126.** ——— **Dispossession of tenant holding over.**—*Right to possession on being dispossessed.*—Where a tenant, holding over after the expiration of his lease, is wrongfully dispossessed, he has a right to be restored to possession; and he has the same right if, having been ejected during his lease, his lease expires pending a suit to recover possession. As against every one except the landlord he is still the person entitled to possession. ARUB *v.* ASHRUF . . . . . **24 W. R., 335**

**127.** ——— **Suit against tenant holding over.**—*Suit on contract or for use and occupation.*—Where there is an express contract the zemindar can only sue on the terms of the contract, and cannot sue for use and occupation. WATSON & CO. *v.* TARINEE CHURN GANGOOLY . **17 W. R., 494**

**LANDLORD AND TENANT**—*continued.*

10. HOLDING OVER AFTER TENANCY —*continued.*

**Suit against tenant holding over**—*continued.*

DHUNUNDRO CHUNDER MOOKERJEE *v.* LAIDLAY **[20 W. R., 400**

**128.** ——————— *Use and occupation of building under unregistered lease.*—A party who retains and holds a building under an unregistered kabuliat, is liable, though the kabuliat cannot be enforced for want of registration, to pay a reasonable compensation for the use and occupation of it. PUROMA SOONDAREE DOSSEE *v.* PROLLAD CHUNDER DOSS . . . . **12 W. R., 289**

**129.** ——————— *Liability to change of rent.*—*Notice.*—*Use and occupation of land.*—In cases not governed by Bengal Act VIII of 1869, a landlord, by merely giving his tenant notice, cannot bind him to pay a particular rent; but he can put an end to the tenancy on its former terms, and if the tenant continue to hold he does so without any rent having been fixed. A suit by the landlord to recover his dues in such a case would be not a suit for rent, but for reasonable compensation for the use and occupation of the land, and the Court would have no power to fix the rent for the future. KYLASH CHUNDER SIRCAR *v.* WOOMANUND ROY **[24 W. R., 412**

*See* LALUNMONEE *v.* AJOODHYA RAM KHAN **[23 W. R., 61**

**130.** ——————— *Termination of tenancy and alteration of rent after notice to quit.*—*Suit for use and occupation.*—A landlord who can terminate his tenant's tenancy by a reasonable notice to quit, can also, without giving a positive notice to quit, raise the tenant's rent by serving a reasonable notice upon him that in the ensuing year he will require a higher rent. In a suit to recover such rent, whether governed by Bengal Act VIII of 1869 or not, the Court has power to find the tenant liable to pay a reasonable sum for occupation. BUDUN MOLLAH *v.* KHETTUR NATH CHATTERJEE **[24 W. R., 441**

**131.** ——————— *Consent of landlord.*—*Trespasser.*—*Damages for use and occupation.*—To justify a holding over after expiry of lease, a direct consent on the part of the landlord is requisite. No implication of consent can or ought to be received when there has been every opportunity of consent in express terms, and particularly in the face of a special warning from the landlord that he should re-enter on the land when the term expired. When tenants have no right to hold over, their use and occupation of the land is a trespass, and they are liable, not for rent as tenants, but for damages as trespassers. MACKINTOSH *v.* GOPEE MOHUN MOOJOOMDAR . . . . . **4 W. R., 24**

**132.** ——————— *Settlement with tenant containing a clause for re-entry.*—*Compensation in lieu of rent.*—*Use and occupation.*—*Tres-*

LANDLORD AND TENANT—*continued.*

10. HOLDING OVER AFTER TENANCY —*continued.*

**Suit against tenant holding over**—*continued.*

*passers.*—The plaintiff made a settlement of certain land with *A.* and *B.* for five years, there being in the settlement a stipulation that if the tenants failed to pay rent the plaintiff might accept another tenant. *A.* died during the tenancy, and *B.* left the place and the property without paying rent, and thereupon the plaintiff entered into possession of the property and held khas possession of it for two years, when he in 1870 entered into a settlement of it with defendant No. 1 for six years. In 1878 *B.* died, and defendants Nos. 2 and 3, alleging themselves to be the chela and dasiputra of *B.*, took upon themselves to collect rent from the tenants. The plaintiff thereupon brought a suit against the three defendants, treating them as trespassers, but at the same time asked for the amount of rent due and for eviction. *Held* that defendants Nos. 2 and 3 had no right on the property at all, and that defendant No. 1, who might have been considered as holding over after the expiration of his lease, if he had been in actual sole possession, should not be made liable for the whole rent when defendants Nos 2 and 3 were in possession as much as he was; but that, as the plaintiff had elected to waive the trespass, all the defendants might, on the authority of *Lalun Monee* v. *Sona Monee Dabee, 22 W. R., 333;* and *Lukhee Kant Dass Chowdhry* v. *Sumeeruddi Lusker, 13 B. L. R., 243 : 21 W. R., 208,* be treated as tenants, and a decree for use and occupation given against them. SURNOMOYEE *v.* DINONATH GIR SUNNYASEE

[I. L. R., 9 Calc., 908 : 13 C. L.R., 69

133. ——————— *Ejectment, Delay in executing decree for.—Possession of tenant until execution.—Suit for damages.*—A plaintiff who had obtained a decree for ejectment under section 25, Act X of 1859, and did not execute that decree for some months after, is not entitled to a decree in a suit subsequently brought for damages, in respect of the same lands, for the period included between date of the institution of the ejectment suit and the execution of the decree in that suit, the occupation of the defendants being the occupation of tenants-at-will, and not of trespassers. AYMEL ISLAM *v.* JARDINE, SKINNER, & Co. . . . . 8 W. R., 501

11. DAMAGE TO PREMISES LET.

134. ——— **Damage by fire.**—*Negligence.—Defect in building.*—The plaintiff hired a thatched bungalow of the defendant, entered into possession, and after living in the house some time lit a fire in the fire-place in one of the rooms. The chimney took fire, and the plaintiff's furniture was destroyed. He subsequently ascertained that the chimney had been thatched over, of which fact he had been all along ignorant. *Held* that the landlord, defendant, was liable in damages for the loss sustained by him. *Per* KEMP, *J.*—The landlord should have given the plaintiff notice of the defective construction of the chimney. The plaintiff had a right to assume that it was properly built. RADHA KIRSHNA *v.* O'FLAHERTY

[3 B. L. R., A. C., 277 : 12 W. R., 145

LANDLORD AND TENANT—*continued.*

11. DAMAGE TO PREMISES LET—*continued.*

**Damage by fire**—*continued.*

135. ——— **Damage by storage of goods.**—*Warehouse.—Damage.—Suit for negligence.—Onus probandi.*—The plaintiff let to the defendants a godown on an upper storey over his own godown, for the purpose of storing goods, the only stipulation in writing being that no combustible or hazardous goods should be stored there. The plaint alleged that the premises were taken by the defendants on the understanding that the defendants should use the same in a tenant-like manner, yet the defendants used them in an untenant-like manner, and loaded an unreasonable and improper weight on the floor, whereby it broke through and damaged the plaintiff's goods below. The evidence showed that the godown had been used by former tenants for storing light goods, but, in addition to light goods, the defendants had, at the time the floor broke, stored upon it several casks of white and red lead, and some cases containing tin plates. The evidence of professional witnesses showed that a warehouse floor ought to be able to bear 1½ cwt. per superficial foot, and there was evidence to show that the pressure on the portion of the floor which fell was, at the time, 1 cwt. 1 qr. 6 lbs. The floor gave way in the part where the heavy goods were stored, but there was nothing to show that they were improperly stored. Evidence was given that it was not usual to store heavy goods on an upper floor, but that heavy goods were sometimes stored on upper floors. The evidence of the professional witnesses was to the effect that the floor was not a proper one upon which to store merchandise, but that 1½ cwt. was not a dangerous weight for a warehouse-floor to bear, and that no unprofessional person could have anticipated danger from it in the present instance. There was also evidence to show that the girders were not sufficient for the floor of an upper storey to be used as a godown. In a suit for damage sustained by the plaintiff by reason of the breaking of the floor, —*Held* (*per* MACPHERSON, *J.*, and on appeal) that it lay upon the plaintiff to show that the defendants had acted in an improper and untenant-like manner, and that he had failed to show that any improper or unreasonable weight had been placed by the defendants upon the floor, or such as a tenant exercising ordinary caution might not have placed there. KOEGLER *v.* YULE

[5 B. L. R., 401 : 14 W. R., O. C., 45

12. DEDUCTIONS FROM RENT.

136. ——— **Right to hajuts or remissions of rent.**—*Discretion of landlord.*—A ryot can have no claim in law to hajuts (or remissions), which being acts of grace on the part of the landlord, rest solely on his discretion. PANAOLLAH NASHYO *v.* NUBODEEP CHUNDER SHAHA . 15 W. R., 270

LANDLORD AND TENANT—*continued.*

13. REPAIRS.

**137. ——— Liability for repairs.**—*Construction of lease.*—Where certain premises were let under an agreement in which the tenant covenanted as follows:—"I will make the necessary repairs to the buildings at my own cost; if by reason of my not so repairing, any injury occur to a building, or it become broken, I will restore it;" it was held that it would not be a fair construction to hold that if, whilst the buildings were in good repair, and the tenant had done all the necessary repairs, they were blown down or injured by a cyclone, the liability to restore them should fall upon the tenant. The agreement bound the tenant only to restore buildings, which it became necessary to restore in consequence of his not repairing them. Any loss occasioned by the natural operation of time ought to fall upon the landlord and not upon the tenant. ANUND MOYEE DOSSEE *v.* RAJ COOMAR ROY . **23 W. R., 34**

**138. ——— ———** *Deduction from rent.*—In a suit for house-rent, the tenant cannot be allowed to set-off a sum expended by him in repairing the house without authority from the plaintiff. ZUMMEERUNNISSA *v.* GAYER . **6 W. R., Civ. Ref., 26**

14. TAX.

**139. ——— Liability for tax.**—*House built by tenant.*—The owner of the land is not liable for the tax assessed on a house built upon the land by his tenant. WOOMA NUNDO ROY *v.* BROWNE **[6 W. R., Civ. Ref., 30**

15. ALTERATION OF CONDITIONS OF TENANCY.

(*a*) POWER TO ALTER.

**140. ——— Mortgagee of tenant.**—*Change of nature of tenure without authority from landlord.*—When the conditions of a tenure have been settled by a compromise between the landlord and tenant, a subsequent mortgagee has no power to change the conditions so as to bind the landlord unless he has power expressly given him in that behalf, and the tenant is estopped from denying the conditions. HUR PERSHAD *v.* OODIT NARAIN **[1 Agra, Rev., 60**

(*b*) DIVISION OF TENURE AND DISTRIBUTION OF RENT.

**141. ——— Change in position of tenants and rent payable for each portion of land.**—A landlord, who has let out land at a certain rent, payable in one sum for the whole, cannot, without the consent of the tenant, alter the position of the latter and say that in future so much shall be payable in respect of one parcel only, and so much in respect of another. KALEE CHUNDER AICH *v.* RAMGUTTY KUR . . . . **25 W. R., 95**

**142. ——— Breaking up tenures without consent of tenants.**—*Liability for rent.*—

LANDLORD AND TENANT—*continued.*

15. ALTERATION OF CONDITIONS OF TENANCY—*continued.*

(*b*) DIVISION OF TENURE AND DISTRIBUTION OF RENT—*continued.*

**Breaking up tenures without consent of tenants**—*continued.*

Where tenants hold land by different agreements the zemindar has no right without their consent to break up existing holdings and redistribute lands so as to alter the extent and nature of the holdings. RUHEEMUDDY AKUN *v.* POOBNO CHUNDER ROY CHOWDHERY . . . . . **22 W. R., 336**

**143. ——— Splitting claim for rent.**—*Suit for rent under a lease of several estates where the rent is a lump sum.*—Where the rent reserved by a lease of several estates is a lump sum, a claim to recover it under the lease cannot be split and apportioned. OOSMAN KHAN *v.* CHOWDHRY SHEORAJ SINGH . . . . . **5 N. W., 42**

**144. ——— Division of holding by tenant.**—*Recognition of, by landlord.*—A zemindar may recognise the division of a holding either formally, by actually dividing it into parts, or impliedly, by receiving rent from parties holding separately. OOMA CHURN BANERJEE *v.* RAJLUCKHEE DEBIA **[25 W. R., 19**

**145. ——— ———** *Consent of landlord.—Act X of 1859, s. 27.*—Under section 27, Act X of 1859, no division of tenure or distribution of rent is valid or binding without the consent in writing of the landlord. UPENDRA MOHUN TAGORE *v.* THANDA DASI . . **3 B. L. R., A. C., 349**

S. C. WOOPENDRO MOHUN TAGORE *v.* THANDA DOSSIA . . . **12 W. R., 263**

SADHAN CHANDRA BOSE *v.* GURU CHARAN BOSE **[8 B. L. R., 6, note : 15 W. R., 99**

**146. ——— ———** *Acquiescence by landlord.*—But where a zemindar himself put up a tenure for sale in separate lots, and took rents from two of the purchasers separately, it was held that no written consent was necessary in order to his being bound to recognise the partition. NUBO KISHEN MOOKERJEE *v.* SREERAM ROY . **15 W. R., 255**

**147. ——— ———** *Consent of landlord.—Power to consent.—Farmer.*—*Held,* by a majority of the Court (*dissentiente* STEER, *J.*), that the farmer of a Government khas mehal, as the party entitled to the rents, can accept a surrender of a tenure, and therefore is competent to assent to the division of a ryoti holding within his farm into several distinct and separate holdings. HUREE MOHUN MOOKERJEE *v.* GOBA CHAND MITTER **[2 W. R., Act X, 25**

**148. ——— Agreements as to division.**—*Act X of 1859, s. 27.—Liability for rent.*—The provision of Act X of 1859, which requires that every agreement as to division or distribution of rent should be in writing, applies only to division or distribution made after the Act came into operation. ALLENDER *v.* DWARKANATH ROY . . **15 W. R., 320**

**LANDLORD AND TENANT**—*continued.*

15. ALTERATION OF CONDITIONS OF TENANCY—*continued.*

(*c*) CHANGE OF CULTIVATION AND NATURE OF LAND.

**149. ——— Allowance of time for change of cultivation.**—*Irrigated and unirrigated land.*—Where a landlord claimed to revert to nanjai rates of rent (rent assessed on irrigated land), on the ground that he had repaired a tank, which for years had been unrepaired,—*Held* that a reasonable time must be allowed to the tenant to prepare for change of cultivation. LAKSHMANAN CHETTI *v.* KOLANDAIVELU KUDUMBAN **[I. L. R., 6 Mad., 311**

**150. ——— Changing the nature of the land.**—*Using land for brick-making.—Injunction.—Acquiescence of landlord.*—In a suit for a perpetual injunction against the principal defendants to stop the business of brick-making carried on by them on lands which they had taken under temporary leases from their co-defendants, who were holders of small jotes within the plaintiff's zemindari, and to recover damages for alleged injury done to the lands, where the evidence showed such a continued use of the land for twenty-five years for the purpose of brick-making, as raised a strong presumption of acquiescence on the part of the landlord, and that so far from injuring the land, the defendants had placed it in a better condition than it had been in previously,—*Held* that no case had been made out for the issue of an injunction. TARINEE CHURN BOSE *v.* RAMJEE PAL . **23 W. R., 298**

**151. ——— Changing nature of land.**—*Right of tenant to change nature of land.*—No tenant taking land is entitled, without some specific agreement on the subject, to change the nature of that land, or to make any permanent alteration in the state of the landlord's property. If a person wishes to lease lands for the purpose of making bricks, that should be the subject of a special agreement between the parties, in the same way as when parties take lands for building purposes. ANUND COOMAR MOOKERJEE *v.* BISSONATH BANERJEE . **17 W. R., 416**

(*d*) DIGGING WELLS OR TANKS.

**152. ——— Right to dig well.**—*Mokurrari tenure, Holder of.*—A mokurrari ryot may build a well on his land, or do anything that does not so entirely destroy the land as to endanger the zemindar's ground-rent. DHEPUT SINGH *v.* HALAL KHOORY CHOWDHRY . . . **W. R., 1864, 279**

**153. ———** *Right of tenant to dig well for use of himself and other residents in village.*—A tenant with a right of occupancy, who failed to show that he had a right, by custom or otherwise, to construct a well without his landlord's permission, is not justified in constructing one, and thereby infringing his landlord's rights, on the plea that he built it for the use of himself and the other residents of his village. SKINNER *v.* MAHTAB **[4 N. W., 160**

**LANDLORD AND TENANT**—*continued.*

15. ALTERATION OF CONDITIONS OF TENANCY—*continued.*

(*d*) DIGGING WELLS OR TANKS—*continued.*

**Right to dig well**—*continued.*

**154. ———** *Custom.—Acquiescence of zemindar.*—Where a cultivator was in the habit of digging wells to irrigate his field, described as irrigated chobee, and from the practice which had arisen under the old proprietors the consent of the zemindar had not been thought necessary,—*Held* that the cultivator was entitled to insist on his old right until by a new contract the old terms of his holding were superseded. MAHOMED FYZOODDEEN *v.* IMRUT . . . . . **8 Agra, 285**

**155. ——— Breach of covenant not to dig tank.**—*Suit by zemindar.*—For breach of a covenant by an ijardar not to excavate a tank on the lands leased to him, or, if so, to be liable to eviction by the zemindar, and to pay the cost of filling up the tank, no suit will lie at the instance of the zemindar for the recovery of a fractional portion of the lands covered by the lease, but the zemindar may declare the lease cancelled and resume the whole of the lands, or he may sue for cancellation of the lease, and he may also sue for damages occasioned by the excavation of the tank. BEER CHUNDER MANICK *v.* HOSSEIN . . . . **17 W. R., 29**

**156. ——— Digging well or planting trees without permission.**—*Ejectment.—Forfeiture of lease as for breach of condition.*—The act of digging a well or planting trees may not necessarily imply or assert a proprietary right in the land in which the well is dug or the trees are planted, yet by the general law of the North-West Provinces a ryot, even having a right of occupancy, being prohibited from doing certain acts, such as planting of trees or digging wells, without his landlord's consent, makes himself liable to ejectment, unless protected by local usages, from his holding, if he were to dig a well or plant trees without the landlord's consent. Section 6, Act X of 1859, which provides that a ryot who has held or cultivated the land for more than twelve years acquires a right of occupancy in it so long as he pays rent for the same, must be read consistently with clause 5, section 23 of that enactment, which provides that a ryot is liable to ejectment from his holding for breach of contract, and not as importing that a ryot having a right of occupancy, so long as he pays the rent claimable from him, is at liberty to use and deal with the land as he pleases. The useful or beneficial nature of an act is not a justification of it if it be a breach of contract. A condition not expressly made between the parties to a contract, may nevertheless be attached to such contract by custom. The general rule that a ryot is liable to ejectment on the digging of a well without the consent of the zemindar, may be varied by particular local usage or express contract. KOONJ BEHARY PATUCK *v.* SHIVA BALUK SINGH **[Agra, F. B., 119: Ed. 1874, 89**

LANDLORD AND TENANT—*continued.*

15. ALTERATION OF CONDITIONS OF TENANCY—*continued.*

(*d*) DIGGING WELLS OR TANKS—*continued.*

**157. ——— Rule prohibiting tenant from digging wells.**—*Forfeiture for breach of condition.—Liability to ejectment.*—Any rule which prohibits a tenant from improving his holding is one which, on grounds of public policy, Courts are bound to restrain within its strictest limits. When a zemindar insists on his right to prohibit the construction of kutcha wells, he should be required to prove that the right claimed by him customarily exists on the estate. Forfeiture is not bound to be deemed the invariable penalty for breach of contract occasioned by the construction of a well. When such forfeiture is claimed, and the right to claim it is proved, the Court should consider whether an adequate remedy cannot be secured to the landlord without depriving the tenant of his whole interest in the holding; and if it finds that such a remedy can be given, and that the tenant has not deliberately invaded his landlord's rights, but, admitting his own position as tenant, has acted in what he believed to be the exercise of a right, or in the honest belief that his act would not meet with objection on the part of the landlord, it should refuse to oust the tenant, and leave the landlord to seek a remedy which would be more proportionate to the injury he has sustained, and amply relieve him from its effects. SHEOCHURN *v.* BUSSUNT SINGH. RAMJUTHUN SINGH *v.* MEHDEE

**[3 N. W. 282: Agra, F. B., Ed. 1874, 258**

**158. ——— Prohibition to excavation of tank.**—*Sub-tenant.—Breach of stipulation in lease.—Excavation of tank.*—The plaintiff let a piece of land to *M.*, and by the terms of the lease it was stipulated that the lessee should not excavate a tank on the land. *M.* sub-let the land to *J.* and *N.*, who, in the course of their occupation, excavated a considerable plot of ground. The plaintiff thereupon brought a suit against *M.*, *J.*, and *N.* to have the ground restored to its former condition, or for damages. The first Court gave a decree for the plaintiff. The Judge was of opinion that *J.* and *N.*, not being parties to the original lease, could not be made liable in the suit, and he dismissed the suit as against them. The plaintiff appealed making *J.* and *N.* only respondents. *Held* that *J.* and *N.* had no right to use the land in contravention of the terms of the lease, and that if the plaintiff proved that their acts were in breach of the stipulation in the lease to *M.*, he was entitled to the assistance of the Court in getting the land restored as nearly as possible to its former condition. MONINDRO CHUNDER SIRKAR *v.* MONEERUDDEEN BISWAS

**[11 B. L. R., Ap., 40: 20 W. R., 230**

(*e*) ERECTION OF BUILDINGS.

**159. ——— Right to erect buildings.**—*Tenant of non-agricultural land.—Injunction to restrain erection.*—Although where land is let for building pucka houses upon it, or where the tenant with the knowledge of the landlord does in fact lay out large sums upon the land in buildings or

LANDLORD AND TENANT—*continued.*

15. ALTERATION OF CONDITIONS OF TENANCY—*continued.*

(*e*) ERECTION OF BUILDINGS—*continued.*

**Right to erect buildings**—*continued.*

other substantial improvements, that fact, coupled with a long continued enjoyment of the property by the tenant or his predecessors in title, might justify a Court in presuming a permanent grant, especially if the origin of the tenancy could not be ascertained; yet the mere circumstance of a tenant occupying buildings upon property will not justify such a presumption, unless it can be shown that they were erected by him or his predecessors, because a landlord might let property of that kind as agricultural land at will or from year to year. *Prosunno Coomaree Debea* v. *Rutton Bepary, I. L. R., 3 Calc., 696: 1 C. L. R., 377,* considered. *Lal Sahoo* v. *Deo Narain Singh, I. L. R., 3 Calc., 781,* distinguished. Where land has, with the consent of the landlord, ceased to be agricultural, and the tenant has since built a homestead or used part of it for tanks or gardens, the nature of the tenure is not thereby changed, nor is the tenant thereby deprived of any right of occupancy which he might have acquired. See *Nyamatoollah Ostagar v. Gobind Charn Dutt, 6 W. R., Act X, 40.* PROSUNNO COOMAR CHATTERJEE *v.* JAGUN NATH BAISAK . . . **10 C. L. R., 25**

Reversing decision in JAGGANATH BAISAK *v.* PROSONNO COOMAR CHATTERJEE . **9 C. L. R., 221**

**160. ——— *Erection of buildings by tenant-at-will or tenant from year to year.—Determination of tenancy.—Notice to quit.***—There is no law in this country which converts a holding at will from year to year, or for a term of years, into a permanent tenure, merely because the tenant, without any arrangement with his landlord, builds a dwelling-house upon the land demised. PROSONNO COOMAREE DEBIA *v.* RUTTEN BEPARY

**[I. L. R., 3 Calc., 696: 1 C. L. R., 577**

**161. ——— *Grant of land.—Presumption as to nature of tenure.—Erection of buildings.—Bastu land.—Suit to evict.***—Where it is conceded that lands were not let out for agricultural purposes, but that they had apparently been let out more than sixty years before suit for building purposes, the defendant's ancestors having erected thereon a house more than sixty years before suit, and having, with the defendants, resided there from first to last, the Court is at liberty to presume that the land was granted for building purposes, and that the grant was of a permanent character. *Prosonno Coomar Chatterjee* v. *Jagan Nath Bynack, 10 C. L. R., 25,* followed. *Prosunno Coomaree Debea* v. *Rutton Bepary, I. L. R., 3 Calc., 696.* GUNGA DHUR SHIKDAR *v.* AYIMUDDIN SHAH BISWAS

**[I. L. R., 8 Calc., 960**

S. C. GOVINDA CHUNDRA SIKDAR *v.* AYINUDDIN SHA BISWAS . . . . **11 C. L. R., 281**

**162. ——— *Occupancy of homestead land.—Tenancy, Determination of.***—The mere record of the name of a tenant, who is found

LANDLORD AND TENANT—*continued.*

15. ALTERATION OF CONDITIONS OF TENANCY—*continued.*

(*e*) ERECTION OF BUILDINGS—*continued.*

**Right to erect buildings**—*continued.*

in occupation of a particular piece of land, in settlement proceedings, and of the rent payable by him, does not invest him with any permanent title to hold it. Where an estate, at one time the property of the Government, was as a khas mehal settled ryotwari for a period of thirty years from 1247, and where in such settlement *A.* was recorded as tenant of the land at a stated rent,—*Held* that the Court was not bound to presume that the origin of *A.'s* title was a grant to continue in permanent possession. *Prosunno Coomaree Debea* v. *Rutton Bepary, I. L. R., 3 Calc., 696;* and *Addaito Charan Dey* v. *Peter Das, 13 B. L. R., 17,* followed. ARUT SAHOO *v.* PRANDHONE PYKURA . I. L. R., 10 Calc., 503

**163.** ——— **Suit to compel tenants to clear lands of buildings and trees.**—*Currency of lease.—Cause of action.*—Certain landlords' suits to compel their lessee's tenants to clear certain lands of houses and trees, and to restrain them from building or encroaching in future, were held to be premature while the lease was running; their cause of action as regards any erection or planting subsequent to the date of the lease not arising until the lease had expired. LOOTF ALI *v.* SHIB DYAL SINGH [8 W. R., 512

**164.** ——— **Suit to eject tenant and remove buildings.**—*Unsubstantial or temporary building.*—A claim to occupy a building cannot be maintained on the ground of a previous tenant's long occupancy of the land as against a landlord who has since the death of such tenant exercised rights of ownership over the land. A decree for the removal of a building upon his land may be given to the owner, even though he has stood by and allowed the defendant to construct it, provided the building is not substantial and has not cost much and the materials may be removed without difficulty. SUFDUR ALI KHAN *v.* JEO NARAIN SINGH . 16 W. R., 161

16. TRANSFER BY LANDLORD.

**165.** ——— **Assignee of lessor.**—*Assignee of right to recover rent.—Acquiescence of lessee.*—Where a landlord assigns his right to another, his lessee cannot put an end to the obligation to pay rent, if, after becoming aware of the arrangement, he made no objection. If the assignee dispossesses the lessee, he cannot sue the latter for rent. GOUR DYAL SINGH *v.* HUBEEL HOSSEIN . 14 W. R., 83

**166.** ——— ——— *Right to rent.—Attornment by lessee.*—A party succeeding to the proprietary rights of a lessor and dispossessing the lessee cannot sue such lessee in the Collector's Court for rent due from him as tenant, unless the latter has previously attorned to him. RAM LALL MISSER *v.* CHUNDRABULLEE DABEE . 13 W. R., 228

**167.** ——— ——— *Liability for rent to assignee of person admittedly in possession.*—A party holding an assignment from the landlord to recover rents from *C.*, a registered tenant, having sued both *C.* and *D.* as co-tenants of the tenure, the suit against *D.* was dismissed by the lower Courts. *Held* that, as the assignment respected the rents of that tenure, and *D.* had admitted being in possession of the land, the suit ought to have been allowed to proceed against both. DHOOLEE CHUND *v.* RAJROOP KOOER . . . 15 W. R., 107

**168.** ——— ——— *Change in proprietary title of estate.—Right of putnidar to eject tenant.*—A mere change in the proprietary title of an estate does not entitle a putnidar, who holds from the new proprietor, to eject a tenant who can prove a right of occupancy. RAM GHOSE *v.* RADHA CHURN GANGOOLY . . . . 15 W. R., 416

**169.** ——— ——— *Transfer by landlord or person having right to receive rent.—Right of assignee to realise rent.*—*A.*, a zemindar, granted lands on kaul to *B.* *B.* assigned to *C.*, but the lands being mostly in the hands of cultivators, *C.* only occupied those that had been in *B.'s* possession. The kist fell into arrear, and *A.* attached property of *C.'s.* Notice of the attachment was given before, but the property was not seized till after the whole of the arrears claimed had become due. *C.* resisted *A.'s* claim on the ground, substantially, that the sum demanded included arrears which had accrued on the lands not occupied by him. *Held* that as to the lands of which *C.* had obtained the actual possession there was such a privity between *A.* and *C.* as gave *A.* a right to realise the amount of kist outstanding in respect of those lands. *Held,* also, that this right was not affected by failure to prove the execution of a muchalka by *C.* to *A.*, or by the omission to furnish *C.* with a list of the property attached. KAMALA NAYAK *v.* RANGA RAU [1 Mad., 24

**170.** ——— ——— *Sale of zemindar's rights.—Right of purchaser to rent.*—If, when a judgment-debtor's rights and interests in property are sold the property is lawfully in the possession of tenants, the proper course is not to dispute their lawful possession and occupation, but to place the purchaser in a condition to receive from them the rents in the place of the judgment-debtor. UNCOVENANTED SERVICE BANK *v.* PALMER . 2 N. W., 456

**171.** ——— ——— *Purchaser of zemindari, Right of, to rent.*—Where a party purchases another's zemindari rights in an estate in which that other had created an under-tenure with a fixed rent, the circumstance that payment of rent on account of such tenure was suspended while the zemindari was in the hands of the former proprietor does not affect the rights of his successor, or the fixity of the rent. GUDADHUR LALL *v.* RAM JHAN GUNDEREE . . . . 10 W. R., 212

**172.** ——— ——— *Position of tenant-at-will paying rent and the purchaser.*—Where

a party occupies land within a zemindari with the zemindar's permission as a tenant-at-will, on the terms of paying rent, a purchaser of the zemindari has a right to treat him as his tenant unless the zemindar has transferred his right,—*e.g*, by granting a putni for the land to a third party. In a suit by such purchaser against such tenant, in which the third party intervened, the issue whether the zemindar transferred his rights to the plaintiff or had previously transferred them to the intervenor was material. GOOROO PROSUNNO BANERJEE *v.* SREEGOPAL PAL CHOWDHRY . . **20 W. R., 99**

**173.** ——————— *Purchaser at sale for arrears of revenue.—Alteration in payment of rent.*—The purchasers of a zemindar's right, by having their shares separately recorded in the Collector's office under Act XI of 1859, do not acquire any right to alter the position of tenants as regards the manner in which rent is to be paid, so long as the latter hold over after the expiry of a settlement. DELAUNY *v.* KOFILOODDEEN . . **25 W. R., 35**

**174.** ——————— *Suit by purchaser of moiety of talook for rent.*—Where the plaintiff, after purchasing from *S.* a moiety of a talook which had been previously let in ijara on a lump jumma to *T.*, brought a suit under Act X of 1859 against the lessee to recover that portion of the whole rental properly accruing on the talook purchased, and the suit was dismissed on the ground that the ijara kabuliat did not specify the proportion of rent due upon the talook, it was held in a subsequent suit brought against *S.* and *T.*, for a declaration of title and for rent from the time of the purchase, that as the lessee had no explicit notice of the purchase and no apportionment had been made with her consent of the rent payable on the share sold, she would be justified in continuing to pay the rent as a whole to the original lessor. TARAMONEE DOSSEE *v.* PUNCHANUN BOSE . . . . **18 W. R., 508**

**175.** ——————— *Arrangement between landlord and tenant binding on purchaser.*—A purchaser of land is bound by a contract between his vendor and a tenant, which is secured by the rent of the land remaining in the hands of such tenant, the contract being in the nature of an assignment of rent of the property sold. CHOORAMUN SINGH *v.* PATOO KOOER . . . . . **24 W. R., 68**

**176.** ——————— *Mortgagee after foreclosure and tenant of mortgagor.*—A mortgagee who has foreclosed his mortgage is not entitled to rent from a tenant of the property from the date of the foreclosure, but from the date on which he has perfected his title and the tenant has notice of his having done so. RAISUDDIN CHOWDHRY *v.* KHODU NEWAZ CHOWDHRY . . **12 C. L. R., 479**

**177.** ——————— *N.-W. P. Rent Act, XII of 1881, ss. 7, 95 (l).—Determination of rent by Revenue Court.—Suit for arrears of rent as so determined for period prior to such determination.*—An application was made in the Revenue Court under section 95 (*l*) of the N.-W. P. Rent Act (XII of 1881) by the purchaser of proprietary rights in a mehal, for determination of the rent payable by his vendors, who had become, under section 7, his ex-proprietary tenants in respect of the land they had previously held as sír. The Revenue Court, by an order dated the 18th February 1884, fixed the rent at a particular sum payable annually, after making the deduction of four annas in the rupee required by section 7 of the Rent Act. In May 1884 the purchaser sued the ex-proprietary tenants to recover from them arrears of rent at the sum so fixed, for a period of three years prior to the Revenue Court's order. *Held*, by the Full Bench, that the plaintiff was entitled to recover arrears of rent for the years in suit at the amount determined by the Revenue Court's order of the 18th February 1884, subject to any question of limitation that might arise. MAHADEO PRASAD *v.* MATHURA . **I. L. R., 8 All., 189**



## 17. TRANSFER BY TENANT.

**178.** ——— **Right to sub-let.**—*Tenant with permanent right of occupation.*—A tenant who has a permanent right to the occupancy of land subject to payment of fair and equitable rent has, as a matter of course, a right to sub-let the land to the extent of his own interest therein. KHOSHAL MAHOMED *v.* JOYNOODDEEN . . **12 W. R., 451**

**179.** ——————— *Limit of power.—Under-lease specifying no term.*—A lessee cannot make an under-lease for a longer time than his own lease, nor is he the agent of the landlord so as to bind him by granting leases for any time he may think fit. Where an under-lease specifies no term of tenancy, it cannot be construed to have effect beyond the interest of the grantor. HURISH CHUNDER ROY CHOWDHRY *v.* SREE KALEE MOOKERJEE **[22 W. R., 274**

**180.** ——————— *Limit of power.—Expiration of primary lease.—Held* that no farmer can, during the term of his lease, create for himself a sub-tenure which is to endure after the lease expires, to the prejudice of the owner whose *locum tenens* he is; and that no occupancy or jotedari rights, which relate to a specific extent of land, could be acquired in respect of an undivided share of an estate. SHOORUT SOONDRY DABEE *v.* (BINNY) JARDINE, SKINNER, & Co. . . . . **25 W. R., 347**

**181.** ——— **Transfer of tenancy.**—*Yearly tenancy.—Consent of landlord.*—A yearly tenancy cannot be transferred without the lessor's consent, and the fact that the lessee has had enjoyment under the pottah for a very long series of years does not alter the character of the interest originally created by the pottah. LALLJEE SAHOO *v.* BHUGWAN DOSS . . . . . **8 W. R., 337**

**182.** ——————— *Consent of landlord.—Purchaser from tenant.*—The purchaser of a

**LANDLORD AND TENANT**—*continued.*

17. TRANSFER BY TENANT—*continued.*

**Transfer of tenancy**—*continued.*

ryoti tenure is bound to communicate with the zemindar and obtain his consent to the transfer of the tenure; without this being done, a gomastah's receipts of rent are not binding on the zemindar. BHOJOHUREE BANICK *v.* AKA GOLAM ALI [16 W. R., 97

**183.** ——— *Transfer of non-transferable tenure.—Right of purchaser against transferee of ryot.*—Where proprietors purchased a tenant's rights, and sued to eject one, who alleged that he held the pottah from the tenant, it was held that the tenant, being a simple ryot, without transferable rights, could not give a third party any right of possession as against the proprietors of the estate, and that the holder of the pottah from the tenant was a mere trespasser. OMAR *v.* ABDOOL GUFFOOR . . . . . 9 W. R., 425

**184.** ——— *Kurpha tenant. Transferable tenures.*—The jummai rights of a kurpha under-tenant are not transferable without the consent of the ryot-landlord. BONOMALI BAJADUR *v.* KOYLASH CHUNDER MOJOOMDAR [I. L. R., 4 Calc., 135

**185.** ——— *Transfer by tenant of mirasi rights.—Acknowledgment of transfer by landlord.*—The right of transfer of mirasi rights, although by no means commonly enjoyed by tenants in these provinces, is nevertheless in some places sanctioned by local usage. Where a person has made such a transfer without authority, it should nevertheless be enquired into whether or not the landlord has sanctioned such transfer by accepting the assignee as tenant, and receipt of rent. KOOBERYA *v.* DOORGA PERSHAD . . . 2 N. W., 139

**186.** ——— *Suit for rent of transferable tenure.—Possession of holder.*—The person into whose hands a transferable tenure comes is bound to pay rent to the landlord, unless kept out of possession and enjoyment by the fault of the landlord, and the landlord's right to claim rent from his tenant does not depend upon the fact of possession by the tenant. GOBIND CHUNDER CHUNDER *v.* KRISTO KANTO DUTT . . 14 W. R., 273

**187.** ——— *Liability for rent.—Party in possession.*—A landlord seeking to recover rent is not bound to proceed against any person who may have any latent beneficial right to the tenure in respect of which the rent has fallen due, but against that person only who may be found in possession thereof with a legal right. TILOCK CHUNDER CHUCKERBUTTY *v.* GOURMONEE. 2 Hay, 364

**188.** ——— *Liability for rent.—Registered tenant.*—When arrears of rent become due, a zemindar is not bound to look beyond his book for the party liable, except when he has recognised other persons as his tenants either by receipt of rent or in other ways. ANUND MOYEE DASSEE *v.* MOHINDRO NARAIN DASS . . 15 W. R., 264

**LANDLORD AND TENANT**—*continued.*

17. TRANSFER BY TENANT—*continued.*

**Transfer of tenancy**—*continued.*

**189.** ——— *Suit for rent against person in possession though unregistered.*—An action for rent does not lie against a person said or shown to be in possession of a tenure which is written in the books of the zemindar in the name of a different person, unless there is a contract for rent, express or implied. ESHAN CHUNDER GHOSSAL *v.* BURNO MOYEE DOSSEE . . 16 W. R., 233

**190.** ——— *Liability for rent.—Unregistered transfer.*—Where there has been neither an entry of the transfer of the holding in the serishta of the zemindar, nor anything in the way of acceptance or recognition by the zemindar of the transferee as his tenant, the original tenants are not exempted from their responsibility to pay the rent. MOTEE ROY *v.* MEAJAN . . 20 W. R., 443

SUROOP CHUNDER MITTER *v.* DHONAYE BISWAS [23 W. R., 103

**191.** ——— *Transfer of ryoti jote.—Unregistered occupier.—Person in possession.*—In the case of transfer of a mere ryot's jote, the person in possession is liable for the rent, whether he is registered or not. GUNGA RAM SIRDAR *v.* BIRESSUR BANERJEE . 6 W. R., Act X, 32

MISSLEBACK *v.* LUCHMEE NARAIN [17 W. R., 504

**192.** ——— *Suit for rent.—Possession.—Registration of tenants.*—A suit for rent against several parties is maintainable against such of them as are shown to be in possession as tenants, whether they are registered or not. JERABUTOONISSA KHANUM *v.* RAM CHUNDER DOSS [6 W. R., Act X, 36

**193.** ——— *Non-registration of transfer.*—When a tenure is not transferable, and no transfer has been consented to or adopted by the zemindar, the zemindar is entitled to treat the in coming ryot as a trespasser, and to evict him even in the middle of the year. But when a tenure is transferable, the mere absence of registration, or of acknowledgment of the zemindar's right by the ryot, will not make the ryot such a trespasser as to justify the zemindar in evicting him in the middle of the year. HURRO MOHUN MOOKERJEE *v.* CHINTAMONEE ROY [2 W. R., Act X, 19

**194.** ——— *Non-registration of transfer.*—Non-registration in the zemindar's serishta does not invalidate the sale of a tenure. BHARUT ROY *v.* GANGANARAIN MOHAPUTTER [14 W. R., 211

**196.** ——— *Unregistered transferee.*—The unregistered transferee of a transferable tenure cannot be treated by the zemindar as a trespasser, but, as against the zemindar who has evicted him, has a right to be restored to possession. NOBEEN KISHEN MOOKERJEE *v.* SHIB PERSHAD PATTUCK . . . . . 8 W. R., 96

Upheld on review . . . 9 W. R., 161

LANDLORD AND TENANT—*continued.*

17. TRANSFER BY TENANT—*continued.*

Transfer of tenancy—*continued.*

196. ——————— *Unregistered transferee.*—*Per* KEMP, *J.*—On the death of a registered putnidar, a zemindar is not bound to recognise any one as his tenant without registration in his serishta; nor is he prevented from putting in a sezawal to collect the rents until a declaration of the rights of the deceased putnidar's heirs. RAM CHURN BANDOPADHYA *v.* DROPO MOYEE DOSSEE [17 W. R., 122

197. ——————— *Acknowledgment of tenancy.*—*Non-registration and mutation of names.*—A zemindar is bound to sue the actual tenant, when known to him, though the tenant's name has not been registered in his serishta. There can be a legal and valid recognition by a landlord of the vendee of a saleable under-tenure as tenant, notwithstanding that no mutation of names has taken place in his books. MEAH JAN *v.* KURRUNAMAYI DEBI [8 B. L. R., 1

198. ——————— *Act X of 1859, s. 27.*—*Division of rent or tenure.*—The lessor is not bound to recognise the title of any one except the person with whom he deals, whatever that title may be as between the lessee and the members of his family. UPENDRA MOHUN TAGORE *v.* THANDA DASI [3 B. L. R., A. C., 349

S. C. WOOPENDRO MOHUN TAGORE *v.* THANDA DOSSIA . . . . 12 W. R., 263

SADHAN CHANDRA BOSE *v.* GURU CHARAN BOSE [8 B. L. R., 6, note: 15 W. R., 99

199. ——————— *Liability for rent.*—*Mortgagee in possession.*—*Transfer of Property Act (IV of 1882), ss. 65, 76.*—Where the subject of a mortgage is leasehold property, and the mortgagee is put into possession under circumstances which amount to an assignment or transfer of the leasehold interest, the mortgagee becomes liable, as a rule, to pay the rent; but where the mortgagee is in possession and his name is registered in the landlord's books as the tenant, there can be no doubt as to his being liable for the rent. KANNYE LALL SETT *v.* NISTORINY DOSSEE . I. L. R., 10 Calc., 443

200. ——————— *Purchaser of khas mehal.*—*Registration of tenures.*—The purchaser of a Government khas mehal is not bound by the transfer of the rights of any of the original tenants, which have never been registered or recognised by himself or by Government; but can sue the original tenants for their arrears of rent. HURO MOHUN MOOKERJEE *v.* RAM COOMAR MITTER [1 W. R., 225

It is otherwise if they are registered. HURO-MOHUN MOOKERJEE *v.* GOLUCK MUNDUL [1 W. R., 351

SUTTO CHURN GHOSAL *v.* OBHOY NUND DOSS [2 W. R., Act X, 31

201. ——————— *Failure to obtain registry of name.*—*Purchaser, Position of.*—

LANDLORD AND TENANT—*continued.*

17. TRANSFER BY TENANT—*continued.*

Transfer of tenancy—*continued.*

Where the purchaser of a putni talook fails to obtain registry of his name in the zemindar's books, a third party who claims to derive his title from the purchaser's vendor has no right on the ground of such failure to treat the purchaser as his tenant. RAM NARAIN DOSS *v.* TWEEDIE . 12 W. R., 161

202. ——————— *Right of purchaser.*—*Under-lessees.*—*A.* agreed to take at a stipulated rent a portion of the property leased to *B.* for the remainder of *B.'s* lease. Almost immediately after, *B.* surrendered his lease to the landlord (*S.*), who gave a fresh lease to *B.*, to whom he afterwards sold all his rights. *A.* continued in occupation some time, and on relinquishing was sued for rent at the stipulated rates. *A.* denied liability, alleging that he had made no agreement with *B.*, but, from the time of *B.'s* purchase, had held under him as a tenant-at-will. *Held* that *A.* was bound, under the terms of his contract, to pay the rent for as many years as the lease had to run to his lessor, or to the person who represented his lessor. RUSHTON *v.* ATKINSON [11 W. R., 485

203. ——————— *Liability for rent accruing before tenant's possession.*—*Liability of transferee of lease for rent.*—Except under special circumstances, which the plaintiff must prove, a tenant-defendant cannot be held liable for the rent which has accrued due prior to his taking possession. Hence if *A.* leases land to *B.*, who transfers the lease to *C.*, and *C.* mortgages to *D.*, who afterwards forecloses his mortgage and takes possession of the demised premises, *D.* cannot be held liable for any rent which has accrued due prior to his taking possession. MACNAGHTEN *v.* LALLA MEWA LALL [3 C. L. R., 285

204. ——————— *Non-registration of tenure.*—*Recognition of transfer of tenure.*—A putnidar is not bound to recognise any purchaser by private sale as his dur-putnidar until he registers his name in the zemindar's serishta, and any proceeding held against the old dur-putnidar for the recovery of arrears of rent without making the purchaser a party to it is perfectly legal. BISSOMOYEE DOSSEE *v.* MACKINTOSH . . . . 2 Hay, 14

205. ——————— *Transfer of permanent hereditable tenure.*—*Forfeiture.*—*Surbarakari tenure.*—A zemindar is not bound to recognise the transfer of a permanent hereditable tenure effected without his consent, and cannot be compelled to register such transfer in his serishta; but the fact of such improper transfer does not deprive the old surbarakar of his rights, or entitle the zemindar to get khas possession. KASHEENATH PUNEE *v.* LUKHMONEE PERSHAD PATNAIK . 19 W. R., 99

206. ——————— *Transfer defeating right of re-entry.*—Even where a lessee's interest is transferable, the landlord is not obliged to recognise a transfer, if the effect of so doing would be to defeat his own right of re-entry. NUND KISHORE SINGH *v.* ISMED KOOER . . 20 W. R., 189

LANDLORD AND TENANT—*continued.*

17. TRANSFER BY TENANT—*continued.*

Transfer of tenancy—*continued.*

207. ——————— *Liability for rent.—Registration of tenant.—Transfer without landlord's knowledge.*—Where a landlord registers a new tenant with his express or implied consent in the place of the old tenant, the new tenant becomes for the future as much personally liable for the rent as the old tenant was; and this personal liability continues, notwithstanding a fresh transfer or devolution of the tenure, unless proper steps are taken to apprise the landlord of the change, and to have it registered in his sérishta. DWARKA NATH MITTER *v.* NOBONGO MUNJORI DASSI . 7 C. L. R., 233

208. ——————— *Acknowledgment of tenancy.—Registration of transfer.—Deposit of rent.*—The mere deposit of rent in the Collector's office by the purchaser of an under-tenure in his own name and that of the registered tenant, is not sufficient notice to the zemindar of such purchase; nor is the mere acceptance by the zemindar of rent so paid an acknowledgment on his part of the purchaser as his under-tenant, but it is otherwise when there is acceptance with notice, notwithstanding that the transfer has not been registered. MRITYUNJAYA SIRCAR *v.* GOPAL CHANDRA SIRCAR [2 B. L. R., A. C., 131

S. C. MIRTUNJOY SIRCAR *v.* GOPAL CHUNDER SIRCAR . . . . . 10 W. R., 466

209. ——————— *Transfer by registered tenant.—Sale in execution of decree.—Receipt of rent.—Acknowledgment of tenancy.—Bengal Act VIII of 1865, s. 16.*—The plaintiffs were shareholders with one *B.* in a tenure, of which *B.* was the registered tenant, but of which he had assigned part to the plaintiffs without the consent of the zemindar. In execution of a decree against *B.* for arrears of rent, the plaintiffs' portion was sold, and purchased by the defendant. In a suit by the plaintiffs to set aside the sale, and recover their property,—*Held*, they were pecuniarily liable for the rent with *B.*, unless the zemindar had made a separate agreement with them; that the whole tenure was rightly seized and sold in execution of the decree; and that the taking of the rent from them by the zemindar was no such recognition as to bind him, or create a valid incumbrance under section 16, Bengal Act VIII of 1865. SRINATH CHUCKERBUTTY *v.* SRIMANTO LASHKAR . 8 B. L. R., 240, note : 10 W. R., 467

210. ——————— *Without consent of zemindar.—Right of zemindar to sell tenure for arrears of rent.—Recognition of transferee.*—A tenant cannot, by merely alienating his tenure, deprive the zemindar of the right which he would otherwise have to sell it in execution of a decree for arrears of rent. A zemindar can sell the tenure in the hands of the transferee, not being one of the judgment-debtors, if he does so with reasonable promptness: provided he has not done anything to recognise the transfer. Where a zemindar makes a transferee a party to a suit for rent and accepts a decree against him jointly with other persons, he must be held to have recognised the transferee as a tenant, although the latter's name may not have been entered as such in the zemindar's book. RAM KISHORE ACHARJEE CHOWDHRY *v.* KRISHNO MONEE DEBIA [23 W. R., 106

211. ——————— *Liability for rent.—Non-registration of tenure.—A.*, the lessee of a transferable tenure, transferred his interest to *B.*, but after the transfer the name of *A.* remained as registered tenant. Subsequently the zemindar brought a suit against *A.* for arrears of rent which accrued due partly before and partly after the purchase, and obtained a decree for the sale of the tenure. *Held* that the decree might be executed against the tenure, though the latter was in *B.'s* possession before it was passed, it not appearing that the zemindar had knowledge of the transfer before the date of the decree. WOOMA CHURN CHATTERJEE *v.* KADAMBINI DABEE . . 3 C. L. R., 146

*See* NOBIN CHUNDER SEN CHOWDHRY *v.* NOBIN CHUNDER CHUCKERBUTTY . 22 W. R., 46

212. ——————— *Position of purchaser.—Act X of 1859, s. 21.*—A decree against a vendor obtained before a Collector cancelling a pottah of a jote which has been sold, is not binding on the purchaser of the jote if the purchase was made before the transfer of the tenure to him took place. The purchaser having entered into possession became a "ryot holding under a pottah, the term of which had not expired," within section 21, Act X of 1859, and therefore could not be ejected otherwise than in execution of a decree made in a suit against himself. LALLJEE SAHOO *v.* BHUGWAN DOSS [8 W. R., 337

213. ——————— *Suit for rent.—Liability of tenure for rent.—Rent due by former tenant.*—A decree for rent obtained by a landlord against his registered tenant renders the tenure comprised in the decree liable for sale, although such tenure may have passed into other hands than those of the judgment-debtor. The landlord's remedy is, however, in such case, strictly confined to the sale of such tenure under his decree. He cannot make a tenant personally liable for rent which accrued due before such tenant became the owner of the tenure. The remedies which are provided by the Rent Law for enforcing the payment of rent by sale of the tenure or by distress are remedies *in rem*. The personal liability of one tenant cannot be transferred to another. RASH BEHARY BUNDOPADHYA *v.* PEARY MOHUN MOOKERJEE . . I. L. R., 4 Calc., 346 [3 C. L. R., 116

18. ACCRETION TO TENURE

214. ——— **Right to increment to tenure.**—The law gives an increment to a tenant or under-tenant in possession, without reference to the nature of his title. NARAIN DOSS BEPARY *v.* SOOBUL BEPARY . . . . 1 W. R., 113

LANDLORD AND TENANT—*continued.*

18. ACCRETION TO TENURE—*continued.*

**Right to increment to tenure**—*continued.*

**215.** ——————— *Tenant-at-will.*—A tenant-at-will is entitled to occupy an accretion to his holding so long as he retains possession of his original holding. BHUGABUT PRASAD SINGH *v.* DURG BIJAI SING . . . 8 B. L. R., 73 [S. C., 16 W. R., 95

*Contra,* FINLAY, MUIR CO., *v.* GOPEE KRISTO GOSSAMEE . . . . 24 W. R., 404

**216.** ——— **Right to pottah from the zemindar for accreted land.**—*Jote paying rent to Government.*—In case of an accretion to land by alluvion, the ryot is not entitled to a pottah from the zemindar in respect of the accretion, if it is an accretion to a jote the rent of which is payable to Government. CAMPBELL *v.* KISHEN DHUN AUDHICAREE . . Marsh., 67 : 1 Hay, 233

KISHEN DHUN AUDHICAREE *v.* CAMPBELL [W. R., F. B., 22 : 1 Ind. Jur., O. S., 79

**217.** ——— **Terms of holding accreted lands.**—*Beng. Reg. XI of 1825.—Assessment of accreted lands.*—Lands accreting to a tenure are, under Regulation XI of 1825, to be held under the rates and on the conditions imposed upon the original tenure itself. MAHOMED WASSIL *v.* ZULEKHA KHATOON . . . . 2 Hay, 515

**218.** ——————— *Beng. Reg. XI of 1825, s. 4, cl. 1.—Held* that, under section 4, clause 1, Regulation XI of 1825, tenants have a right to the land accreted to their holding; and if the tenant has acquired a right of occupancy in his original holding he would enjoy a similar right in the alluvial land, although he may not establish that he has held such alluvial land for twelve years. OODIT RAI *v.* RAMGOBIND SINGH [2 Agra, Pt. II, 206

**219.** ——————— *Land accreted to maafee tenure.—Beng. Reg. XI of 1825, s. 4, cl. 1.*—Where alluvial land has been formed in front of and contiguous to an old maafee which had been resumed and settled with the maafeedars,—*Held* that, in the absence of any custom to the contrary, the 1st clause of section 4, Regulation XI of 1825, applies, and the portion so thrown up in front of the maafee becomes an increment to the holding of ex-maafeedars. FUZL-OOD-DEEN *v.* IMTEEAZ-OON-NISSA [3 Agra, 152

**220.** ——————— Where lands become annexed to a jote by gradual accretion within the meaning of section 4, Regulation XI of 1825, the jotedar is entitled to hold them on the same principle and under the same legal conditions as he holds the parent estate. GOBIND MONEE DEBIA *v.* DINO BUNDHOO SHAHA . . 15 W. R., 87

**221.** ——————— *Beng. Reg. XI of 1825, s. 4, cl. 1.*—Clause 1, section 4, Regulation XI of 1825, refers only to under-tenants intermediate between the zemindar and the ryot, and to khoodkasht or other ryots who possess some permanent interest in their lands, and not to tenants from year to year. ZUHEEROODEEN PAIKAR *v.* CAMPBELL [4 W. R., 57

LANDLORD AND TENANT—*continued.*

18. ACCRETION TO TENURE—*continued.*

**Terms of holding accreted lands**—*continued.*

**222.** ——————— *Beng. Reg. XI of 1825, s. 4, cl. 1.*—Clause 1, section 4, Regulation XI of 1825, prescribes that the right to the occupancy of accreted land is with the owner of the parent mehal or subordinate tenure, as the case may be. But so far from saying that it is revenue or rent free, or that the original revenue or rent assessment covers the demand both for the original estate or original subordinate tenure and for the accreted land, the very reverse is contemplated by the section, which provides for payment of revenue or rent, if payable under law or usage. Accreted lands, when liable to enhancement at the ordinary neighbouring rates, are entitled to a deduction of 10 per cent. for collection charges, and 10 per cent. for talookdari profits. JUGGUT CHUNDER DUTT *v.* PANIOTY . . . . 6 W. R., Act X, 48

**223.** ——— **Accretion to zimma tenure.**—*Beng. Reg. XI of 1825.*—Clause 1, section 4, Regulation XI of 1825, and section 22, Act X of 1859, will not allow a suit for the assessment of lands accreted to a zimma tenure; and holders like the zimmadar, in a case of this nature, are not liable under section 15, Act X of 1859, for additional rent for chur land, until they are shown by the zemindar to be holders of tenures subsequent to the Decennial Settlement not having a fixed jumma, and then only liable for the talookdari rates paid by others of the same class for similar lands. PANIOTY *v.* JUGGUT CHUNDER DUTT . . . . 9 W. R., 379

**224.** ——— **Accretion to holding of mirasi jotedar.**—*Right of occupancy.*—A mirasi jotedar with a right of occupancy has a right to lands which accrete to his jote, and the zemindar cannot take them away and settle them with other parties. ATTIMOOLLAH *v.* SAHEBOOLLAH [15 W. R., 149

**225.** ——— **Rent of accreted land.**—*Beng. Reg. XI of 1825, s. 4, cl. 1.—Liability to increased rent.*—When the area of land held by a tenant under a permanent tenure has been increased by accretion the tenant becomes subject to pay an increased rent on account of the land gained by accretion on the conditions laid down in Regulation XI of 1825, section 4, clause 1. RAMNIDHEE MANJIE *v.* PARBUTTY DASSEE . I. L. R., 5 Calc., 823

S. C. SHOROSSOTI DOSSEE *v.* PARBUTTI DOSSEE [6 C. L. R., 362

BROJENDRA COOMAR BHOOMICK *v.* WOOPENDRA NARAIN SINGH . I. L. R., 8 Calc., 706

*See* BAKRANATH MANDAL *v.* BINODE RAM SEIN [1 B. L R., F. B., 25 : 10 W. R., F. B., 33

HUREOSOONDEREE DOSSEE *v.* GOPI SOONDEREE DOSSEE . . . . 10 C. L. R., 559

**LANDLORD AND TENANT**—*continued.*

18. ACCRETION TO TENURE—*continued.*

**226.** ——— **Lessee under Government.**—*Right of lessee to accretions to his tenure.*—The lessee of a mouzah ordinarily being in the position of zemindars, a lessee holding lands from Government, in the absence of any stipulation in his lease to the contrary, is entitled to the benefit of all accretions formed upon such lands during the term of his holding and may sue the occupants for a fair and equitable rent. MUTURA KANT SHAHA *v.* MEAJAN MUNDUL . . . . . **5 C. L. R., 192**

**227.** ——— **Land in excess of tenure.**—*Accretions to parent tenure.—Rate of rent.—Beng. Reg. XI of 1825, s. 4, cl. 1.*—In a suit for arrears of rent, it appeared that the defendant had, in 1260 (1853), executed a kabuliat, in which the boundaries of the land were given and the rate of rent fixed, and which provided that the land might be measured after 1261 (1854). In 1281 (1874), a measurement was made, and it was found that some land had accreted; and the plaintiff now sued for rent for the accreted land, at rates varying with its nature and quality. *Held* that the accreted land should be governed by the terms and conditions applicable to the parent tenure, and that the same rent was payable for it as for the land included in the kabuliat. The meaning of Regulation XI of 1825, section 4, clause 1, is, that the incidents of the original tenure attach to the increment. GOLAM ALI *v.* KALI KRISHNA THAKUR **[I. L. R., 7 Calc., 479: 8 C. L. R., 517**

**228.** ——— *Submergence of occupancy-tenant's land.—Diluvion.—Liability for rent.—Resumption by landholder.—Custom.—Act XII of 1881 (N.-W. P. Rent Act), ss. 18, 31, 34 (b), 95 (n).*—A landholder,—alleging that by local custom when land was submerged, and the tenant ceased to pay rent for the same, his right to it abated, and when the land reappeared the landholder was entitled to possession thereof; that certain land belonging to him had been submerged and the occupancy-tenant thereof had ceased to pay rent for it; and that such land had reappeared and had come into his possession under such custom,—sued such tenant in the Civil Court for a declaration of his right to the possession of it. *Held* that, inasmuch as sections 18 and 31 of the N.-W. P. Rent Act, 1881, showed that notwithstanding the submergence of the land the tenancy still subsisted, and as the tenant could not lose his right to the land except by relinquishment or ejectment under the provisions of that Act, and as the custom set up by the landholder was opposed to the provisions of section 34 (*b*) of that Act, the suit was not maintainable. KUPIL RAI *v.* RADHA PROSAD SINGH **[I. L. R., 5 All., 260**

**229.** ——— *Suit for increased rent for lands found in excess on measurement.*—In a suit to recover a kabuliat at enhanced rates for excess lands, where defendant filed a pottah on which were endorsed the numbers of certain daghs of a measurement made by the zemindar, and composing a mokurrari tenure, and also pleaded

**LANDLORD AND TENANT**—*continued.*

18. ACCRETION TO TENURE—*continued.*

**Land in excess of tenure**—*continued.*

that part of the excess land was lakhiraj, it was held, in regard to the land claimed as lakhiraj, that plaintiff's remedy lay in a suit for resumption and assessment; and with regard to the land covered by the pottah, that defendant was entitled to hold the whole of the lands comprised within the daghs, notwithstanding that a recent measurement showed a greater extent of area than had been formally ascertained. MODEE HUDDIN JOWADAR *v.* SANDES **[12 W. R., 439**

RASHUM BEEBEE *v.* BISSONATH SIRCAR **[6 W. R., Act X, 57**

DAVID *v.* RAM DHUN CHATTERJEE **[6 W. R., Act X, 97**

RAJMOHUN MITTER *v.* GOOROO CHURN AYCH **[6 W. R., Act X, 106**

**230.** ——— **Land held in excess of tenure.**—*Mirasi istemrari pottah.—Right to enhance rent.*—Where a mirasi istemrari pottah had been granted by a putnidar whose putni had been created while the mehal was under temporary settlement, and who had to pay a higher rent to the zemindar when the latter obtained a permanent settlement from Government at a higher jumma, it was held that the fact of the putnidar having to pay a higher rent to the superior holder did not, under the circumstances, warrant his raising his lessee's rent. Where a putnidar sued for enhancement of rent on the foregoing ground, he was held not to be entitled to a decree for enhancement of excess land in defendant's possession, or to treat him as a trespasser in respect of such excess. BINODE BEHAREE ROY *v.* MASSEYK . . **15 W. R., 494**

**231.** ——— *Rate of rent assessable for.*—In respect to excess area it was held (PHEAR, *J.*) that plaintiff was entitled to a fair and equitable rate; (BAYLEY, *J.*), that excess land should, as a part of the same lease, be liable to the same terms as the other land originally given under it. GOLAM ALI *v.* GOPAL LALL TAGORE . **9 W. R., 65**

**232.** ——— *Suit for rent.—Encroachment.—A.*, the holder of an independent istemrari tenure lying in *B.'s* zemindari, let it to *C.*, who, under cover of his lease, encroached upon the zemindari lands. *Held* that there was no implied contract of tenancy between *C.* and *B.*, and *B.* could not sue *C.* for rents on account of the excess lands. JAYNARAYAN SINGH *v.* MATILAL JHA **[1 B. L. R., A. C., 21**

**233.** ——— *Encroachment by tenant, Presumption of English law as to.*—The presumption of English law as to encroachments made by a tenant during his tenancy upon the adjoining lands of his landlord is that the lands so encroached upon are added to the tenure and form part thereof for the benefit of the tenant, so long as the original holding continues, and

**LANDLORD AND TENANT**—*continued.*

18. ACCRETION TO TENURE—*continued.*

**Land held in excess of tenure**—*continued.*

afterwards for the benefit of the landlord, unless it clearly appeared by some act done at the time that the tenant made the encroachment for his own benefit. Where lands encroached upon have been added to the tenure, the tenant, if his tenancy is permanent, or he has a right of occupancy, cannot be ejected from them while the tenure lasts; but when rent is readjusted, these lands may be brought into the calculation. GOOROO DOSS ROY *v.* ISSUR CHUNDER BOSE . . . 22 W. R., 246

**234.** ——————— *Landlord's right.—Encroachment acquiesced in by landlord.*—If a tenant during his tenancy encroaches upon the land of a third person, and holds it with his own tenure until the expiration of the tenancy, he is considered to have made the encroachment not for his own benefit, but for that of his landlord; and if he has acquired a title against the third person by adverse possession, he has acquired it for his landlord and not for himself. NUDDYARCHAND SHAHA *v.* MEAJAN [I. L. R., 10 Calc., 820

**235.** ——————— *Tenant bringing jungle land into cultivation.—Assessment of rent.—Improvements by tenant.*—A ryot who brings jungle land into cultivation is liable, after a reasonable period, to pay the full pergunnah rates of cultivated land. A ryot who does more than bring uncultivated land into cultivation,—*i.e.*, converts, by means of special works and special labour, unculturable into culturable land,—is entitled to hold at exceptionally low rates. CHOWDHRY KHAN *v.* GOUR JANA . . . . 2 W. R., Act X, 40

19. RIGHT TO CROPS.

**236.** ——— **Right to crops on death of occupancy ryot.**—*Legal representatives, Right of, against zemindar.*—A zemindar cannot lay claim to the crops on the ground at the ryot's death, even supposing that the occupancy right lapsed in his favour, as it forms a part of the property belonging to the deceased, and passes to his legal representatives. DOORGA PERSHAD *v.* DOOCHUR PERSHAD [32 Agra, 188

**237.** ——— **Right to crops when stored.**—*Bhag-jote tenure.*—When lands are held under a bhag-jote tenure, and the tenants are bound by agreement to cut and store the crops on their landlord's chuck, where it is afterwards to be divided, the dominion over the crops till division is in the landlord. HORRO NARAIN *v.* SHOODHA KRISTO BERAH . I. L. R., 4 Calc., 890 : 4 C. L. R., 32

**238.** ——— **Standing crops.**—*Effect of order of ejectment under Bengal Rent Act, 1869.*—The effect of an order of ejectment under the Bengal Rent Act is to dispossess the ryot not only of the land, but also of the crop standing thereon. IN THE MATTER OF DURJAN MAHTON *v.* WAJID HOSSEIN [I. L. R., 5 Calc., 135

**LANDLORD AND TENANT**—*continued.*

20. PROPERTY IN TREES PLANTED ON LAND.

**239.** ——— **Right to trees for timber.**—*Right to cut down trees.*—A zemindar has a right in the trees grown on the land by the tenant; and although the tenant has a right to enjoy all the benefits of the growing timber during his occupancy, he has no power to cut the trees down and convert the timber to his own use. The zemindar may sue to have his title in the growing trees declared. ABDOOL ROHOMAN *v.* DATARAM BASHEE [W. R., 1864, 367

**240.** ——— **Right to trees planted by ryot.**—*Death of ryot.—Held* that the plaintiffs, the owners of the lands on which trees stand, are, in default of heirs, entitled to proprietary possession of trees as "lawarisee" which had been planted by the deceased ryot. BHAIROW DEEN *v.* MOOKTA RAM [1 Agra, 13

**241.** ——— **Right to trees already planted.**—*Lease in perpetuity.*—Where a lease is granted in perpetuity at a fixed rent, and the lessor reserves no reversionary interest in the land or in the trees growing on it, the lessees are entitled to the ownership of the trees. SHARODA SOONDARI DEBIA *v.* GONEE SHEIK . . . . 10 W. R., 419

**242.** ——— **Assessment in respect of trees.**—*Profits realised by erection of huts for pilgrims.*—A landlord is entitled to assessment in respect of trees as being the produce of the soil, but not in respect of profits realised by the use of stalls or huts erected by the tenant for the use of pilgrims frequenting a fair annually held on the land in honour of an idol which the defendant has there. KEWAJAH CHYEMUN KAJAH *v.* JAN ALLY CHOWDHRY [1 W. R., 46

**243.** ——— **Evidence of property in trees.**—*Proof of acts of ownership.*—A person's title or property in a tree may be proved by showing that the tree grows on his land, without proof of any act of ownership over the tree. CHUTOOR BHOOJ TEWAREE *v.* VILLAET ALI KHAN [W. R., 1864, 223

**244.** ——— **Trees planted by lessee.**—*Right to growing trees under grant of homestead or waste land.*—A peshcushi sanad, or grant at a quit rent of homestead and waste land, being construed to assign a heritable right in a tract of land capable of yielding fruits by virtue of which the holder, during the continuance of his right, possessed absolutely the entire use and fruits thereof,—*Held* that the lessor or grantor had no more right to the trees planted by the lessee than he had to the crops sown by him. GOLUCK RANA *v.* NUBO SOONDUREE DOSSEE [21 W. R., 344

**245.** ——— **Presumption as to ownership of trees.**—*Suit for possession of tree.—Presumption in favour of lessee.*—In a suit to recover possession of a tree and of its produce, where defendant was admitted to be plaintiff's tenant as to the land on

LANDLORD AND TENANT—*continued.*

20. PROPERTY IN TREES PLANTED ON LAND—*continued.*

**Presumption as to ownership of trees—** *continued.*

which the tree stood,—*Held* that the tree was rightly presumed to be included in the lease, and that it was for the plaintiff to establish that he was entitled to remain in possession of the tree notwithstanding the lease. *Held* that the fact of a part of defendant's allegation—*viz.*, that the tree had been planted by his ancestor—having proved untrue, did not entitle plaintiff to a decree. MAHOMED ALI *v.* BOLAKEE BHUGGUT . . . . . **24 W. R., 330**

**246. ——— Right of tenant to remove trees.**—*Determination of tenancy.—Purchaser of rights of tenant after expiry of tenure.—Held* that trees accede to the soil and pass to the landholder with the land on the termination of a tenancy, and unless the tenant uses, during the term of his tenancy, his privilege, where he has it, of removing the trees, he cannot do so afterwards; he would then be deemed a trespasser. *Held* also that, where a tenant has been ejected in the execution of the decree of a Revenue Court for arrears of rent from the land forming his holding, his tenancy then terminates, and with it all right in the trees standing on such land or power of dealing with them. A person, therefore, who purchases the rights and interests of a tenant after his ejectment in the execution of such a decree, cannot maintain a suit for the possession of the trees standing on the tenant's holding. RAM BABAN RAM *v.* SALIG RAM SINGH . . **I. L. R., 2 All., 896**

**247. ——— Property in timber.**—*Right to trees on land.—Transfer of trees by tenant.*—The presumption of law and the general rule is that property in timber on a tenant's holding rests in the landlord in the same way as, and to no less an extent than, the property in the soil itself. *Soonar* v. *Khuderun, 2 N. W., 251; Ajudhia Nath* v. *Sital, I. L. R., 3 All., 567; Abdool Rohoman* v. *Dataram Bashee, W. R., 1864, 367; Ruttonji Edulji Shet* v. *Collector of Thanna, 11 Moore's I. A., 295: 10 W. R., P. C., 13*, referred to. *Held*, therefore, where an occupancy-tenant transferred his holding, that the transfer was not only invalid in respect of the holding, but in respect also of the trees on the holding. KASIM MIAN *v.* BANDA HUSAIN . **I. L. R., 5 All., 616**

**248. ——— Lease of produce of trees.**—*Effect of lease to pass property in trees.*—A lease which gave a right to the produce of trees held not to pass any property in the trees. MAHOMED ALI *v.* DEO NARAIN SINGH . . . **1 W. R., 352**

**249. ——— Property in trees passing with the land.**—Trees so long as they are not severed or cut are *primâ facie* to be taken as passing with the land on which they grow, and a sale of a house and compound would comprise the trees thereon unless it could be shown that they were specially excepted. SOONAR *v.* KHUDERUN . . **2 N. W., 251**

**250. ——— Sale of trees in execution of decree against tenant.**—*Trees planted by*

LANDLORD AND TENANT—*continued.*

20. PROPERTY IN TREES PLANTED ON LAND—*continued.*

**Sale of trees in execution of decree against tenant**—*continued.*

*occupancy-tenant with landholder's consent.—Transfer of right of occupancy.—Act XII of 1881 (N.-W. P. Rent Act), s. 9.*—An occupancy-tenant, whose orange trees, planted with the landholder's consent, had been sold in execution of a decree against him, made a collusive resignation of his land to the landholder, who thereupon sued the purchaser and the occupancy-tenant for possession of the land with or without the trees. *Held* that, as the purchase did not involve a transfer of the tenancy of the land in the sense of section 9 of the N.-W. P. Rent Act, nor any change in the relations between the landholder and the occupancy-tenant such as was prohibited by that law, the landholder was not entitled to possession of the land. LALMAN *v.* MANNU LAL **[I. L. R., 6 All., 19**

**251. ——— Right of occupier of land.**—*Bombay Act I of 1865, s. 40.—Right to trees on land.*—The occupier of land who does not come under section 40 of the Bombay Survey and Settlement Act, 1865, has not, in the absence of agreement, any proprietary right to the trees growing on his land. GOVIND PURSHOTAM KOLATKAR *v.* SUB-COLLECTOR AND DEPUTY CONSERVATOR OF FORESTS OF COLABA . . . **6 Bom., A. C., 188**

**252. ——— Lien of mortgagee of guava trees after ejectment of tenant.**—*Trees planted by tenant.*—A ryot mortgaged certain guava trees which he had planted on a portion of his holding. Subsequently the zemindar obtained a decree against the ryot for ejectment, and after his ejectment the mortgagees obtained a decree on their mortgage deed. *Held*, in a suit between the mortgagees and the zemindar, that their lien on the trees was destroyed by the ejectment of the ryot. PEARUN *v.* RAM NARAIN SINGH *alias* RUNNOO SINGH **[1 N. W., Ed. 1873, 213**

**253. ——— Right to hypothecate trees.**—*Tenant with right of occupancy.*—A tenant with a right of occupancy can only make a valid hypothecation of the trees on the land he holds for the term of his tenancy; with his ejectment from such land and the cessation of his tenancy, such an hypothecation ceases to be enforceable. AJUDHIA NATH *v.* SITAL . . . . **I. L. R., 3 All., 567**

**254. ——— Right of usufructuary mortgagee.**—*Right to trees planted by him during tenure.—Held* that, although defendant, usufructuary mortgagee of a share in a joint estate, would not acquire any right to the trees planted by him in his mortgage term, yet, as coparcener in the estate, he would be sharer in the trees. BAHADOOR KHAN *v.* KORA MULL . . . . **1 Agra, 281**

**255. ——— Ex-proprietary tenant, Right of.**—*Nature of the right of occupancy.—N.-W. P. Rent Act, XII of 1881, s. 7.—Trees.*—In a suit for recovery of possession of zemindari property

LANDLORD AND TENANT—*continued.*

20. PROPERTY IN TREES PLANTED ON LAND—*continued.*

**Ex-proprietary tenant, Right of**—*continued.*

conveyed by a sale deed, including certain plots of land which were the defendant-vendor's sir, the lower Courts held, with reference to section 7 of the N.-W. P. Rent Act (XII of 1881), that the defendant was entitled to hold possession of the said plots as ex-proprietary tenant; but as it appeared that they had fruit and other trees upon them, the Courts awarded the plaintiff possession of these trees, on the ground that the nature of an ex-proprietary tenure did not entitle the holder to resist a claim of this kind as to the trees upon the land forming the area of such tenure. *Held* that this decision was erroneous, and that the plaintiff's claim to possession of the trees upon the plots in question must be dismissed. *Per* MAHMOOD, *J.*, that the principle of the maxim *cujus est solum ejus est usque ad cœlum* was applicable to the case by way of analogy, and that an ex-proprietary tenant had all the rights and incidents assigned by jurisprudence to the ownership of land, subject only to the restriction imposed upon the occupancy tenure by the statute which created it, and that hence he would be entitled to the trees on the land, and to use them as long as the tenure existed. *Sohodwa* v. *Smith, 12 B. L. R., 82; Narendra Narain Roy Chowdhry* v. *Ishan Chandra Sen, 13 B. L. R., 274; Gopal Pandey* v. *Parsotom Dass, I. L. R., 5 All., 121; Goluck Rana* v. *Nubo Soondurce Dassee, 21 W. R., 344; Mahomed Ali* v. *Bolakee Bhuggut, 24 W. R., 330; Ram Baran Ram* v. *Salig Ram Singh, I. L. R., 2 All., 896;* and *Debi Prasad* v. *Har Dyal, I. L. R., 7 All., 691,* referred to. Also *per* MAHMOOD, *J.*, that it would be impossible to give effect to the lower Court's decrees without disturbing the ex-proprietary tenant's rights, for if the plaintiff were entitled to possession of the trees, he would be entitled to enter upon the land to get at the trees, because when the law gives a right, it must be understood to allow everything necessary to give that right effect. DEOKI NANDAN *v.* DHIAN SINGH [I. L. R., 8 All., 467

21. FORFEITURE.

(*a*) BREACH OF CONDITIONS.

**256. ——— Condition for forfeiture, Construction of.**—A condition of forfeiture should not be extended beyond the words in which it is expressed, unless, perhaps, it is impossible without so extending it to give a reasonable construction to the instrument in which it appears. RAM NURSINGH CHUCKERBUTTY *v.* DWARKANATH GANGOOLY [23 W. R., 10

**257. ——— Condition for forfeiture.**—*Concurrent remedies for breach of conditions in lease.—Damages.*—There is nothing incompatible in the two remedies of damages and forfeiture for breach of the conditions of a lease. Where there is an obligation (as in this case by a lessee) to do several successive acts, the obligation is broken if any one of the

LANDLORD AND TENANT—*continued.*

21. FORFEITURE—*continued.*

(*a*) BREACH OF CONDITIONS—*continued.*

**Condition for forfeiture**—*continued.*

acts is omitted when the time for its performance comes. The lessor is not obliged to wait until the expiration of the term; nor is the lessee liable to several successive suits for each partial breach of the condition, and then to one general penalty for the whole. Nor is it usual, when a penalty is provided for breach of condition, to bring two suits—one to enquire into the existence of the breach, and the other to enforce the penalty. CHUNDER NATH MISSER *v.* SIRDAR KHAN . . . 18 W. R., 218

**258. ——— *Conveyance with agreement to re-purchase.—Lease.***—*A.* conveyed land to *B.*, with a collateral agreement to re-purchase within a certain period; the right to redeem, however, being dependent upon the due performance by *A.* of the conditions of a certain lease of the land in question which *A.*, remaining in possession, agreed to take from *B.* The rent falling in arrear, *B.* sold the land to *C.* within the period allowed *A.* to redeem. On appeal the High Court set aside the sale, holding that there was no natural connection between the lease and the condition to redeem, and that the clause for forfeiture was so vaguely worded as to have the appearance of a mere threat, as in equity, in the absence of specific mention of the nature of the failure which is to bring down the penalty of forfeiture, that penalty ought not to be enforced. ANONYMOUS . . 1 Ind. Jur., O. S., 130

S. C. CHIDAMBARA PILLAI *v.* MANIKKA CHETTI [1 Mad., 63

**259. ——— Breach of conditions in lease.**—A breach of any of the stipulations in a lease does not cancel the lease or give a right to eject, unless there has been an express provision to that effect in the lease. AUGUR SINGH *v.* MOHINER DUTT SINGH . . 2 W. R., Act X, 101

MAHOMED FAEZ CHOWDHRY *v.* SHIB DOOLAREE TEWAREE . . . . 6 W. R., 103

TUMEEZOODDEEN CHOWDHRY *v.* SURWAR KHAN [7 W. R., 209

**260. ——— *Ejectment.—Ryot with right of occupancy.***—A ryot with a right of occupancy, though holding under a temporary pottah for a term of years, cannot be ejected by his landlord, unless the latter can prove a stipulation under section 7, Act X of 1859. SHEEB DYAL PAULEET *v.* DWARKANATH SOOKUL [2 W. R., Act X, 54

**261. ——— *Improper use of land.—Ejectment.***—Where a tenant has been guilty of a breach of duty in the use of his land, such as making a tank in it, building on it improperly, or changing the character of the cultivation, such conduct does not necessarily operate as a forfeiture so as to render the tenant liable to ejectment. NOYNA MISSER *v.* RUPIKUN [I. L. R., 9 Calc., 609: 12 C. L. R., 300

LANDLORD AND TENANT—*continued.*

21. FORFEITURE—*continued.*

(*a*) BREACH OF CONDITIONS—*continued.*

**Breach of conditions in lease**—*continued.*

262. ——— *Destruction of trees and alteration of cultivation by tenant.—Right of re-entry.*—Some of the trees in a grove were destroyed, and the tenant brought the land on which they had existed into cultivation. His act operated to create a right of re-entry on so much of the land in favour of the landholder. AMIR SINGH *v.* MOAZZUM ALI KHAN . . . . 7 N. W., 58

263. ——— *Forfeiture for neglect to cultivate.—Construction of lease.*—Where it was a condition in the kabuliat that the tenant's holding would be forfeited if he neglected to cultivate the land without reasonable excuse—*Held* that the condition could not be regarded as a mere *ad terrorem* clause, since, if it came to the selling up of the tenure for default, it made a great difference to the landlord whether the land had been properly cultivated or not. GOLAM ALI CHOWDHRY *v.* BHOSAI [25 W. R., 227

264. ——— **Right to cancel tenancy.**—*Zemindar.—Resumption of land for non-cultivation.*—A zamindar cannot put an end to the relation of landlord and tenant, except in the manner provided by law. A tenancy is not determined by the mere fact that the tenant has allowed the land to remain uncultivated. DINABHANDU *v.* LOKANADHASAMI [I. L. R., 6 Mad., 322

265. ——— *Non-payment of rent.*—Omission to pay rent may be a good ground for a suit for arrears of rent or for ejectment, but not for the cancelment of a pottah not otherwise impugned. UMRITHNATH CHOWDHRY *v.* KOONJ BEHARY SINGH . . . . W. R., F. B., 34

266. ——— *Non-payment of rent.*—The right to cancel a lease for non-payment of rent by a lease-holder not having a permanent or transferable interest in the land being given by section 22, Act X of 1859, need not be provided for in the lease. KADIR GAZEE *v.* MOHADEBEE DOSSIA [6 W. R., Act X, 47

267. ——— **Liability to have tenancy cancelled.**—*Gatkuli tenant.—Non-payment of assessment.*—Where a gatkuli tenant omits to pay the assessment on his gatkuli land, he does not lose his right to the land unless some other person is put in possession by Government. Any one simply taking possession is merely a trespasser, against whom the gatkuli tenant would be entitled to recover. MALHARI VALAD RAGHOJI *v.* TUKARAM VALAD DARKOJI . . . . . 6 Bom., A. C., 86

268. ——— **Non-payment of rent.**—*Lease, Construction of.—Conditions for forfeiture.*—Where a lease of 1847 contained two provisions, one for the payment of R1,300 as rent, and the other was a stipulation for forfeiture and re-entry on default of payment, and by a solehnamah of 1848 that rent was put an end to, and in lieu thereof the lessor received back a portion of the land leased in 1847, but by a subsequent solehnamah of 1858 the lessees agreed to pay R334 as rent, but no new provision was made for re-entry, and no fresh stipulation for forfeiture,—*Held* that the clause of forfeiture and re-entry, in respect of the R1,300 under the lease of 1847, did not apply to the R334 under the solehnamah of 1858. RUHMOONISSA *v.* SOOPUN JAN [18 W. R., 244

LANDLORD AND TENANT—*continued.*

21. FORFEITURE—*continued.*

(*a*) BREACH OF CONDITIONS—*continued.*

**Non-payment of rent**—*continued.*

269. ——— *Ejectment.—Right of occupancy.—Bengal Act VIII of 1869, s. 52.*—The mere omission to pay rent for five years does not of itself amount to forfeiture of a ryot's right of occupancy, and will not be sufficient to sustain an action by the landlord for the recovery of the ryot's holding. A ryot having a right of occupancy cannot be legally ejected, unless under an order regularly obtained under section 52 of the Rent Law,—that is, under a decree for arrears of rent unsatisfied within fifteen days from the passing of the decree. MUSYATULLA *v.* NOORZAHAN . I. L. R., 9 Calc., 808

270. ——— **Failure to pay rent at due date.**—*N.-W. P. Rent Act, XVIII of 1873, s. 93 (c).—Suit for cancelment of lease.—Breach of conditions involving forfeiture.*—The plaintiff, the representative in title of a lessor, sued under clause (c), section 93 of Act XVIII of 1873, for the cancelment of a lease, on the grounds, among others, that the lessees had paid the rent to the Collector, on account of the revenue due in respect of the estate, instead of to him; secondly, on the ground that they had failed to pay certain instalments of rent on the due dates; thereby committing breaches of the conditions of the lease involving its forfeiture. *Held*, on the construction of the lease, with reference to the first ground, that as the lease was intended to be perpetual, and as the rent had been paid to the Collector for many years under an arrangement effected between the parties to the lease, and it was not shown that the plaintiff had repudiated this arrangement (even if he had the power of so doing) or demanded payment of the rent directly to himself, payment of rent by the lessees to the Collector did not amount to a breach of the conditions of the lease: with reference to the second ground, that the lease being intended to be perpetual, and no arrears of rent being due, irregularity and unpunctuality in the payment of the instalments of rent in question were not breaches of the conditions of the lease involving its forfeiture. ABLAKH RAI *v.* AHMAD KHAN [I. L. R., 2 All., 437

271. ——— *Breach of conditions of lease.—Delay in payment of rent.—Right to interest.*—In strict law a farmer forfeits his lease by the withdrawal of the personal security given by him at the time of taking the farm. But cases of forfeiture are not favoured when no injury has resulted, or when a money compensation is a sufficient remedy. Mere unpunctuality in the date of payment

LANDLORD AND TENANT—*continued.*

21. FORFEITURE—*continued.*

(*a*) BREACH OF CONDITIONS—*continued.*

**Failure to pay rent at due date**—*continued.*

of rent is no ground for forfeiture. The zemindar, if he has sustained injury by such unpunctuality, may sue for the interest due during the period in which the different instalments remained unpaid and for conditional forfeiture, but he cannot demand at once the absolute forfeiture of the property. ALUM CHUNDER SHAW CHOWDHRY *v.* MORAN [W. R., 1864, Act X, 31

272. ——— **Right to re-enter, Accrual of.**—*Relief against forfeiture for non-payment of rent.*—It is not absolutely necessary for a lessor to take legal measures for obtaining possession of the demised property on accrual of right of re-entry for breach of covenant. He may (if he can do so peaceably and quietly) take possession thereof without having recourse to civil proceedings (which are only necessary in case he apprehends resistance); and if he does so re-enter he cannot be sued for trespass, inasmuch as the interest of the lessee becomes forfeited, and the lessor enters on what is in fact his own property. The mere fact of demanding rent in one year is not sufficient to create an obligation to make such a demand in subsequent years, or on failure thereof to debar the right of re-entry. Relief may be granted by the Courts in India against forfeiture for non-payment of rent. A lessor who has re-entered on the demised property for breach of a particular condition can, when called upon to defend his position, plead other breaches which might have justified the re-entry, and cannot be restricted to prove only that under which he originally claimed re-entry. GREAT EASTERN HOTEL COMPANY *v.* COLLECTOR OF ALLAHABAD . . . 2 Agra, Ex., O. C., 1

273. ——— **Relief against forfeiture.**—*Penalty.—Non-payment of rent.*—Third defendant, purchaser of the interest of first and second defendants, held certain lands under the terms of a permanent kanam (A.), which contained the following condition: "And (I have also agreed) that on failure to pay the said quantity of paddy the kanam amount of 550 fanams shall be received by me, and the land restored." In a suit by the kanamdar to recover possession for non-payment of rent,—*Held* that this condition of redemption was intended as a penalty to secure regular payments of the rent, and that, such being the original intention of the parties, the penalty was one which ought to be relieved against. KOTTAL UPPI *v.* EDAVALATH THATHAN NAMBUDIRI . . . . . 6 Mad., 258

274. ——— *Condition in mokurrari lease for forfeiture on non-payment of rent.*—Where, in a mokurrari lease, there was a condition that, in case of non-payment of one year's rent, and its falling into arrears, the mokurrari settlement was to be cancelled, and default was made and a suit for ejectment was brought,—*Held* that, independently of the Rent Act, the defendants should be allowed in equity a reasonable time to pay the landlord's

LANDLORD AND TENANT—*continued.*

21. FORFEITURE—*continued.*

(*a*) BREACH OF CONDITIONS—*continued.*

**Relief against forfeiture**—*continued.*

dues in order to prevent forfeiture. MAHOMED AMEER *v.* PERYAG SINGH . I. L. R., 7 Calc., 566 [9 C. L. R., 185

275. ——— *Mulgaini lease, void for non-payment of rent or alienation.—Relief against penalty.*—Where a perpetual lease was granted subject to a condition that if the rent was not paid in any year or if the land was alienated by the tenant the lease became void and all rights to improvements effected by the tenant forfeited,—*Held* (1) that a sale of the tenant's right in execution of a decree for arrears of rent, obtained by the landlord and transferred by him to a stranger, was not a breach of the condition against alienation; (2) that the landlord having already sued for arrears of rent for three years without claiming recovery of the land could not again sue to recover the land on the ground of non-payment of rent during those years; (3) that the forfeiture could not be enforced against the purchaser of the tenant's rights at the execution-sale for non-payment of rent which accrued subsequently to those three years, as the condition must be held to have been intended to secure payment of the rent, and the penalty ought to be relieved against. SUBBARAYA KAMTI *v.* KRISHNA KAMTI [I. L. R., 6 Mad., 159

276. ——— *Mulgaini lease.—Non-payment of rent.—Penal clause.*—In a mulgaini lease dated 1849, it was stipulated that if the rent fell in arrear in any year, the lease should be cancelled,—*Held* that this clause must be construed as a penal clause which should be relieved against. *Kottal Uppi* v. *Edavalath Thathan Nambudri, 6 Mad., 258,* followed. NARAYANA SANABHOGA *v.* NARAYANA NAYAK . I. L. R., 6 Mad., 327

277. ——— *Non-payment of rent.*—The Court will not relieve against the forfeiture of a lease caused by non-payment of rent, although the lessor on previous occasions has waived the forfeiture. CUTENHO *v.* SOUZA . 1 Mad., 15

278. ——— **Planting trees.**—*Liability to ejectment.—Consent of landlord.—Held* that a ryot having a right of occupancy forfeits his holding and is liable to ejectment therefrom if he plants trees on a portion of his holding without the landlord's consent. JEWA RAM *v.* FUTTEH SINGH. TEZ SINGH *v.* RAM DASS . Agra, F. B., 125: Ed. 1874, 94

279. ——— *Right of tenants to plant trees without consent of zemindar.*—The question whether tenants have a right to keep up or renew existing baghs by planting new trees without the consent of zemindar, must be determined with reference to the custom of the country. JHONA SINGH *v.* NEAZ BEGUM . 2 Agra, Pt. II, 183

280. ——— *Maafeedars of Government.—Held* that the plaintiffs, being mere

**LANDLORD AND TENANT**—*continued.*

21. FORFEITURE—*continued.*

(*a*) BREACH OF CONDITIONS—*continued.*

**Planting trees**—*continued.*

maafeedars of a moiety of the right of Government, had no right to plant trees themselves or to prevent the zemindars from planting the trees, as they had no right to the land. AZURROODEEN *v.* MOHUR SINGH . . . . . **2 Agra, 165**

**281.** ——— *Ejectment for planting trees.*—In an action of ejectment for planting trees the penalty of forfeiture is not to be enforced as a matter of strict right; the Court may make a decree for removal of the trees. KOORA *v.* DICK . . . . . **3 N. W., 322**

**282.** ——— *Ejectment.*—*Liability to forfeiture of entire holding by planting on one portion.*—A tenant planted trees on one of the plots of land comprising his holding, an act which rendered him liable to ejectment. He paid rent, not in respect of each plot of land, but in respect of the entire holding. *Held* that he was liable to ejectment, not merely from the plot on which he had planted the trees, but from his entire holding. BHOLAI *v.* RAJAH OF BANSI . . **I. L. R., 4 All., 174**

**283.** ——— *Prohibition against planting trees and sinking wells.*—The plaintiff, the representative-in-title of the lessor, sued under clause (*c*), section 93 of Act XVIII of 1873, for cancelment of a lease on the ground, amongst others, that the lessees had planted trees and sunk wells and had allowed their tenant to do the same without the lessor's consent, thereby committing a breach of the conditions of the lease involving forfeiture. *Held* that the condition as to the planting of trees and sinking wells being merely a prohibition, and not a condition the breach of which involved the forfeiture of the lease, the lease could not be cancelled because the lessees had planted trees or sunk wells, and allowed their tenants to do the same, without the lessor's consent,—*Held* also that, assuming that the lessor was entitled, on that ground, to the cancelment of the lease, cancelment was not to be deemed the invariable penalty for the breach of such a condition as that mentioned in that ground. The Full Bench ruling in *Sheo Churun* v. *Busunt Singh, 3 N. W., 282,* followed. ABLAKH RAI *v.* SALIM AHMED KHAN **[I. L. R., 2 All., 437**

**284.** ——— **Sub-letting.**—*Right of tenants to let their houses.*—Whether tenants are entitled to let their houses, or whether, in the event of their letting houses, the zemindar can claim forfeiture must be determined with reference to the custom of the village. RAM BUKSH SINGH *v.* PURDUMUN KISHORE . **2 Agra, Pt. II, 202**

**285.** ——— *Covenant not to sub-let, What constitutes breach of.*—Where there is a covenant not to sub-let, what constitutes a sub-lease causing forfeiture? *Held* that the lessee must transfer all his rights of collecting rents and of suing for them in the Courts; and that although a sub-lease may not be so absolute and complete as to make the lease *ipso facto* void, yet it may be such a fraudulent evasion of the terms of the covenant as to entitle the plaintiff to equitable relief. The mere fixing of a sum to be paid by the sub-tenant to the farmer, and the declaration of the sub-tenant's right to all sums collected beyond that amount, are not sufficient to convert an agency into a sub-lease. ALUM CHUNDER SHAW CHOWDHRY *v.* MORAN **[W. R., 1864, Act X, 31**

**286.** ——— **Alienation of tenure.**—*Liability to forfeiture.*—A tenant who alienates his tenure does not thereby subject it to forfeiture. DWARKANATH MISREE *v.* KANAYE SIRDAR **[16 W. R., 111**

And *see* CASES UNDER RIGHT OF OCCUPANCY—TRANSFER OF RIGHT.

**287.** ——— **Transfer of lease.**—*Effect of unlicensed transfer of lease.—Suit for ejectment.*—The plaintiffs were mokurrari lease-holders, prior to whose lease the proprietor granted a pottah of the same land to *A.*, with a stipulation that *A.* should not let the land to others without leave. *A.* afterwards, with the proprietor's consent, sold his lease to *B.*, who again, without such consent, sold his rights to the defendants. The plaintiffs sued to eject the defendants as trespassers. *Held* that as there was nothing in the condition on which the plaintiffs (as exercising the proprietor's rights) rely that implies right of re-entry upon the land in case of a breach of that condition, the only effect of the want of the plaintiffs' consent on the part of the plaintiffs to *B.'s* sale was to maintain unimpaired *B.'s* liability to the landlord, without reference to the arrangement between *B.* and any other parties. And therefore the plaintiffs were not entitled to eject the defendants. GORDON, STUART, & CO., *v.* TAYLOR **[W. R., F. B., 9**

**288.** ——— **Transfer of tenure.**—*Transfer of non-transferable tenure.*—The transfer of a tenure not transferable by the custom of the country gives the zemindar no right to take actual possession so long as the rent is paid by the recorded tenant or his heirs, and not by a stranger. JOY KISHEN MOOKERJEE *v.* RAJ KISHEN MOOKERJEE **[5 W. R., 147**

**289.** ——— *Cuttack, Tenures in.—Surbarakari tenures.—Alienation without consent of landlord.—Alienation by one of several co-sharers.*—The alienation of a surbarakari tenure in Cuttack, and *à fortiori* the alienation of any portion of such tenure, is invalid without the consent of the landlord. Assuming that the sale of such a tenure would entitle the landlord to re-enter as upon a forfeiture, the sale of a portion thereof by one of several co-sharers would not work a forfeiture of the whole tenure. DASSORATHY HURI CHUNDER MAHAPATTRA *v.* RAMA KRISHNA JANA **[I. L. R., 9 Calc., 526 : 13 C. L. R., 114**

## LANDLORD AND TENANT—*continued.*

### 21. FORFEITURE—*continued.*

#### (*a*) BREACH OF CONDITIONS—*continued.*

**290. ——— Waiver of forfeiture.**—*Acceptance of rent.*—The acceptance of the rent by the landlord after the institution of a suit to recover possession of the land is not a waiver of a forfeiture by the tenant under a condition in the lease. A tenant, upon payment of all costs of the suit, will be relieved from the consequence of such forfeiture, in accordance with the practice of Courts of Equity in England and America. TIMMARSA PURANIK *v.* BADYIA . . . **2 Bom., 70: 2nd Ed., 66**

**291. ——— *Acceptance of rent.***—Receipt of rent is not *per se* a waiver of every previous forfeiture; it is only evidence of a waiver. CHUNDER NATH MISSER *v.* SIRDAR KHAN **[18 W. R., 218**

**292. ——— *Acceptance of rent.***—A lease provided that every four years a measurement should be made either by the lessor or by the lessees, and additional rent paid for accretion to the land leased. It then provided for failure on the lessee's part to execute a kabuliat for the excess lands in the following terms: "If, at the fixed time stated above, we do not take an Ameen and cause measurement to be made, you will appoint an Ameen and cause the entire land of the said chur to be measured, and no objection on the ground of our recording or not our presence on such measurement chitta shall be entertained, and we will duly file a separate dowl kabuliat for the excess rent that will be found after deducting the settled land of the dowl executed by us from the land settled therein. If we do not, we will be deprived of our right of obtaining a settlement of such excess land, as well as of the land which will accrete in future to the said chur, and no objection thereto on our part shall be entertained." In a suit by the lessor, alleging that in 1876 he had caused a measurement to be made, and had called on the lessees to execute a kabuliat for the rent of certain excess lands, and praying that the lessees might be ejected, the lessees pleaded that the lessor had waived his right to enforce the forfeiture by subsequent receipt of rent. It appeared that payments had been made to the lessor by the lessees, which were accepted as rent, but were kept in suspense, subject to payment by the lessees of the "remaining amount." *Held* that such a qualification did not make the payments anything else than payments of rent, and that the lessor had waived his right to insist on re-entry on the lessees' failure to measure the lands, or execute a kabuliat when called on to do so. *Davenport* v. *Queen, L. R., 3 App. Cas., 155,* followed. KALI KRISHNA TAGORE *v.* FUZLE ALI CHOWDHRY **[I. L. R., 9 Calc., 843: 12 C. L. R., 592**

#### (*b*) DENIAL OF TITLE.

**293. ——— Denial by tenant of title of landlord.**—*Refusal to pay rent where decree is obtained for possession against landlord.*—As a general rule, where a person takes land from another and

## LANDLORD AND TENANT—*continued.*

### 21. FORFEITURE—*continued.*

#### (*b*) DENIAL OF TITLE—*continued.*

**Denial by tenant of title of landlord—*continued.***

pays rent to him he cannot deny the title of his landlord; but he is not precluded or estopped from proving, when sued for rent, that that title has expired. He is not warranted, however, in refusing to pay rent simply on the apprehension that he may be called on to pay the rent by a party who is said to have obtained a decree against the landlord for the land. Even if a decree has been passed against the person from whom the landlord derives his title, he is entitled to recover his rent until the decree is put in force. BURN & Co. *v.* BUSHO MOYEE DASSEE **[14 W. R., 85**

**294. ——— *Assignee of landlord.***—The fact of a tenant having stated in a former suit that he had a good title as against a person alleging himself to be the assignee of the original landlord, does not constitute a forfeiture of the tenure in favour of the landlord or warrant a suit by the landlord for khas possession. DOORGA KRIPA ROY *v.* JANOO LATHAK . . . . . **18 W. R., 465**

**295. ——— *Liability to ejectment.***—Where it is proved that one man has been the tenant of another, it is necessary, before the former can be ejected, to show that the tenure has, in some way or other, come to an end, and the tenant cannot be said to have put an end to his relation with his landlord or denied his title if, in order to save himself from ejectment, he, for a time, attorned to a third person who legally put himself in the place of landlord. HARADHUN MUDDUCK *v.* DINOBUNDHOO MOJOOMDAR . . . . . **25 W. R., 319**

**296. ——— *Forfeiture of tenure.—Ejectment.***—The weight of authority of the decisions of the High Court is in favour of the view that when a tenant directly repudiates the relation of landlord and tenant and sets up an adverse title in himself, the landlord is entitled to take possession irrespective of the period during which the tenant may have been in possession. SHUMSHER ALI *v.* DOYA BIBI . . . . . **8 C. L. R., 150**

**297. ———** *A.*, a ryot with right of occupancy, in a rent-suit brought against him by *B.*, the purchaser of an aima mehal, denied the existence of the relationship of landlord and tenant between himself and *B.*, on the ground that the lands occupied by him were not included in the aima mehal purchased by *B.* *B.'s* rent suit having been dismissed for failure of evidence on this point, *B.* afterwards brought a regular suit to evict *A.*, and for mesne profits. *Held* that *A.*, by denying the title of *B.* in the rent suit, thereby forfeited his rights of occupancy, and became liable to eviction. MOZHURUDDIN *v.* GOBIND CHUNDER NUNDI **[I. L. R., 6 Calc., 436**

*See* SUTTYABHAMA DASSEE *v.* KRISHNA CHUNDER CHATTERJEE . . **I. L. R., 6 Calc., 55 [6 C. L. R., 375**

LANDLORD AND TENANT—*continued.*

21. FORFEITURE—*continued.*

(*b*) DENIAL OF TITLE—*continued.*

**Denial by tenant of title of landlord—** *continued.*

And ISHAN CHUNDER CHATTOPADHYA *v.* SHAMA CHURN DUTT . I. L. R., 10 Calc., 41 [12 C. L. R., 414

**298.** ——————— *Suit for ejectment.*—In a suit for ejectment, where it is alleged that the defendant has forfeited his tenure by denying his landlord's title, the forfeiture must be strictly proved. It must be proved what the defendant said, and the judgment in the suit in which he is alleged to have denied the title is not sufficient. AHULLYA DEBIA *v.* BHYRUB CHUNDER PATTRO [25 W. R., 147

**299.** ——————— *Ejectment, Suit for.*—To a suit brought to recover rent in 1877, the defendant set up his lakhiraj title; this suit was dismissed. In 1880, in a suit brought by the same plaintiff to obtain khas possession of the land in question in the former suit, against the same defendant and three others claiming under the same title as himself, the defence that the land was lakhiraj was set up by all. *Held* that the case fell within the principle of the case of *Suttyabhama Dassee* v. *Krishna Chunder Chatterjee, I. L. R., 6 Calc., 55,* and that the plaintiff, who had successfully proved that he had collected rents from the predecessors of the defendants, was entitled to evict them as trespassers on their failure to prove their lakhiraj title. ISHAN CHUNDER CHATTOPADHYA *v.* SHAMA CHURN DUTT . I. L. R., 10 Calc., 41 : 12 C. L. R., 414

**300.** ——————— *Setting up permanent tenure.*—In a suit for ejectment, where the defendant set up a right as a permanent tenant,—*Held* that the setting up of this right was a repudiation of the landlord's title for which he was liable to immediate ejectment. BABA *v.* VISHVANATH JOSHI [I. L. R., 8 Bom., 228

**301.** ——————— *Suit for ejectment.—Cause of action.—Written statement.*—*P.* and *R.* brought a suit for ejectment on the allegation that their tenants had failed to come to a settlement in respect of a certain jote, and that a notice to quit had thereupon been served on them. The defendants (tenants) in their written statement denied the landlords' title. The lower Courts found that the jote belonged to the plaintiffs, and the defendants had been and still were in possession of the same as tenants; but dismissed the suit on the ground that the service of notice had not been proved. *Held* (on second appeal) that, inasmuch as the cause of action must be based on something that accrued antecedent to the suit, the denial by the defendants of their landlords' title in the written statement would not entitle the plaintiffs to a decree on the ground of forfeiture. PRANNATH SHAHA *v.* MADHU KHULU [I. L. R., 13 Calc., 96

**302.** ——————— *Suit for ejectment.—Repudiation of title.—Setting up different tenure from that alleged by landlord.*—The plaintiff in 1870 brought a suit for rent, in which the defendant set up and filed a permanent howladari lease, but admitted that he held at the rent alleged by the plaintiff, and that suit was decreed, the Court thinking it unnecessary to decide the question of the validity of the tenure set up by the defendant. In a suit brought after a notice to quit, which was found to be invalid, to eject the defendant, and for a declaration that he had no such permanent howladari tenure as he alleged, the defendant again set up the howladari lease under which he admitted he had paid a fixed rent to the plaintiff. *Held* that, though the defendant repudiated the particular holding which the plaintiff attributed to him, he did not question the plaintiff's right to receive the rent, and therefore did not in any sense repudiate his landlord's title. What he did amounted merely to questioning the right of the landlord to enhance the rent, which was not such a disclaimer as would result in law in a forfeiture of his tenure. The plaintiff therefore was not entitled to eject the defendant without giving him a proper notice to quit. *Vivian* v. *Moat, L. R., 16 Ch., 730,* distinguished, on the ground that the principle on which it is based is wholly inapplicable in Bengal. *Baba* v. *Vishvanath Joshi, I. L. R., 8 Bom., 228,* dissented from. KALI KRISHNA TAGORE *v.* GOLAM ALLY . I. L. R., 13 Calc., 248

The principle laid down in *Vivian* v. *Moat, L. R., 16 Ch. D., 730,* is not applicable to this country. KALI KISHEN TAGORE *v.* GOLAM ALI [I. L. R., 13 Calc., 3

**303.** ——————— *Tenant setting up a permanent lease.—Notice to quit.—Ejectment suit.*—The plaintiff sued for possession of certain land which had been demised to him by the first defendant. The fourth defendant set up a previous purchase from the third defendant, who, he alleged, was a permanent lessee from the first defendant's father, and he contended (*inter alia*) that his vendor not having been served with a notice to quit, he could not be ejected. The lower Appellate Court held that the plaintiff could sue the defendant No. 1 only for specific performance, and could not eject the former tenants with or without notice. On appeal by the plaintiff to the High Court, it was contended for him that the defendant No. 4, having set up a permanent lease, had denied the landlord's title, and was not, therefore, entitled to any notice to quit. *Held,* confirming the lower Appellate Court's decree, that the plaintiff could not recover, in ejectment, without previous notice to quit. By his statement, that his alienor (defendant No. 3) was a permanent tenant and had not received notice to quit, the defendant pleaded an alternative defence he was entitled to make, and could not, therefore, be regarded as having consented to the contract of yearly tenancy (which was alleged by the plaintiff) being treated as cancelled. PURSHOTAM BAPU *v.* DATTATRAYA [I. L. R., 10 Bom., 669

LANDLORD AND TENANT—*continued.*

22. ABANDONMENT OR RELINQUISHMENT OF TENURE.

**304. ——— Verbal relinquishment.**—*Sufficiency of relinquishment.*—The mere use of the words "অন্যকে বিলিকর" in conversation by the tenant, when called upon by the zemindar to pay increased rent, were held to be insufficient to constitute a relinquishment where there was no acceptance of the same and not even a verbal notice to quit, or to justify the zemindar in letting the tenure to another. BONOMALEE GHOSE *v.* DELU SIRDAR [24 W. R., 118

**305. ——— Cultivating ryot leaving land uncultivated.**—*Relinquishment of land.—Verbal relinquishment.*—When a cultivating ryot goes away from the land which he has occupied and neither cultivates nor pays rent for it, he has wholly relinquished the land. The relinquishment need not be in writing. MUNEERUDDEEN *v.* MAHOMED ALI [6 W. R., 67

**306. ——— ——— *Relinquishment of tenure.***—When a ryot, without giving any notice, goes away from the land he has occupied, and neither cultivates it nor pays rent, the landlord is justified in assuming that he has relinquished it: and the ryot has no right to ask to be reinstated in possession on the ground that he has never formally relinquished the land. RAM CHUNG *v.* GORA CHAND CHUNG [24 W. R., 344

**307. ——— ——— *Determination of tenancy.—Abandonment of tenure.***—Plaintiff, a mirasidar, purchased certain land in 1850 which he allowed to lie waste from 1853. In 1866, on the application of the first defendant who was also a mirasidar to the second defendant, the local Revenue authority, the land was granted to the first defendant and made over to his possession. Plaintiff was admittedly in arrears of kist. In a suit by plaintiff to recover the land, it was contended that non-cultivation and non-payment of rent for a considerable time warranted the Revenue authorities in entering upon and disposing of the land. *Held*, in special appeal, that plaintiff's tenancy could only be determined by his resignation or abandonment of his holding, or by the procedure laid down in Act II of 1864; that the letting land lie fallow does not necessarily lead to the inference of abandonment; and that, in the present case, plaintiff, not being found to have abandoned the land, had been ejected in a manner which the law does not recognise. *Special Appeal 139 of 1858, Mad. S. D. A., 1859, p. 21; S. C. 482 of 1860, Mad. S. D. A., 1861, p. 112; Genju Reddi* v. *Asal Reddi, 1 Mad., 12; Kumaradeva Mudali* v. *Nallatambi Reddi, 1 Mad., 407;* and *Sanumathaiyan* v. *Samviathaiyan, 4 Mad., 153,* considered. RAJAGOPALA AYYANGAR *v.* COLLECTOR OF CHINGLEPUT [7 Mad., 98

**308. ——— ——— *Surrender of tenancy.***—Mere non-occupation and non-cultivation were held not to amount to a surrender of the tenancy so as to get rid of liability to pay the rent: nor

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22. ABANDONMENT OR RELINQUISHMENT OF TENURE—*continued.*

**Cultivating ryot leaving land uncultivated**—*continued.*

does the denial by the defendant in a former suit that he occupied the land amount to a notice of surrender. BALAJI SITARAM NAIK SALGAVKAR *v.* BHIKAJI SOYARE PRABHU KANOLEKAR [I. L. R., 8 Bom., 164

VENKATESH NARAYAN PAL *v.* KRISHNAJI ARJUN [I. L. R., 8 Bom., 160

**309. ——— Non-cultivation of portion of jote.**—*Relinquishment.*—The non-cultivation of a small portion of an ancestral jote by the admitted holders for one year owing to their minority, does not amount to relinquishment as laid down in *Muneeruddeen* v. *Mahomed Ali, 6 W. R., 67.* RADHA MADHUB PAL *v.* KALEE CHURN PAL . 18 W. R., 41

**310. ——— Abandonment of portion of jote.**—*Liability for rent of entire jote.*—As long as a ryot retains possession of any portion of his jote he is liable for the rent of the whole. SARODA SOONDUREE DEBEE *v.* HAZEE MAHOMED MUNDUL [5 W. R., Act X, 78

**311. ——— Abandonment of share of holding.**—*Separated member of Hindu family.*—Where a separation takes place in a joint Hindu family, and one member becomes the owner of a khas share, being a portion of land with a house, which (after living in it for some time) he eventually abandons, the zemindar is entitled to deal with it in the same way as he is entitled by law to deal with the abandoned holding of a cultivating ryot. LALLA NUKCHED LALL *v.* FUTTEH BAHADOOR LALL [24 W. R., 39

**312. ——— Voluntary abandonment of permanent tenure.**—*Express relinquishment.—Determination of tenancy.*—A voluntary abandonment of a permanent and transferable tenure for a long period, without any inevitable force, merger, or other cause beyond the power of the holder, is tantamount to an express relinquishment. If a man so abandon his holding for years, neither he, nor any one under him, can reclaim it. CHUNDERMONEE NYA BHOOSUN *v.* SUMBHOO CHUNDER CHUCKERBUTTY . . . . . W. R., 1864, 270

SHOODAN KURMAKAR *v.* RAM CHURN PAL [2 W. R., 137

**313. ——— Non-payment of rent with loss of possession.**—Non-payment of rent, coupled with the fact that the plaintiff was for five years out of possession, was held to amount to a relinquishment of land. NUDDEAR CHAND PODDAR *v.* MODHOOSOODUN DEY PODDAR . . . 7 W. R., 153

**314. ——— Non-payment of rent for some years.**—*Claim to eject tenant put in by landlord after relinquishment.*—In a suit for ejectment it appeared that the plaintiff had purchased the house which stood upon the plot in dispute thirteen years prior to the institution of the suit; that he had occu-

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22. ABANDONMENT OR RELINQUISHMENT OF TENURE—*continued.*

**Non-payment of rent for some years—** *continued.*

pied it for four years and then left the district for business purposes, paying no rent for the seven or eight years of his absence, during which the zemindar put the defendant in possession and took rent from him. *Held* that, even if the plaintiff had a right when he went away to occupy the land if he chose to do so, as he did not do so, he had no right on his return to eject the defendant. MUTTY SOONUR *v.* GUNDUR SOONUR . . . . . **20 W. R., 129**

**315. ——— Desertion of land and house by tenant.**—*Right of landlord to take possession.*—When the house had fallen to the ground and the land been deserted by the tenant, the zemindar was held justified in taking possession of the land as abandoned. BADAM *v.* MICHEL . **1 Agra, 266**

BUNNOO BEBEE *v* SHEO BUNS KANDO **[3 Agra, Rev., 9**

**316. ——— Land left vacant by tenant.**—*Zemindar's right to possession.*—A zemindar who without unlawful means enters upon the land after the ryot's tenancy is at an end, and takes possession, cannot be sued for illegal ejectment. MAHMOOD ALI KHAN *v.* GUNGA RAM . **3 Agra, 304**

**317. ——— Desertion by one of two tenants.**—*Relinquishment by the other.—Lease by landlord.—Right of deserter to claim land subsequently.*—One of the two proprietors of a jote having deserted the land, the other proprietor, while ostensibly in possession of the entire jote, relinquished it to the landlord, who let it to the defendants. Some years after such relinquishment, the plaintiff, who claimed to have purchased the right of the proprietor, who had relinquished, sued to eject the defendant on the ground that the relinquishment was not valid. *Held* that whether or not the relinquishment was in fact valid, the landlord was under the circumstances entitled to induct another tenant on the land, and that the plaintiff could not eject the defendant. See *Ishen Chunder Mowleek* v. *Poorno Chunder Chatterjee, 3 W. R., 153;* and *Manirullah* v. *Ramzan Ali, 1 C. L. R., 293.* BOIDONATH MAJI KOYBURTO *v.* AUPURNA DABEE . . . . **10 C. L. R., 15**

**318. ——— Condition for liability for rent until express surrender.**—*Lessor and lessee.—Kabuliat.—Suit for rent.—Notice of surrender.—Surrender of land by tenant.*—The plaintiff was a mortgagee of certain land, and sued the defendant for the rent thereof for the three years 1871, 1872, and 1873. He alleged that in 1866 the defendant had passed to him a kabuliat for one year; that the defendant did not vacate the land on the expiry of his term; that he (plaintiff) had sued him in 1868 and 1870 for rent, and obtained decrees against him; that the defendant had not yet surrendered the land, and had not paid the rent, and hence the present suit. The defendant answered that he had not occupied the land during the years in dispute, and that

LANDLORD AND TENANT—*continued.*

22. ABANDONMENT OR RELINQUISHMENT OF TENURE—*continued.*

**Condition for liability for rent until express surrender—** *continued.*

it had been in the possession of the owner (the mortgagor). The Subordinate Judge awarded the plaintiff's claim; but the District Judge, in appeal, rejected it, holding that the plaintiff had failed to prove that the defendant had occupied the land during the three years in dispute, and that the defendant's conduct in the former suits was ample notice to the plaintiff that he (defendant) had surrendered the land. On appeal to the High Court,—*Held* that the result of the former suits was to establish the fact that the defendant's tenancy or liability as a tenant had continued until the end of the cultivating year 1870. By the terms of the lease the defendant was liable until he restored the property to the lessor. He had, therefore, to show, as against the plaintiff's claim for rent, that he (defendant) had terminated the tenancy by some intimation to the lessor (plaintiff) and put him in the way of acting on it by a re-entry on the premises. The High Court, accordingly, finding that there was no evidence in the case either of notice given to the plaintiff or of an opportunity afforded to him of resuming possession of the land, remanded the case for the determination of that question, observing that if such notice were given, and such opportunity afforded, the plaintiff could not legally claim rent after the end of the cultivating year. VENKATESH NARAYAN PAI *v.* KRISHNAJI ARJUN . . . **I. L. R., 8 Bom., 160**

**319. ——— Omission to make express surrender.**—*Notice of surrender of land by tenant.—Splitting up of the cause of action.—Son's liability on the father's contract of tenancy.*—On the 22nd April 1848 one *A.* mortgaged certain land to the plaintiff. *S.* (the father of *B.*, the defendant), who was then tenant in possession of the land, attorned to the mortgagee (plaintiff) by a kabuliat dated the 1st June 1848. *S.* died in 1870 in possession as tenant. In 1877 the plaintiff sued the defendant *B.* as heir of *S.* for three years' rent from 1871-72 to 1873-74. The defendant answered that he had had no possession or occupation of the land since the death of his father in 1870. It was decided in that suit that the defendant had occupied the land up to 1874, and a decree was made against him for the rent claimed. In July 1878 the plaintiff brought the present suit for rent for the subsequent three years, *viz.*, from 1875-76 to 1877-78. The defendant answered that he had given up the land in 1871-72. He did not assert, either in the former or in the present suit, that he had given notice to the plaintiff of his intention to terminate his tenancy by surrendering the land to the defendant, nor did he allege that the plaintiff had assented to a surrender of it by the defendant without such notice. The lower Courts found the kabuliat proved, but threw out the plaintiff's claim on the ground that he failed to prove the defendant's occupation of the land during the three years for which rent was claimed. In the second appeal it was contended for the plaintiff that the tenancy continued until the mortgage was paid

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22. ABANDONMENT OR RELINQUISHMENT OF TENURE—*continued.*

**Omission to make express surrender**—*continued.*

off. *Held* that *S.* became a yearly tenant of the plaintiff under the kabuliat, but that he was not bound to continue his tenancy until the mortgage was paid off. *Held*, also, that neither the plaintiff nor *S.* as yearly tenant could, without the consent of the other, terminate the tenancy without six months' notice ending with the cultivating year (30th June). *Held*, further, that the defendant as the son and heir of *S.* was responsible on his father's contract of yearly tenancy, so far as he (defendant) had assets of his father, and in order to free those assets from a continuing liability under that contract he was bound to give a six months' notice of surrender to the plaintiff. The mere denial by the defendant in the former and present suit, that he had ever occupied the land, could not operate as such notice, and his non-occupation or non-cultivation alone could not relieve him from his liability to pay the annual rent to the mortgagee (plaintiff), unless the latter assented to a surrender or abandonment of the land by the defendant. *Held*, also, that the right of the plaintiff to the rent for the year 1875-76 depended upon whether he might have included it in the former suit. The High Court reversed the decrees of the Courts below, and made a decree for the plaintiff for the rent for 1876-77 and 1877-78. *Venkatesh Narayan Pai* v. *Krishnaji Arjun, I. L. R., 8 Bom., 160*, referred to and followed. BALAJI SITARAM NAIK SALGAVKAR *v.* BHIKAJI SOYARE PRABHU KANOLEKAR

[I. L. R., 8 Bom., 164

320. ——— **Relinquishment by some of lessees.**—*Joint lease.*—Where a joint lease was given to many persons, with an entirety and equality of interest among the tenants, the resignation of some of the joint lessees does not necessarily operate to void the lease. MOHIMA CHUNDER SEIN *v.* PETAMBUR SHAHA . . . . 9 W. R., 147

321. ——— **Relinquishment by manager for joint family.**—*Joint lease.*—Where a member of a joint family is registered as jotedar in a zemindar's serishta, not as for himself only but as manager for the family, his relinquishment of the jote is not sufficient in law to authorise the zemindar to make arrangements with any others he pleases. BYKUNT NATH DOSS *v.* BISSONATH MAJHEE

[9 W. R., 268

322. ——— **Relinquishment, Effect of.**—*Liability for rent.*—The mere fact of a tenant relinquishing the land will not excuse him from payment of rent if he is otherwise liable, unless he makes some terms with his landlord. MAHOMED AZMUT *v.* CHUNDEE LALL PANDEY . . 7 W. R., 250

323. ——— *Liability for rent.*—Where land relinquished by the original tenant is settled by the zemindar with other ryots, the former ryot cannot be held liable for rent, even though his relinquishment was not accompanied by

LANDLORD AND TENANT—*continued.*

22. ABANDONMENT OR RELINQUISHMENT OF TENURE—*continued.*

**Relinquishment, Effect of**—*continued.*

notice given in writing. MAHOMED GHASEE *v.* SHUNKER LALL . . . . . 11 W. R., 53

324. ——— *Relinquishment by tenant having a right of occupancy.*—Ordinarily tenants having a right of occupancy may, on the expiry of any agricultural year, relinquish their holdings by giving the landlord due notice; and the determination of the tenure of the tenant, whether by forfeiture or relinquishment, will put an end to the tenure of the shikmee holding under the tenant The relinquishment of the holding will ordinarily put an end to the sub-tenures, provided such relinquishment be accepted by the landlord in good faith. Where the landlord procures the relinquishment of the holding to defeat the under-leases, he should be held bound by such under-leases, although custom may not authorise the tenant to grant leases to enure beyond the duration of his own interest. HOOLASEE RAM *v.* PURSOTUM LAL

[3 N. W., 63: Agra, F. B., Ed. 1874, 250

325. ——— *Surrender to landlord, Effect of, on under-tenant.*—When a tenant who holds land for a term with consent of the landlord underlets that land, he parts with his own interest therein to the extent of the interest created by the under-lease, and cannot, therefore, determine the interest of his under-tenant by surrendering his own term to the landlord. HERRAMONEE *v.* GUNGA NARAIN ROY . . . . . 10 W. R., 384

326. ——— *Surrender to landlord, Effect of, on under-tenant.*—Where a lessor gives his lessee power to sublet, and the latter sublets, the sub-lessee obtains rights against both of which he cannot be deprived without his own consent. The lessee's surrender of his lease cannot operate to the prejudice of the sub-lessee. NEHALOONISSA *v.* DHUNNOO LALL CHOWDRY . . . 13 W. R., 281

327. ——— *Mokurrari tenure.—Relinquishment of mokurraridar.*—When a mokurraridar resigns his tenure, the dur-mokurraris created by him come to an end, but the position of ryots holding rights of occupancy is not affected by the extinction of either the tenure or the under-tenures. KOYLASH CHUNDER BISWAS *v.* BISSESSUREE DOSSEE . . . . . 10 W. R., 408

328. ——— *Relinquishment of purchaser from whom tenant holds.*—The rights of a tenant cannot be destroyed by the relinquishment of rights by the purchaser from a puttidar from whom the tenant held by pottah. Before the tenant can be ousted, it must be ascertained whether he holds under a legal title and one which gives him a right of occupancy. CHUTTER DHAREE SINGH *v.* JUTTA SINGH . . . . . 4 W. R., 76

329. ——— *Mirasidar.*—A mirasidar does not lose his mirasi rights by relin-

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22. ABANDONMENT OR RELINQUISHMENT OF TENURE—*continued.*

**Relinquishment, Effect of**—*continued.*

quishing his pottah. SUBBARAYA MUDALI *v.* COLLECTOR OF CHINGLEPUT . **I. L. R., 6 Mad., 303**

**330. ——— Inability to surrender to landlord.**—*Mortgage with landlord's consent.*—A tenant who, with the implied consent of his landlord, has mortgaged his holding, cannot resign it to the landlord. He may resign to him the equity of redemption. But till the mortgage has been redeemed the mortgagee is entitled to retain possession SHEOUMBUR RAI *v.* SHEOBHUNG RAI **[1 N. W., 45 : Ed. 1873, 41**

**331. ——— *Holder of survey field.*—*Consent of heirs.***—There is no precedent for ruling that the holder of a survey field is incompetent to resign it without the consent of his heirs. DAVALATA BIN BHUJANGA *v.* BERU BIN YADOJI **[4 Bom., A. C., 107**

**332. ——— *Putnidar.*—*Refusal to pay rent.***—It is not open to a putnidar of his own choice to throw up the putni, and by so doing escape his liability to pay rent. The contract, though not indissoluble, can only be dissolved by an act of the Court, and as the result of proper enquiry. HEERA LALL PAL *v.* NEEL MONEE PAL **[20 W. R., 383**

**333. ——— *Dur-mirasi mokurrari tenure.*—*Notice of relinquishment.*—*Surrender of lease.***—A tenure under a dur-mirasi mokurrari lease of land, which is not let for agricultural purposes, cannot be put an end to by a mere relinquishment, on the part of the lessee, although after notice to the landlord. *Per* FIELD, *J.*—The principle laid down in the case of *Heera Lall Pal* v. *Neel Monee Pal, 20 W. R., 383,* where it was held that a putnidar cannot, of his own option, relinquish his tenure, is applicable to all intermediate tenures between the zemindar and the cultivator of the soil, except those held on farming leases. JUDOONATH GHOSE *v.* SCHOENE, KILBURN, & CO. **[I. L. R., 9 Calc., 971 : 12 C. L. R., 343**

**334. ——— Ex-proprietary tenant.**—*Relinquishment of ex-proprietary rights.*—*Act XII of 1881 (N.-W. P. Rent Act), ss. 9, 31.*—*Held,* by the Full Bench, that an ex-proprietary tenant is not competent to relinquish his holding to his landlord by private arrangement. *Per* PETHERAM, *C. J.*—Section 31 of the N.-W. P. Rent Act (XII of 1881) was enacted absolutely in the interests of the cultivator, and provides, in effect, that although the occupancy tenant may not be turned out, and may not transfer his rights, he is not to be regarded as bound to his holding, that he may relinquish it, and that, in that case, he is not liable for rent; but this provision must not be taken advantage of by letting the zemindar buy the holding, and thus introducing a new cultivator, contrary to the prohibition contained in section 9. INDAR SEN *v.* NAUBAT SINGH **[I. L. R., 7 All., 487**

LANDLORD AND TENANT—*continued.*

23. EJECTMENT.

(*a*) GENERALLY.

*See* CASES UNDER EJECTMENT, SUIT FOR—

**335. ——— Interference with tenant by zemindar.**—*Inducing sub-tenants to pay rent to zemindar.*—Where a zemindar so interferes with the possession of a tenant not personally occupying the land as to induce the under-tenants to pay rent to him (the zemindar), his interference amounts to dispossession. HOYMOBUTTY DASSEE *v.* SREEKISSEN NUNDEE . . . **14 W. R., 58**

*See* RADHA MADHUB PANDA *v.* JUGGERNATH DOOAB . . . . **14 W. R., 183**

**336. ——— Right of landlord to eject and re-enter.**—*Expiration of lease and omission to take renewal.*—Where an old lease has expired, and the lessee, having the option of renewal on applying within a specified time, does not choose to take a new lease, the landlord's claim to re-entering cannot be styled a penalty in the sense in which forfeiture of a lease would be upon non-performance of a contract. DEB POOREE BOISTOBEE *v.* KENOO SINGH ROY . . . . . **20 W. R., 357**

**337. ——— Right of lessee of zemindari rights to eject.**—Unless evidence to the contrary be forthcoming, a lessee of zemindari rights must in this country be presumed to have all and the same powers in relation to the location or ejectment of ryots as are possessed by the zemindar. SUDA NUND *v.* DWARKA SINGH . . . **2 N. W., 194**

**338. ——— Right of joint lessor.**—*Suit for ejectment.*—One of several joint lessors can eject a lessee after expiry of the lease. MUDUN SINGH *v.* NURPUT SINGH . . **2 W. R., 291**

**339. ——— Right of purchaser.**—*Putni talook.*—*Sale for arrears of rent.*—"*Optimus interpres rerum usus.*"—The plaintiff, purchaser of a talook sold for arrears of rent under Regulation VIII of 1819, brought a suit for khas possession of a tank within the talook purchased by him, which had been held by the defendant and her predecessors from a time anterior to the grant of the talook. *Held* that the relationship of landlord and tenant in which the parties stood did not prevent the application of the maxim *optimus interpres rerum usus,* and it was open to the defendant to show by evidence as to the nature of the enjoyment what the origin of the tenure really was. It being shown that the interest in the tank had been frequently transferred during a period of more than sixty years without any change in the terms of the holding or the amount of rent paid, and that one of the transferees of the tank had been the owner of the talook in which it was, it was held that the plaintiff was not entitled to a decree for khas possession. NIDHIKRISHNA BOSE *v.* NISTARINI DASI . **13 B. L. R., 416 : 21 W. R., 386**

**340. ——— *Summary ejectment.*—*Person not in receipt of rent.***—Tenants long in possession and paying rent cannot be summarily ejected in an action by an alleged purchaser

LANDLORD AND TENANT—*continued.*

23. EJECTMENT—*continued.*

(*a*) GENERALLY—*continued.*

**Right of purchaser**—*continued.*

suing for possession; they can only be ejected in a suit in the Revenue Court by the person entitled to receive the rent. THAKOOR DOSS ROY *v.* BHYRUB CHUNDER BHUTTACHARJEE . **11 W. R., 509**

**341.** ——— **Liability to ejectment.**—*Long tenancy, Nature of.*—Where the defendant had been in possession as tenant for more than thirty years, and there was no lease or agreement showing the nature of the original tenancy, the presumption of law is that he is a tenant from year to year, and therefore liable to be ejected. Regulation V of 1827, section 1, does not apply to such a case. BAI GANGA *v.* DULLABH PARAG . . **5 Bom., A. C., 179**

**342.** ——— *Inamdar.*—*Perpetual right of occupancy.—Suit for ejectment.*—Where a family of kulkarnis in the Konkan was proved to have been in actual occupation of land under an inamdar for ninety years at a uniform rent,—*Held*, in the absence of proof of any lease for a more limited term as alleged by the plaintiff, that the occupants were entitled to hold as long as they paid the usual rent. ANNAJI APPAJI *v.* KASI ATMAJI **[3 Bom., A. C., 124**

**343.** ——— *Tenants of inamdar.—Right to raise rent.—Tenants in possession before grant.*—An inamdar, though he cannot eject his tenants who have been in possession before the grant of the inam, as long as they pay the rent due for their land, may nevertheless raise such rent at his pleasure (they not having acquired a prescriptive title), and is not restrained in doing so by the rates fixed by the Government survey. HARI BIN JOTI *v.* NARAYAN ACHAREYA . **6 Bom., A. C., 23**

**344.** ——— *Position of sub-lessee under unexpired lease.*—The fact that a person holds under an unexpired lease granted by a mere occupancy ryot against whom a decree of ejectment has been obtained, is of no avail to enable such person to support his possession against the zemindar. JAFREE BEGUM *v.* HOSSEIN ZAMAN KHAN **[2 N. W., 6**

**345.** ——— *Status of kashtkar.*—The plaintiff occupied as kashtkar a piece of land in a mouzah which was subsequently leased in farm. The farmer granted a pottah of a portion of the mouzah, including the plaintiff's holding, to *S.*, to whom, instead of the farmer, the plaintiff subsequently paid rent. In the absence of any evidence as to the nature of the pottah granted to *S.*, and of any consent on the part of the plaintiff to change his status, he did not lose his status of kashtkar, and was not liable to ejectment by reason of the ejectment of *S.* MATAPULUT SINGH *v.* MATA DYAL . . . . . **3 Agra, 275**

**346.** ——— *Lessees from lakhirajdar.—Right of zemindar to eject.*—A party in legal possession under a lease from a lakhirajdar cannot be summarily evicted by the zemindar without the intervention of the Court, even if the zemindar is entitled to resume the land as invalid lakhiraj, or as lands which have lapsed on non-performance of stipulated service. INDRABUTTY KOONWAREE *v.* HOLLOWAY . . . **9 W. R., 168**

LANDLORD AND TENANT—*continued.*

23. EJECTMENT—*continued.*

(*a*) GENERALLY—*continued.*

**Liability to ejectment**—*continued.*

**347.** ——— **Illegal ejectment.**—*Right of tenant to be restored to possession if dispossessed before tenure is put an end to.*—In a suit for possession by a tenant who claimed to hold under a permanent tenure, it was found that the tenure under which the plaintiffs claimed had not, though not found to be permanent, been put an end to. *Held* that the plaintiffs were entitled to succeed. CHUNDAR KUMAR GUHA *v.* MUNGUL MOLLAH **[11 C. L. R., 387**

**348.** ——— *Suit by tenant for possession.*—A tenant, suing to recover possession of an old jote from which he has been dispossessed by his landlord before the termination of his tenancy, is not required to prove a right of occupancy. CROWDY *v.* JHUKREE DHANOOK **[23 W. R., 387**

**349.** ——— *Act X of 1859, s. 25.*—An ejectment by a zemindar without application made to the Collector under section 25, Act X of 1859, is not necessarily an illegal ejectment. The illegality of the ejectment must be established by evidence. SHEO RUTTUN SINGH *v.* PHOOL KOOMAREE . . . **W. R., 1864, Act X, 68**

**350.** ——— *Act X of 1859, s. 23, cl. 6, and s. 25.—Limitation Act, 1859, s. 15.—Suit for possession by ryot.*—When a zemindar, of his own authority, and without the intervention of the Collector under section 25, Act X of 1859, ejects a tenant whose lease has expired, the tenant may recover possession, without reference to the title of the zemindar to eject him, in a suit under section 15, Act XIV of 1859; but if the tenant sue under clause 6, section 23, Act X of 1859, the question is open as to whether the tenancy was at an end or not; and if it was at an end, the tenant must fail in his suit. JONARDUN ACHARJEE *v.* HARADUN ACHARJEE **[B. L. R., Sup. Vol., 1020: 9 W. R., 513**

URJOON DUTT BONICK *v.* RAM NATH KURMOKAR . . . . . **21 W. R., 123**

**351.** ——— *Restoration to tenancy after wrongful eviction.*—If a ryot, holding at a particular rent, is unlawfully evicted, he does not necessarily cease to hold at that rent; and if he is restored to possession, he is restored to his original holding. RASHBEHARY GHOSE *v.* RAM COOMAR GHOSE . . . . . **22 W. R., 487**

LUTTEEFUNNISSA BIBEE *v.* POOLIN BEHAREE SEIN **[W. R., F. B., 91**

**352.** ——— *Liability to damages for ejectment.*—In a suit by an ejected les-

LANDLORD AND TENANT—*continued.*

23. EJECTMENT—*continued.*

(*a*) GENERALLY—*continued.*

**Illegal ejectment**—*continued.*

see to recover a year's balance of rent from his lessor, who had given a lease to another party and dispossessed plaintiff,—*Held* that, by granting the later lease, defendant had made himself responsible for any loss which might thereby be occasioned to plaintiff, even though he (the lessor) had not collected the rent himself. GOBIND CHUND JUTTEE *v.* MUN MOHUN JHA . . . . . 14 W. R., 43

**353.** ——— **Effect of order of ejectment.** —*Bengal Rent Act, 1869, s. 53.—Right to standing crops on land.*—The effect of an order of ejectment under section 53 of the Rent Act is to dispossess the ryots, not only of the land, but also of the crop standing thereon, the object of such an ejectment being to terminate completely the connection between the parties as landlord and tenant. IN THE MATTER OF DURJAN MAHTON *v.* WAJID HOSSEIN [I. L. R., 5 Calc., 135

(*b*) NOTICE TO QUIT.

**354.** ——— **Necessity of notice.**—*Mode of determination of tenancy.*—Notice to quit is a necessary part of the landlord's title to eject the tenant. ABDULLA RAWUTAN *v.* PAKKERI MOHOMED RAWUTAN . . . I. L. R., 2 Mad., 346

**355.** ——— *Mode of determination of tenancy.*—In a suit by a lessee to oust the tenant in possession,—*Held* that the tenancy must be shown to have been legally determined by notice to quit, demand of possession, or otherwise. FITZPATRICK *v.* WALLACE [2 B. L. R., A. C., 317 : 11 W. R., 231

NARAIN MUNDUL *v.* BHOOKTO MAHATO [25 W. R., 56

**356.** ——— *Ryot without right of occupancy.*—*Quære,*—Can a zemindar eject a ryot not having a right of occupancy without giving any notice? KOMUL SANGATH *v.* ROMANATH GOSSAMEE . . . . . 21 W. R., 332

**357.** ——— *Suit for ejectment brought without notice.*—A ryot whose tenancy can only be determined by a reasonable notice to quit, expiring at the end of the year, can claim to have a suit for ejectment brought against him by his landlord dismissed on the ground that he has received no such notice. RAJENDRONATH MOOKHOPADHYA *v.* BASSIDER RUHMAN KHONDKHAR [I. L. R., 2 Calc., 146: 25 W. R., 329

**358.** ——— *Tenant-at-will.* —*Evidence of local custom.*—The nature of a holding, as between landlord and tenant, must always be a matter of contract, either expressed or implied. If there is no express agreement, a tenant becomes a tenant-at-will, or from year to year, and is liable to be ejected upon a reasonable notice to quit, unless

LANDLORD AND TENANT—*continued.*

23. EJECTMENT—*continued.*

(*b*) NOTICE TO QUIT—*continued.*

**Necessity of notice**—*continued.*

some local custom to the contrary is proved. PROSUNNO COOMAREE DEBEA *v.* RUTTON BEPARY [I. L. R., 3 Calc., 696 : 1 C. L. R., 577

ABDOOL KUREEM *v.* OMEE CHAND LAHATA [24 W. R., 461

TARUKPODO GHOSAL *v.* SHYAMA CHURN NAPIT [8 C. L. R., 50

**359.** ——— *Receipt of rent.* —*Creation of tenancy.*—The recognition by the owner of lands of the interest of parties in possession by the receipt of rent from them, constitutes a tenancy requiring to be determined by notice or otherwise before such parties can be treated as trespassers. SONET KOOER *v.* HIMMUT BAHADOOR [I. L. R., 1 Calc., 391 : 25 W. R., 239 L. R., 3 I. A., 92

**360.** ——— *Lease at small rent.—Endowed lands.—Tenant-at-will.*—Lands forming part of the endowment of a temple were demised by the Collector at a svamibhogam rent of four annas per cottah, the lessee paying the Government tirvai. The lessee entered, improved, and paid his rent for several years. *Held,* reversing the decree of the Principal Sudder Ameen, that the smallness of the rent showed that the lessee was merely a tenant-at-will, and the hakdar of the endowment, having regained possession, might oust him at his pleasure. Regulation V of 1822, section 8, refers only to zemindars and other proprietors of estates permanently settled under the Regulation of 1802. NALLATAMBI PATTAR *v.* CHINNADEYVANAYAGAM PILLAI . . . . . 1 Mad., 109

**361.** ——— *Suit for partition and ejectment of ryots.—Right of occupancy.*—In a suit for partition of the joint inam lands of a Hindu family, it was not disputed that the plaintiffs were entitled to the share which they claimed, but they joined as defendants a number of cultivating ryots whom they sought to eject. The ryots pleaded that the lands had been reclaimed by their forefathers, and that they and their fathers had been in possession ever since, and that they had thereby acquired a permanent right of occupancy. *Semble,*—That, even if the ryots had not a permanent tenure, they could not be ejected except upon notice at the end of the Fasli, so long as they paid the rent due upon the lands. SAMINADA PILLAI *v.* SUBBA REDDIAR . . . . . I. L. R., 1 Mad., 333

**362.** ——— *Mittadar, Right of.—Kudivaram or tenant-right, Presumption as to. —Right to eject.*—The kudivaram (tenant-right) does not necessarily vest in a mittadar, as such, so as to entitle him to eject the ryots on his mitta on notice as tenants from year to year. SRINIVASA CHETTI *v.* NUNJUNDA CHETTI . I. L. R., 4 Mad., 174

**363.** ——— *Tenure transferable by custom.*—The mere fact that a tenure is

LANDLORD AND TENANT—*continued.*

23. EJECTMENT—*continued.*

(*b*) NOTICE TO QUIT—*continued.*

Necessity of notice—*continued.*

transferable under the custom of the district does not make it one which is not terminable by the landlord on sufficient notice. SHAMA SUNDARI DABI *v.* NOBIN CHUNDER KOLYA . 6 C. L. R., 117

364. ——————— *Claims of rival tenants.—Pottah by landlord to tenant out of possession.*—In a suit between two rival tenants having the same landlord, the one striving to obtain, and the other to maintain, possession of a particular parcel of land, where it is found that the defendant is still in occupation and has not been ejected by the zemindar, the mere production of a pottah alleged to have been granted to the plaintiff by the zemindar cannot of itself determine the tenancy of the defendant, or enable the plaintiff to stand in the shoes of the zemindar and serve the occupant tenant with a notice to quit. CHUNDER MONEE CHANDA *v.* BRINDABUN NATH . . . 25 W. R., 132

365. ——————— *Permanent tenancy.—Tenancy from year to year.—Ejectment.*—Where the plaintiff sued in ejectment, and the defendant set up a right as a permanent tenant,—*Held* that the setting up of this right was a repudiation of the landlord's title, and absolved him from the obligation which would have devolved on him of giving to the defendant a notice to quit if the defendant had set up a tenancy from year to year. BABA *v.* VISHVANATH JOSHI [I. L. R., 8 Bom., 228

366. ——————— *Tenant from year to year.*—When there is no custom of the country to the contrary, six months' notice to quit is proper notice. This period must have elapsed before the plaint is filed, and the time occupied in the suit before decree cannot be counted. NANABHAI RUSTAMJI *v.* PESTANJI JAMSETJI . 6 Bom., A. C., 81

367. ——————— *Tenant from year to year.*—A notice to quit, running only for ten days, is not a sufficiently reasonable notice on which a landlord can maintain a suit in ejectment against a tenant from year to year. RAM ROTTON MUNDUL *v.* NETTRO KALLY DOSSEE [I. L. R., 4 Calc., 339

368. ——————— *Monthly tenancy.*—By indenture, dated 1st February 1856, *A.* leased certain premises in Calcutta to *B.* for a term of ten years, as from 1st November 1855, at a rent of R100 per month, payable monthly. *A.* covenanted with *B.* to grant to her on her request, to be made within three months of the expiry of the term, a fresh lease on the same terms for three years. The defendant in 1858 became the assignee of the lease without notice to *A.*, and continued to occupy the premises and paid rent in the name of *B.* up to August 1866. No renewal of the lease was applied for, and the plaintiffs, who became the representatives of *A.* in June 1866, gave notice through their attorneys on 6th September 1866 to *B.* to quit on 1st November 1866, and on that date demanded possession from *B.* and from the defendant. *Held* that the tenancy after 31st October 1865 was a monthly tenancy in the name of *B.*, and was terminated on the 31st October 1866 by the notice of 6th September 1866. BROJONATH MULLICK *v.* WESKINS [2 Ind. Jur., N. S., 163

369. ——————— *Tenant from year to year.—Occupancy, Right of.*—If a tenant from year to year receive no notice determining the tenancy at the end of eleven years, and is allowed to remain on the land after the commencement of the twelfth year, he cannot be ejected until the end of the twelfth year, when he will acquire a right of occupancy. DARIAO BISHOON *v.* DOWLUTA [5 N. W., 9

370. ——————— *Limitation—Putni lease.—Receipt of rent.—Notice.*—*A.*, a Hindu, died leaving his widow *B.* and his mother *C.* *B.* adopted *D.* *C.* granted a putni pottah to *E.* of certain property belonging to the estate of *A.* During the minority of *D.*, *B.* received the rent from *E.*, and afterwards *D.*, on attaining majority, realised rent from *E.* by suits under Act X of 1859 Twelve years after attaining majority, *D.* sued for cancellation of the putni lease and for obtaining khas possession of the property. *Held* that the suit was not barred. The receipt of rent was no confirmation of the putni lease; it only created the relation of landlord and tenant. *Held*, also, that the plaintiff was not entitled to khas possession before the relationship of landlord and tenant was legally determined by a reasonable notice. *Semble*,—Such notice should expire at the end of the year. BUNWARI LAL ROY *v.* MAHIMA CHANDRA KHAL [4 B. L. R., Ap., 86 : 13 W. R., 267

371. ——————— Sufficiency of notice.—*Ejectment, Application for.*—A zemindar cannot rightfully seek the assistance of the Collector in ejecting a ryot during the currency of the agricultural year, nor can an application of this kind for immediate ejectment be received in the light of a notice to the tenant requiring him to resign his holding at the end of the agricultural year. MAHOMED SHAH *v.* USGHR HOSSEIN . . . 5 N. W., 151

JADOONUNDUN SINGH *v.* FAUJDAR KHAN [5 N. W., Ap., 1

372. ——————— *Unreasonable notice.*—A notice to quit within thirty days, served by a landlord on his tenant at a time when the crops are ripening, is unreasonable and insufficient. Where such a notice was given, the Court refused to determine what would have been a sufficient notice, and to make a decree to take effect at a future date on the basis of such notice *Per* GARTH, *C. J.*—The cases of *Mahomed Rasid Khan Chowdhry* v. *Jodoo Mirda, 20 W. R., 401*; and *Hem Chunder Ghose* v. *Radha*

LANDLORD AND TENANT—*continued.*

23. EJECTMENT—*continued.*

(*b*) NOTICE TO QUIT—*continued.*

**Sufficiency of notice**—*continued.*

*Pershad Paleet, 23 W. R., 440,* considered and doubted. JUBRAJ ROY *v.* MACKENZIE [5 C. L. R., 231

**373.** ——————— *Reasonable notice.—Tenant other than occupancy ryot.*—A tenant other than an occupancy ryot is entitled to a reasonable notice to quit. What is a reasonable notice is a question of fact, which must be decided in each case according to the particular circumstances and the local customs as to reaping crops and letting land. It is not necessary that the notice must expire at the end of the year. *Janoo Mundur* v. *Brijo Singh, 22 W. R., 548;* and *Rajendronath Mookhopadhya* v. *Bassider Ruhman Khondkar, I. L. R., 2 Calc., 146,* considered. JAGUT CHUNDER ROY *alias* BASHI CHUNDER ROY *v.* RUP CHAND CHANGO [I. L. R., 9 Calc., 48 : 11 C. L. R., 143

**374.** ——————— *Reasonableness of notice.*—There is no authority for the proposition that a notice to quit to a ryot other than an occupancy ryot must terminate at the end of a cultivating year or be a three months' notice. Such a ryot is only entitled to a "reasonable" notice, and such as will enable him to reap his crop; what is a "reasonable" notice is a question of fact to be decided in each case, having regard to its particular circumstances, and the local customs as to reaping crops and letting land. RADHA GOBIND KOER *v.* RAKHAL DAS MUKHERJI . I. L. R., 12 Calc., 82

**375.** ——————— *Reasonable notice.*—It is not necessary that the period allowed in a notice to quit by a landlord to his tenant should terminate at the end of the year, but the notice must be in respect of the date of determination of the tenancy as well as in other respects a reasonable notice. A notice to quit served on the 26th of Pous, and allowing two months to the tenant to vacate his holding, such period thus expiring on the 26th Falgun, when it appeared that cultivation began in the months of Magh and Falgun, and that they were the months for letting out land in the district, held not to be a reasonable notice. BIDHUMUKHI DABEA CHOWDHRAIN *v.* KEFYUTULLAH [I. L. R., 12 Calc., 93

**376.** ——————— *Determination of tenancy.—Inamdars.*—An inam, existing under grant made in 1811, became in 1863 the subject of arrangement between the zemindar, who had succeeded the grantor in the zemindari, and the inamdars. This resulted in what was either a confirmation of the original grant on terms more favourable to the zemindar, or a new grant of an estate in all respects, save as to the rent, similar to the previously existing estate, which was a tenancy in perpetuity. To a suit brought by certain mortgagees against the inamdars to enforce mortgage rights existing since 1842, the defence was made that possession taken of the inam lands by the Collector in 1845 had determined the original inam rights therein, as well as the lien of the mortgagees. The present zemindar, son and successor of the grantor of 1863, now claiming that he had determined the tenancy by a notice to quit,—*Held* that the tenancy was not determinable by such notice. MAHARAJAH OF VIZIANAGRAM *v.* SURYANARAYANA [I. L. R., 9 Mad., 307 L. R., 13 I. A., 32

**377.** ——————— *Notice ending with cultivating year.—Inamdar.—Partition.*—An inamdar cannot eject a yearly tenant without six months' notice to quit, ending with the cultivating year. Nor can he eject other tenants, except on the expiration of their term of years or other interest in the land. Where a family of inamdars disagree among themselves, and one of them obtains a decree for partition against the others, he cannot, in execution thereof, eject (without due notice to quit) the tenantry on such portion of the land as may have been allotted to him under that decree in a suit to which such tenantry were not parties, and by which, therefore, their rights are not barred. NARAYAN BHIVRAV *v.* KASHI . . . . I. L. R., 6 Bom., 67

**378.** ——————— *Inamdar.*—Tenants cannot be ejected as mere trespassers. If they are yearly tenants, they are entitled to a clear six months' notice to quit before they can be evicted. If they are tenants for a term of years or for a life or lives, there must be proof of an expiration of the term by effluxion of time or of the falling of the life or lives. PANDURANG SAKHARAM *v.* YEDNESHWAR [I. L. R., 6 Bom., 70

**379.** ——————— *Holding from year to year.*—Even in the case of a tenant from year to year, the landlord cannot evict without giving previous notice to quit. To be reasonable, a notice must not be peremptory, but must fix a time within which the ryot is required to quit the land. BETTS *v.* JAMIE SHAIKH . . . 23 W. R., 271

*See* also MAHOMED RASID KHAN CHOWDHRY *v.* JADOO MIRDHA . . 20 W. R., 401

**380.** ——————— *Transfer of Property Act, IV of 1882, ss. 106, 111.*—On the 11th December 1882, *A.*, who had, on the 1st July 1882, let rooms in a dwelling-house to *B.*, sent a letter to the tenant in the following terms: "If the rooms you occupy in the house No. 5, Thornhill Road, are not vacated within a month from this date, I will file a suit against you for ejectment as well as for recovery of rent due at the enhanced rate." On the 1st February 1883 the lessor instituted a suit against the tenant for ejectment, with reference to the above letter. *Held* by OLDFIELD, *J.* (MAHMOOD, *J.*, dissenting), that, with reference to the terms of section 106 of the Transfer of Property Act, the letter was not such a notice to quit as the law required, inasmuch as the notice did not expire with the end

LANDLORD AND TENANT—*continued.*

23. EJECTMENT—*continued.*

(*b*) NOTICE TO QUIT—*continued.*

**Sufficiency of notice**—*continued.*

of a month of the tenancy; and that this defect was not cured by the circumstance that the lessor waited until the end of the month to enforce his right to eject by suit. *Held* by MAHMOOD, *J.* (OLDFIELD, *J.*, dissenting), that the letter dated the 11th December 1882 was a valid notice to quit under sections 106 and 111 of the Transfer of Property Act, and sufficient to determine the tenancy, inasmuch as it gave the tenant more than fifteen days' notice, and its terms were such that he could with perfect safety have acted upon it by quiting the premises at the proper time,—namely, by the end of the month, which he must be presumed to have known was the right time to leave, without any risk of incurring liability to payment of further rent, the landlord having clearly indicated his intention to terminate the tenancy, and the notice being binding upon him; that the additional time given by the notice must be taken to have been given for the convenience of the tenant, and not with the object of continuing the tenancy; and that the suit for ejectment, not having been brought till long afterwards, was maintainable. *Doe* v. *Smith, 5 Ad. & E., 353; Ahearn* v. *Bellman, L. R., 4 Exch. D., 201; Nocoordass Mullick* v. *Jewraj Baboo, 12 B. L. R., 263;* and *Jagut Chunder Roy* v. *Rup Chand Chango, I. L. R., 9 Calc., 48,* referred to. Also *per* MAHMOOD, *J.*—The words "fifteen days" in section 106 of the Transfer of Property Act imply a fixation of the shortest period of notice allowed by the section; and the term "expiring" means that the terms of the notice must be such as to make it capable of expiring according to law at the right time, so as to render it *safe* for the tenant to quit coincidentally with the end of a month of the tenancy, without incurring any liability to payment of rent for any subsequent period. BRADLEY *v.* ATKINSON

**[I. L. R., 7 All., 596**

*Held*, on appeal under the Letters Patent, that, with reference to the terms of section 106 of the Transfer of Property Act, the letter was not such a notice to quit as the law required, inasmuch as it was not a notice of the lessor's intention to terminate the contract at the end of a month of the tenancy. *Per* STRAIGHT, *J.*—*Quære*,—Whether the letter was a notice to quit at all. Also *per* STRAIGHT, *J.*—A notice to quit must be certain, at all events in respect of the date of the determination of the tenancy: in other words, there must be a clear and explicit intimation to the tenant as to the date after which he will, if he remains in occupation of the premises, become a trespasser. *Ahearn* v. *Bellman, L. R., 4 Exch. D., 201,* distinguished. The judgment of MAHMOOD, *J.*, reversed, and that of OLDFIELD, *J.*, affirmed. BRADLEY *v.* ATKINSON

**[I. L. R., 7 All., 899**

**381.** ——————— *Ejectment by putnidar.—Notice to quit, Verbal.*—A putnidar, desirous of ejecting a tenant whose lease has expired, need not give him a written notice to quit; a verbal notice being sufficient. GOLAM MEHDEE *v.* AMJUD ALI . . . . . **23 W. R., 312**

**382.** ——————— *Tenant without right of occupancy*—The "reasonable notice to quit" which a ryot without a right of occupancy may claim from his landlord before he can be ejected, need not be confined to a demand of possession and notice to quit on a certain day. It is sufficient if the landlord asks for a higher rate of rent and gives the ryot notice to quit if he declines to pay it. A suit for ejectment against a tenant-at-will is a sufficient demand of possession and would justify a decree containing a date fixed for ejectment. HEM CHUNDER GHOSE *v.* RADHA PERSHAD PALEET

**[23 W. R., 440**

**383.** ——————— *Notice to quit or pay an enhanced rent.—Two-fold claim, both for rent and ejectment, not sustainable.—Decree for rent and ejectment.—Bengal Act VIII of 1869, s. 14.*—Where *A.*, after notice to his tenants to pay rent at an enhanced rate from the commencement of the ensuing year or quit, brought a suit in which he prayed for a higher rate of rent or ejectment in the alternative,—*Held* that in such a suit the plaintiff could not insist upon a two-fold claim for both rent and ejectment, nor obtain a decree for rent for the first quarter and ejectment thereafter. It is doubtful whether a notice in the alternative form to pay enhanced rent from a certain day or quit is a good notice. *Janoo Mundur* v. *Brijo Singh, 22 W. R., 548,* doubted. MOHAMAYA GOOPTA *v.* NILMADHAB RAI . . . . . **I. L. R., 11 Calc., 533**

**384.** ——————— **Service of notice.**—*Proof of service.—Publication in newspaper.—Termination of tenancy.—Adverse possession.*—Proof of service of a notice to quit on a tenant, which is confined to proving that such a notice, addressed to the tenant, was published in a local newspaper under circumstances which made it highly probable that the notice in question came to the knowledge of the tenant, is not, without more, such proof of service as will suffice to terminate the tenancy, or entitle the tenant to contend that he remained, after the date fixed by the notice for vacation, in adverse possession of the premises. CHANDMAL *v.* BACHRAJ

**[I. L. R., 7 Bom., 474**

**385.** ——————— *Necessity of proof of service.*—In answer to the plaintiff's suit in ejectment, the defendant denied the plaintiff's title and asserted his own. *Held* that, assuming the defendant to be the plaintiff's tenant, yet, inasmuch as the defendant denied the plaintiff's title, it was not necessary for the plaintiff to prove service of notice to quit on the defendant. GOPALRAO GANESH *v.* KISHORE KALIDAS . **I. L. R., 9 Bom., 527**

24. BUILDINGS ON LAND, RIGHT TO REMOVE—

**386. ——— Removal of buildings by tenant.**—*Tenant holding over after expiry of lease.*—By indenture, dated 1st February 1856, *A.* leased certain premises in Calcutta to *B.* for a term of ten years, as from 1st November 1855, at a rent of R100 per month, payable monthly. *A.* covenanted with *B.* to grant to her on her request, to be made within three months of the expiry of the term, a fresh lease on the same terms for three years, and that it should be lawful for *B.* at any time during the second lease, or extended lease, to remove or sell and dispose of all, or any part, of the screws and machinery which were at the time of the granting of the lease, or during the term or extended term might be upon the premises, and immediately upon or within two months after the expiration of the term or extended term to remove, &c., the buildings, &c., which then were or might at any time, during the term or extended term, be erected on the premises by *B.*, her executors, administrators, or assigns. *B.* erected buildings during her tenancy under the lease. The defendant, on 24th August 1858, became, by various mesne assignments, the assignee of the lease, without notice to *A.*, and subsequently repaired and erected buildings on the land. The defendant continued to occupy the premises, and paid the rent in the name of *B.* up to August 1866. No renewal of the lease (which expired on 31st October 1865) was ever demanded by *B.* or by any one claiming under her. The plaintiffs, who had become *A.'s* representatives in June 1866, gave notice, through their attorneys, on 6th September 1866, to *B.* to quit on 1st November 1866, and not to remove buildings and fixtures put up since 1st November 1855; and on 1st November 1866 the plaintiffs, in pursuance of the notice of the 6th of September, demanded possession of *B.* and of the defendant who was in actual occupation of the premises. *Held* that the acceptance of rent by *A.* and his representatives from the defendant holding over after the expiration of the original term did not constitute a renewal of the lease for three years; that the defendant was not entitled to a renewal for three years; that the tenancy after 1st October 1865 was a monthly tenancy in the name of *B.*, and was terminated on 31st October 1866 by the notice of 6th September 1866; that the defendant was not entitled to remove buildings erected; but that he might remove the machinery. BROJONATH MULLICK *v.* WESKINS . **2 Ind. Jur., N. S., 163**

**387. ——— Removal of material of house by out-going tenant.**—*Custom of Calcutta.—Injunction.*—In an action of ejectment the defendant set up a claim by custom to remove the materials of a house erected by him on the premises in dispute; but the Court granted an injunction to restrain him from doing so, though giving him leave to bring a suit to establish the special custom: in default of such suit being brought, the injunction to be perpetual. DOYAL CHAND LAHA *v.* BHOYRUBNATH KHETTRY . . . . . **Cor., 117**



24. BUILDINGS ON LAND, RIGHT TO REMOVE—*continued.*

**388. ——— Huts, Right of tenant to.**—*Custom for out-going tenant to remove huts.—Acquiescence.*—On a case stating that the plaintiff became tenant to the defendant of certain land in Calcutta, and at the time of becoming such tenant purchased from the out-going tenant, with the defendant's knowledge, two tiled huts which were then standing on the land; that "it had been the practice in Calcutta for tenants to remove such tiled huts as those of the plaintiff erected upon the land let to such tenants, and such huts were by such practice treated as the property of the tenants, who, by such practice, were in the habit of disposing of them without the consent of their landlords;" that, relying on the above-mentioned practice, the plaintiff, with the defendant's knowledge, had partially pulled down and rebuilt such huts; that the plaintiff's tenancy was determined, and the plaintiff ejected from the land by the defendant; that before leaving she endeavoured to pull down and remove the huts, but that she was prevented from so doing by the defendant, who claimed the huts as her property,—*Held* that the plaintiff, by the practice stated, was entitled, before giving up possession of the land, to pull down and remove the tiled huts. *Held*, further, that, apart from the existence of a valid custom entitling the tenant to remove tiled huts, the plaintiff having bought the huts from the out-going tenant with the defendant's knowledge, and relying on the practice, and with the defendant's knowledge having partially pulled down and rebuilt the huts, was entitled as against the defendant to remove them. PARBUTTY BEWAH *v.* WOOMATARA DABEE

**[14 B. L. R., 201**

**389. ——— Removal of buildings on land.**—*Ownership in land and buildings.*—According to the usages and customs of this country, buildings and other such improvements made on land do not, by the mere accident of their being attached to the soil, become the property of the owner of the soil. The general rule is that, if he who makes the improvement is not a mere trespasser, but is in possession under any *bonâ fide* title or claim of title, he is entitled either to remove the materials, restoring the land to the state in which it was before the improvement was made, or to obtain compensation for the value of the building, if it is allowed to remain for the benefit of the owners of the soil; the option of taking the building, or allowing the removal of the materials, remaining with the owner of the land in those cases in which the building is not taken down by the builder during the continuance of any estate which he may possess. IN THE MATTER OF THE PETITION OF THAKOOR CHUNDER PARAMANICK

**[B. L. R., Sup. Vol., 595: 6 W. R., 228**

This case contemplates the case of an admitted sale by a vendor in possession, not a case where the title and possession are disputed. MUDHOO SOODUN CHATTERJEE *v.* JUDDOOPUTTY CHUCKERBUTY

**[9 W. R., 115**

LANDLORD AND TENANT—*continued.*

24. BUILDINGS ON LAND, RIGHT TO REMOVE—*continued.*

Removal of buildings on land—*continued.*

*Held*, not applicable to other than innocent purchasers. SOHUN SINGH *v.* KEOLA BIBEE [16 W. R., 169

390. ——— Removal of buildings.—*Illegal possession.*—In a suit for possession on the ground that the defendant had become illegally possessed of certain land, the Court, while giving plaintiff a decree, allowed the defendant to remove or get compensation for a house which he had erected thereon. DOORGA CHURN *v.* KOONJ BEHARY PANDEY [3 Agra, 23

391. ——— *Sale by tenant without consent of landlord.—Position of purchaser.—Erection of brick-built house by tenant.—Right of owner of land to houses built thereon.*—The relation between landlord and tenant is that of parties to a contract. The contract is entire and single. If a portion of a tenure be sold either by the tenant or in execution of a decree of the Civil Court against the tenant, in the absence of any consent by the zemindar the only mode in which effect can be given to the alienation is to treat the purchaser as holding a rent-free tenure subordinate to that of the original tenant. In this country the ownership and right of possession in the soil does not necessarily carry with it a right to the possession of buildings erected thereon. A tenant who held a piece of land on a lease, erected a brick house upon the land without the permission of, but without any objection by, his landlord. In execution of a decree of the Civil Court against the tenant in January 1865, the materials of the house and the site on which the house was built were sold separately to two individuals from whom the defendant purchased both. On the 31st July 1866 the tenure itself was sold for arrears of rent to one *N.*, from whom the plaintiff purchased it. The plaintiff brought this suit to recover possession of the land free from all incumbrance by the removal of the house. The Court refused to give the plaintiff a decree for possession. SHIBDAS BANDOPADHYA *v.* BAMANDAS MUKHOPADHYA [8 B. L. R., 237: 15 W. R., 360

392. ——— *Additions to existing building.*—A tenant making additions to an existing building is not entitled to remove the building, but is only entitled to compensation for the present value of the expenses incurred by him in making such additions. Possibly, in some cases, he may remove the additions if he can do so without in any way injuring the original building. GOPAUL MULLICK *v.* ANUNDO CHUNDER CHATTERJEE [14 B. L. R., 205, note: 15 W. R., 368

393. ——— *Erection of indigo factory.—Right to remove materials.*—Where a lessee of land under an ijara erected an indigo factory thereon, with the knowledge of and without any objection by the lessor, upon the determination of the ijara lease, and the delivery of possession to the lessor, the lessee was held entitled to remove the materials. KINOO SINGH ROY *v.* NUSSEERODDEEN MAHOMED CHOWDRY . . . . . 17 W. R., 97

394. ——— *Contract Act, 1872, s. 1.*—The law laid down by *In re Thakoor Chunder Paramanick, B. L. R., Sup. Vol., 595,—viz.*, that a person building on the land of another is *primâ facie* entitled to remove the buildings erected upon the land demised, or to receive compensation,—when applied to a contract of tenancy, is not inconsistent with anything in the Contract Act, and therefore is unaffected by it. RUSSICKLOLL MUDDUCK *v.* LOKENATH KURMOKAR [I. L. R., 5 Calc., 683: 5 C. L. R., 492

395. ——— *Ownership in land and buildings.—Suits between Hindu inhabitants of Calcutta.—21 Geo. III., c. 70, s. 17.—Difference in law applicable in Calcutta and the mofussil.—Equity and good conscience.*—At a Sheriff's sale one Templeton bought a Hindu widow's interest in certain land in Calcutta; after passing through several hands, the land was purchased by the defendant. Between the possession of Templeton and the defendant an intermediate holder built a house upon the land. The plaintiff, a reversionary heir to the estate after the widow's death, sued the defendant to recover possession of the house and land. The defendant admitted the plaintiff's claim to possession, but contended that he was entitled to be paid a fair price for the buildings, or to remove the materials. *Held* that he was neither entitled to compensation nor to remove the materials, and that the question raised in the suit could not be said to be a question of either succession or inheritance so as to admit of the Hindu law being applied as directed by George III., Cap. 70, section 17, but that the law applicable to the case was the law of equity and good conscience as administered by the Courts of Equity in England. The case of *Thakoor Chunder Poramanick, B. L. R., Sup. Vol, 595,* discussed. JUGGUT MOHINEE DOSSEE *v.* DWARKA NATH BYSACK [I. L. R., 8 Calc., 582

396. ——— Removal of buildings.—*Suit to eject tenant.—Right to remove buildings or get value for them.*—In a suit to eject defendants (who held under a lease) from a house-ground and to compel them to remove the buildings thereon erected, the defendants pleaded that the lease was a permanent lease, and that plaintiff had no right to eject. The lease expressly authorised the lessee to build. The Court of first instance, holding that it was not a permanent lease, decreed as sued for. The Appellate Court, while concurring with the Munsif as to the construction of the lease, gave the plaintiff the option of paying for the house and resuming the land, or of receiving the value of the land from the defendant. *Held* that the decree of the Appellate Court was right. MAHALATCHMI AMMAL *v.* PALANI CHETTI . . . . . 6 Mad., 245

LANDLORD AND TENANT—*continued.*

25. MIRASIDARS.

**397.** ——— **Nature of tenancy.**—*Yearly or permanent tenancy.—Right of mirasidars.—Custom of country.*—The defendants entered on land as tenants of a mirasidar on terms which they could not prove, but held it at a uniform rent for three generations and for more than fifty years. *Held* that the defendants, in the absence of any special agreement to the contrary, had not acquired by prescription a right of permanent tenancy. Whatever right of permanent tenancy a tenant may, by prescription, acquire as against an inamdar, or a khot, it would be contrary to the custom of the country, and to the nature of mirasi tenure, to hold that he could acquire such a right as against a mirasidar. NARAYAN VISAJI *v.* LAKSHUMAN BAPUJI . . . **10 Bom., 324**

**398.** ——— *Right to perpetual tenancy.—Sanad.—Evidence of title.—Perpetual cultivation.—Long possession.—Local custom.*—Mirasidars who had sanads but who have lost them, and those who never had them, may prove their title by other evidence, and long possession is a strong element in such proof. A sanad is not indispensable to the proof of mirasi tenure. A mirasi right or perpetuity of tenure, like other facts, may be proved by various means. Accordingly, where a plaintiff claimed to hold certain lands in miras and under a right of perpetual cultivation by the custom of the country, and sought to recover the lands from the defendant who claimed as purchaser, at a Court sale, of the right, title, and interest of the inamdar of the said lands, and the lower Courts dismissed the suit on the ground that the plaintiff had failed to prove any right of perpetual cultivation, the District Court, in appeal, observing that no term of occupation as a tenant of inam land would confer a right of perpetual cultivation, and that nothing short of a regular sanad would confer on the plaintiff his alleged right in the lands, the High Court in special appeal reversed the decrees of the Court below, and remanded the case for a new trial on the point whether the plaintiff as a mirasidar or by local usage in virtue of his long possession and uniformity of payment of rent or assessment or otherwise, previously to the Court sale to defendant, had acquired the right to hold the lands in perpetuity on payment of a fixed or other rent ascertainable by local usage. BABAJI *v.* NARAYAN . . . **I. L. R., 3 Bom., 340**

VISHNUBHAT *v.* BABAJI

**[I. L. R., 3 Bom., 345, note**

**399.** ——— *Mirasi tenures—Right of occupancy in mirasi land.*—The mirasidar is the real proprietor of mirasi land, but ryots may be entitled to the perpetual occupancy of mirasi land, subject to the payment of the mirasidar's share. Such tenure, however, generally depends on long-established usage, and must be proved by satisfactory evidence. ALAGAIYA TIRUCHITTAMBALLA *v.* SAMINADA PILLAI . . . . **1 Mad., 264**

**400.** ——— **Right to dues from sukavasi tenants.**—Plaintiff, claiming as sole mirasidar

LANDLORD AND TENANT—*continued.*

25. MIRASIDARS—*continued.*

**Right to dues from sukavasi tenants—***continued.*

of a village, sued the defendants as sukavasi tenants of cultivated land within the village for arrears of rent from 1856. Defendants denied plaintiff's title. The Civil Judge (reversing the decree of the Munsif) dismissed the suit on the ground that the plaintiff had not proved the collection of the perquisites claimed within twelve years before the institution of the suit. *Held* (reversing the decree of the Civil Judge) that if the defendants were sukavasi ryots and the plaintiff was sole mirasidar, and in that right entitled to certain annual dues for all lands cultivated by such ryots immediately on their being brought under cultivation, plaintiff's suit was not barred, except as to rent payable more than three years before suit. KRISHNAMA CHARYAR *v.* TOPPAI GAUNDAN . . . . . **3 Mad., 381**

**401.** ——— **Right to dues from cultivators.**—*Custom.*—It can by no means be laid down as a uniform rule that mirasidars are entitled to dues from cultivators holding lands within the area of the mirasi estate under pottahs from the Government. To avoid injustice, where the right is denied, there should be an enquiry whether by custom it prevails on the estate, or, if there are not sufficient instances on the estate to afford grounds for decision, on similar estates in the neighbourhood. There has been no law depriving mirasidars of any privileges they may have customarily enjoyed. On the other hand, in the regulations the intention of the Government is declared to respect the privileges of landholders of all classes. SAKKAJI RAU *v.* LUTCHMANA GAUNDAN . . . **I. L. R., 2 Mad., 149**

**402.** ——— **Right of occupancy.**—*Abandonment.—Waste lands.—Madras Act II of 1864.*—The plaintiffs, village mirasidars, sued to eject defendants in possession of the waste lands of the village and to obtain a pottah for the same. The facts were that on three several occasions, beginning in Fusli 1269, applications were made by strangers for permission to cultivate waste lands belonging to the village, and that on each occasion the mirasidars successfully intervened, asserting a preferential right to obtain the lands for cultivation. Pottahs were accordingly made out in their names But on no occasion did they either cultivate or pay kist for the lands, and subsequent to the last occasion, in 1867, the lands were put up to auction for arrears of kist. The mirasidars bought them in. But the Collector refused to accept the mirasidars as tenants, cancelled the sale, and issued a pottah to the agent of a former applicant. Plaintiffs brought their suit in March 1873, and the District Munsif dismissed it, holding that the conduct of plaintiffs justified the Revenue authorities in the course they had adopted. The District Judge reversed the decree of the Munsif, on the authority of *Rajagopala Ayyangar* v. *Collector of Chingleput, 7 Mad., 98.* On special appeal, the case was heard before MORGAN, *C. J.*, and INNES, *J.*, and on a difference of opinion was referred to a Full Bench (MORGAN, *C. J.*, HOLLOWAY and INNES, *JJ.*).

**LANDLORD AND TENANT**—*continued.*

25. MIRASIDARS—*continued.*

**Right of occupancy**—*continued.*

*Held* by MORGAN, *C. J.*, and HOLLOWAY, *J.*, allowing the special appeal, that the Collector's settlement with the mirasidars was in form an annual settlement, and that on the face of the transaction there was nothing which could be regarded as amounting to the creation or recognition of a permanent right in the mirasidars (plaintiffs), such as could be determined only in the manner indicated in the case of *Rajagopala Ayyangar* v. *Collector of Chingleput, 7 Mad., 98*: that it was apparent that the mirasidars had no intention either to cultivate the land or (except on legal compulsion) to pay the assessment, and that in such circumstances it was competent to the Revenue officials to decline to accept the plaintiffs as tenants. By HOLLOWAY, *J.*, that the Darkhast Rules of the Revenue authorities did not constitute rights enforceable in a Court of law, and that even if the plaintiffs had been wrongfully dispossessed, their only action would be against the Government for such wrongful dispossession, and the relief sought in the present suit was quite incommensurate with the injury complained of. By INNES, *J.* (dissenting), that plaintiffs having lawfully purchased at a Government sale had become by the express provisions of the law the occupiers of the land, and that they could not be ejected except for the reasons and by the process prescribed by Madras Act II of 1864; that, not having been lawfully ejected, they were still the rightful holders; and, twelve years not having elapsed since the date of their ejectment, could claim to be restored; and that the special appeal should, accordingly, be dismissed. FAKIR MUHAMMAD *v.* TIRUMALA CHARIAR . . . . . I. L. R., 1 Mad., 205

403. ——— **Pottah-holder, Status of.**—*Ryotwar pottah.*—The correctness of the decision of the majority of the Full Bench in *Fakir Muhammad* v. *Tirumala Chariar, I. L. R., 1 Mad., 205*, that a ryotwar pottah enures only for a year, and that a pottah-holder is merely a tenant from year to year, questioned. SECRETARY OF STATE FOR INDIA *v.* NUNJA . . . . I. L. R., 5 Mad., 163

404. ——— **Relinquishment of pottah.**—*Tenure of pottahdar under Government*—*Per* TURNER, *C. J.*—A mirasidar does not lose his mirasi right by relinquishing his pottah. A pottah issued by Government will, unless it is otherwise stipulated, be construed to enure so long as the ryot pays the revenue he has engaged to pay. SUBBARAYA MUDALI *v.* COLLECTOR OF CHINGLEPUT [I. L. R., 6 Mad., 303

**LANDMARKS, OBLITERATION OF—**

*See* ACCRETION—NEW FORMATION OF ALLUVIAL LAND—GENERALLY. [9 B. L. R., 150

**LEASE.**

Col.
1. CONSTRUCTION . . . . . 3060
2. ZUR-I-PESHGI LEASE . . . . . 3079

**LEASE**—*continued.*

——— **Agreement for—**

*See* REGISTRATION ACT, s. 17.
[3 B. L. R., Ap., 1
7 B. L. R., Ap., 21
12 W. R., 394
17 W. R., 509
10 W. R., 127
I. L. R., 10 Bom., 101
I. L. R., 7 Calc., 703, 708, 717
I. L. R., 9 Calc., 865
21 W. R., 315: L. R., 1 I. A., 124

——— **Breach of condition for forfeiture in—**

*See* CASES UNDER BENGAL RENT ACT, 1869, s. 52 (ACT X OF 1859, s. 78).

*See* CASES UNDER LANDLORD AND TENANT—FORFEITURE—BREAH OF CONDITIONS.

——— **Cancellation of—**

*See* CASES UNDER BENGAL RENT ACT, 1869, s. 52 (1857, s. 78).

*See* CO-SHARERS—SUITS BY CO-SHARERS WITH RESPECT TO THE JOINT PROPERTY—RENT . I. L. R., 4 Calc., 96

——— **Construction of—**

*See* SALE FOR ARREARS OF RENT—EFFECT OF SETTING ASIDE SALE. [I. L. R., 4 Calc., 778

——— **granted while lessor is out of possession.**

*See* CASES UNDER TRANSFER OF PROPERTY WHILE TRANSFEROR IS OUT OF POSSESSION.

1. CONSTRUCTION.

1. ——— **Rule for construction.**—*Nature of possession given by lease.*—In construing a pottah, although such construction was according to the practice of the Court on a question of law, the Court held that it must look to the surrounding circumstances, one of which was the nature of the possession given by the grantor and accepted by the grantee. JANOKEE NATH DUTT *v.* MAHOMED ISRAIL . . . . . 22 W. R., 285

2. ——— **"Projah," Meaning of.**—*Status of tenant.*—The word "projah" does not define the status of a tenant. KEDARNATH MITTER *v.* SOOKOOMAREE DEBIA . . 22 W. R., 398

3. ——— **"Karindah," Meaning of.**—*"Nij-jote," Meaning of.—Status of tenant.*—The word "karindah," as used in a pottah, was held to be merely a term used to set forth what was the status of the person to whom the pottah was granted, and to afford no ground for the presumption of the tenants holding previous to the date of that pottah. Nor did the word "nij-jote," as used in the pottah, mean lands cultivated by the cultivator himself, but

LEASE—*continued.*

1. CONSTRUCTION—*continued.*

"Karindah," Meaning of—*continued.*

lands held by the zemindars in their own possession or their own private lands. WAJOODEEN HOSSEIN *v.* MADHOO CHOWDRY . . . 17 W. R., 404

4. ——— "Abadkari talookdari," Meaning of.—*Effect on talookdari right of accepting farming leases.*—Construction of the term "abadkari talookdari" in a lease explained. Neither the acceptance of farming leases by the talookdar *quâ* farmer, subject to the Government proprietary right, nor the sale of that Government right, in any way *ipso facto* extinguishes any talookdari right existing in the abadkari talookdar in that capacity, if otherwise valid. HURO PERSHAD BHUTTACHARJEE [illegible]HYRUB CHUNDER MOJOOMDAR [8 W. R., 391

5. ——— Lease to commence in future.—*Temporary lease.*—An instrument which is in terms a temporary lease is as binding on the lessor, *quâ* lease, where the tenancy is to commence at a future day, or on the determination of an existing lease under which another lessee is in possession, as where it commences immediately. PITCHAKUTTI CHETTI *v.* KAMALA NAYAKKAN . 1 Mad., 153

6. ——— Duration of lease.—*Lease where no term is specified.*—Where no term is mentioned in a lease, it may be either a tenancy terminable at the end of every year, or one for the life of the tenant, according to the terms of the lease. WATSON *v.* DOST MAHOMED KHAN . 2 Hay, 4

7. ——— *Lease of land for building purposes without term.—Liability to ejectment.*—Where land is given to a lessee for the purpose of building a house to live in, without any term being fixed for the tenancy, the tenure of house and land cannot be taken away from the lessee's heir or his vendee so long as he continues to pay the rent assessed on it. JUHOOREE LALL SAHOO *v.* DEAR [23 W. R., 399

8. ——— *Lease for specified term where no provision for continuance is used.*—Where a lease is not in writing, but the terms of holding are specified in a notification addressed by the lessor to his servants, such an acknowledgment is, as against the lessor, conclusive evidence of the terms of the agreement. Where a lease for a fixed term of seven years contains no words to import a continuance of the interest after the death of the grantee, nor any expressions which point to any earlier determination of the interest, the *primâ facie* meaning is a continuance for seven years, and that the lease did not terminate with the death of the original lessee, but survived during the remainder of the term to his heirs and representatives. The onus is on the party who seeks to show that the transaction should be governed by Hindu law that the *primâ facie* construction is contrary to the Hindu law, or the established custom of considering such contracts in Bengal. In this case the lessor having, on the death of the lessee, granted a putni of his whole estate, including

LEASE—*continued.*

1. CONSTRUCTION—*continued.*

Duration of lease—*continued.*

the farm in dispute, was adjudged liable to pay to the representatives of the lessee damages for the time they were deprived of the beneficial enjoyment of the farm, according to the increased rent which the new lessee had undertaken to pay. TEJ CHUND *v.* SREE KANTH GHOSE [6 W. R., P. C., 48: 3 Moore's I. A., 261

9. ——— *Tenancy year by year.*—A tenancy which is to continue year by year is a continuing tenancy so long as the parties are satisfied; and though terminable at the option of either party at the end of any year is not *ipso facto* terminated at the end of every year. MALODDEE NOSHYO *v.* BULLUBBEE KANT DHUR [13 W. R., 190

10. ——— *Tenancy from year to year.*—The words, "you must pay every year Government dues, and enjoy the fields along with the garden lands without disturbance (sukhrup rahani), besides the fixed amount there will be no oppression on account of cesses," do not create a permanent tenancy, but only a tenancy from year to year. GUNGABAI *v.* KALAPA DARI MUKRYA [I. L. R., 9 Bom., 419

11. ——— *Lease from year to year.—Mode of determining tenancy.*—In a suit for possession of a piece of land and for rent of the same, the plaintiff produced in support of his claim two sarkhats or kabuliats purporting to be executed in his favour by the defendants, and dated respectively in January 1875 and June 1876. These documents were not registered. The first, after reciting that the executant had taken the land from the plaintiff on a specified yearly rent, and promised to pay the same yearly, proceeded as follows: "If the owner of the land wishes to have it vacated, he shall give me fifteen days' notice, and I will vacate without making objection: if I delay in vacating the land, the owner can realise, by recourse to law, rent from me at the rate of R8 per annum." The second sarkhat, after reciting that the executants had taken the land from the plaintiff on a yearly rent specified for six years, and promised to pay the same year by year, proceeded thus: "And if the said Shaikh wishes to have the land vacated within the said term, he shall first give us fifteen days' notice, and we will vacate it without objection." The lower Courts held that the sarkhats were not admissible in evidence, as they required registration under section 17 (4) of the Registration Act VIII of 1871, being leases of immoveable property from year to year or reserving a yearly rent. *Held* that the two sarkhats created no rights except those of tenants-at-will, inasmuch as the clause common to both, to the effect that at any time, at the will of the lessor, the lessees were to give up the land at fifteen days' notice, governed all the previous clauses, and the defendants could be asked to quit at any time before the lapse of the term at fifteen days' notice. KHUDA BAKHSH *v.* SHEO DIN [I. L. R., 8 All., 405

LEASE—*continued.*

1. CONSTRUCTION—*continued.*

Duration of lease—*continued.*

12. ——— *Permanent tenancy only modifiable by revision of rent.—Right of ejectment.—Exclusion of lessor's right of terminating lease.*—Ejectment by landlord against tenant. It appeared that the land in dispute was the property of a muttum of which the plaintiff was the trustee; and had been let to the defendant's father under a muchalka (Exhibit A), dated 14th August 1837, entered into with the Collector, the manager of the property on behalf of the Government. The tenancy continued to be regulated by his agreement until plaintiff, in 1867, demanded an increased rent, which the defendant refused to agree to pay. Upon that demand and refusal the plaintiff, at the end of the Fasli, and without tendering a pottah for another Fasli stipulating for the increased rent, brought his suit to eject. The defendant (appellant) contended that the right to put an end to his tenancy was conditional upon his failure to pay the rent fixed by the agreement. *Held*, by SCOTLAND, *C. J.*, upon the construction of the muchalka, that the plaintiff possessed the absolute right to put an end to the tenancy at the end of the Fasli, unless the condition relied upon by the appellant was by force of established general custom (which had not been alleged) or positive law made a part of the contract of tenancy: that neither the Rent Recovery Act nor the Regulations operated to extend a tenancy beyond the period of its duration secured by the express or implied terms of the contract creating it, and that therefore the plaintiff had a right to eject the defendant at the end of a Fasli. By HOLLOWAY, *J.*—That whether the express contract was binding on the pagoda or not, it gave no right to hold permanently, and that there is nothing in any existing written law to render a tenancy once created only modifiable by a revision of rent but not terminable at the will of the lessor exercised in accordance with his obligations. *Enamandaram Venkayya* v. *Venkatanarayana Reddi, 1 Mad. 75*; and *Nallatambi Pattar* v. *Chinnadeyanayagam Pillai, 1 Mad., 109*, doubted. The judgment in the case of *Venkataramanier* v. *Ananda Chetty, 5 Mad., 122*, has gone too far in laying down the rule as to a pottahdar's right of occupation. CHOCKALINGA PILLAI *v.* VYTHEALINGA PUNDARA SUNNADY . . . **6 Mad., 164**

13. ——— *Permanent tenancy on continuing to pay rent.*—Suit to recover the proprietary right in a village belonging to plaintiff's muttah, which was let to defendant's father under a pottah and muchalka, and which on the death of her father and since the defendant refused to surrender, upon the grounds (1) that the right had been leased permanently, subject to the regular payment of the stipulated rent, which condition had been strictly fulfilled; (2) that her father had expended large sums in making substantial permanent improvements in the village, and that he had by gift transferred the tenancy to her. *Held* that, on the true construction of the terms of the pottah and muchalka only a tenancy from Fasli to Fasli was created. Neither Regulation XXX of 1802 nor Madras Act VIII of 1865 operated to make a tenancy established by ordinary pottah and muchalka of a permanent nature, by attaching to it the condition that it should be indeterminable as long as the stipulated rent was paid. *Chockalinga Pillai* v. *Vythealinga Pandura Sunnady, 6 Mad., 164*, followed. FOULKES *v.* RAJAHRATHNA MUDALI . . . . **6 Mad., 175**

14. ——— **Lease of jungle lands.**—*Continuous possession.—Commencement of lease.*—In a lease which provides for rent-free possession for twelve years, the rent-free possession contemplated does not necessarily date from the year of the lease, so that in a suit more than twelve years after the granting of the lease the lessee is entitled to plead that he has not yet had possession rent-free for twelve years. BHARUT CHUNDER ROY *v.* ISSUR CHUNDER SIRCAR . . . . **2 W. R., Act X, 78**

15. ——— **Death of lessee, Effect of.**—*Lease not limited to life of lessee.*—Any leasehold estate, when not expressly limited to the life of the lessee, passes to his heirs in the same way as other property, and if the heirs take the estate of the deceased lessee they take it with all rights and responsibilities. DANOOLLAH *v.* AMANUTOOLLAH **[16 W. R., 147**

RADHA KISHORE ROY *v.* SITTOO SIRDAR **[24 W. R., 172**

16. ——— *Lease at will of lessee.*—A lease of land, whereby the lessee is given the power of holding the land as long as he pleases, is determined by the death of the lessee. VAMAN SHRIPAD *v.* MAKI . . **I. L. R., 4 Bom., 424**

17. ——— **Death of lessor or lessee.**—*Lease for term of years.—Joint liability of lessees.*—In the absence of words to the contrary, a lease of zemindari rights for a term of years does not terminate before the expiration of the term by the mere fact of the death of either the lessor or lessee. *Tej Chund* v. *Sree Kanth Ghose, 8 Moore's I. A., 261*, and *Burdakant Roy* v. *Aluk Munjooree Dasiah, 4 Moore's I. A., 321*, relied on. On the question whether the lessees in this case were jointly as well as severally liable,—*Held* that the terms of the lease indicated that the liability of the lessees was intended to be several, but equal in extent. BADRINATH *v.* BHAJAN LAL . . . **I. L. R., 5 All., 191**

18. ——— **Extension of term for which lease is granted.**—*Leave to remain till called on to vacate.*—A provision in the lease that the tenant might after six months remain in occupation at a monthly rent till called on to vacate, does not extend the term for which the lease is granted. MORA VITHAL *v.* TUKARAM VALAD MALHARJI **[5 Bom., A. C., 92**

19. ——— **Tenancy at will.**—*Agreement to pay rent.—Custom.—Notice to quit.*—An agreement to pay rent in the ordinary form of muchalka given by tenants from year to year already in posses-

LEASE—*continued.*

1. CONSTRUCTION—*continued.*

Tenancy at will—*continued.*

sion is not a lease. A tenancy from Fasli to Fasli is not a tenancy-at-will, but a tenancy from year to year. In the absence of custom to the contrary, no tenant from year to year in this country can be ejected without being served at a reasonable time beforehand with a notice to quit at the period of the year at which the tenancy commenced. ABDULLA RAWUTAN *v.* PAKKERI MOHOMED RAWUTAN [I. L. R., 2 Mad., 346

20. ——— *Suit for ejectment.*—Disputes arose between the Government and an adjacent proprietor, *M. S.*, respecting a piece of alluvial land gained by accretion, of which *M. S.* was then in possession. The Government required the land for public improvements. After some correspondence an agreement was entered into by which *M. S.* undertook to relinquish in favour of Government all claim to the proprietary right, and to rent the land from Government, upon the latter allowing him to remain in possession until the projected public improvements rendered it necessary for him to vacate the land. Possession was given to Government, *M. S.* holding the land from Government at a fixed rent, and undertaking to quit possession at a month's notice. Improvements in the neighbourhood having been made by Government and *M. S.* being dead, notice to quit was served on his representatives, who refused to quit, on the ground that the improvements were not such public improvements as were contemplated by the correspondence and agreement. In a suit for ejectment,—*Held* that *M. S.* was, under the agreement, a mere tenant-at-will and that the suit was maintainable, and the representatives of *M. S.* had no defence to the action. ANUNDOMOHEY DOSSEE *v.* DOE D. EAST INDIA COMPANY [8 Moore's I. A., 43: 4 W. R., P. C., 51

21. ——— Lease to widow.—*Re-marriage and death of widow.—Right of second husband to possession.*—Upon the death of a tenant under a jaghirdar, his widow passed a kabuliat agreeing to hold the land on the same terms as her late husband; and that in the event of her marrying again she should have no right to the holding, but that if she got her husband to live in her house she might continue to hold the land. She afterwards re-married, and held the land till her death. In an action brought by the second husband to recover possession of the land, as the heir of his wife,—*Held* (reversing the decrees of both the Courts below) that the plaintiff had no right to recover possession, and his wife had merely a personal interest in the holding, which ceased upon her death. KAMALUDDIN HUSEN KHAN *v.* BHIKA MANJI . . . 4 Bom., A. C., 49

22. ——— Provision for renewal.—*Suit for possession.—Stipulation as to duration.*—Where, upon a consideration of the terms set forth in the lease, it was found to be a stipulation that the jote was not to terminate *ipso facto* with the conclusion of the ijara, but that it was open to the parties to make a fresh agreement in respect of the land, upon

LEASE—*continued.*

1 CONSTRUCTION—*continued.*

Provision for renewal—*continued.*

the quantity and rents being measured and assessed in accordance with the productive power of the land, —*Held* that the plaintiff was entitled to a decree for khas possession, the stipulation being extremely uncertain in its character, and the defendants having done nothing for years in response to the proceedings taken by the plaintiff. SHOORUT SOONDRY DABEE *v.* BINNY (JARDINE, SKINNER, & Co.) [25 W. R., 347

23. ——— Nature of grant.—*Intention of parties.—Estate for life or inheritance.*—In order to determine the question whether a pottah granted by a zemindar conveyed an estate for life only or an estate of inheritance,—*Held* that it was necessary to arrive, as well as could be done, at the real intention of the parties, to be collected chiefly from the terms of the instrument, but to a certain extent also from the circumstances existing at the time, and further by the conduct of the parties since its execution. WATSON & CO. *v.* MOHESH NARAIN ROY [24 W. R., 176

24. ——— Words conveying right to hold at fixed rates.—It is not absolutely necessary that any particular form of words should be used in conveying rights to hold at fixed rates. UNNODA PERSHAD BANERJEE *v.* CHUNDER SEKHUR DEB . . . . . 7 W. R., 394

AFSAR MUNDUL *v.* AMEEN MUNDUL [8 W. R., 502

KAILAS CHANDRA ROY *v.* HIRALAL SEAL. FAKIR CHAND GHOSE *v.* HIRALAL SEAL [2 B. L. R., A. C., 93: 10 W. R., 403

25. ——— Hereditary lease.—*Continuance of lease dependent on continuance of superior tenure.*—Though the lease in this case contained no words importing an hereditary character, yet it was held to have the effect of being hereditary, on the ground that the period of its continuance was not dependent on the life of any party, whether lessor or lessee, but on the continuance of the superior tenure. LEKRAJ ROY *v.* KANHYA SINGH . 17 W. R., 485

26. ——— *Pottah for building purposes.—Omission of words defining grant.*—A pottah which gave land for building purposes and recited that no abatement of rent was to be granted at any time or for any cause, and that no increase of jumma should ever be demanded, was held distinctly to provide that the land was granted at the rate then fixed for ever, even though no such words were used as "istemrari" or "ba-furzundan." BINODE BEHARY ROY *v.* MASSEYK . . 15 W. R., 494

27. ——— *Absence of words of inheritance in pottah.*—A pottah must not, *primâ facie*, be assumed to give an hereditary interest, though it contains no words of inheritance; "pottah" as used in Act X of 1859 being a generic term, which embraces every kind of engagement between a zemindar and his under-tenants or ryots. Where proof

**LEASE**—*continued.*

1. CONSTRUCTION—*continued.*

**Hereditary lease**—*continued.*

exists of long uninterrupted enjoyment of a tenure, accompanied by recognition of its hereditary and transferable character, it is sufficient to supply the want of the words "from generation to generation" in the pottah, and the tenant cannot be dispossessed by his superior. DHUNPUT SINGH *v.* GOOMUN SINGH [9 W. R., P. C., 3: 11 Moore's I. A., 433

28. ——————— *Absence of words fixing rent.—Lease for building purposes.*—Where a pottah recited that the rent was to be paid from father to son, who were to occupy the land and build a house thereon, although there were no formal words to the effect that the rent was never to be changed, the fixed character of the rent was presumed from long and uninterrupted enjoyment and the descent of the tenure to the present occupant. PEAREE MOHUN MOOKERJEE *v.* RAJ KRISTO MOOKERJEE . . . . 11 W. R., 259

29. ——————— *Istemrari.—Hereditary tenure.*—Where, by an old pottah, lands forming part of a zemindari had been leased at a specified rent, but there were no words in the pottah importing the hereditary and istemrari character of the tenure, —*Held* that the absence of such words was supplied by evidence of long and uninterrupted enjoyment, and of the descent of tenure from father to son, whence that hereditary and istemrari character might be legally presumed. SATYA SARAN GHOSAL *v.* MAHESH CHANDRA MITTER [2 B. L. R., P. C., 23: 12 Moore's I. A., 63 11 W. R., P. C., 10

DEEN DYAL SINGH *v.* HEERA SINGH [2 N. W., 338

30. ——————— *Long uninterrupted enjoyment.—Onus probandi.*—To rebut the evidence afforded by long uninterrupted enjoyment, and the descent of the tenure from father to son, it lies upon the party asserting the holding to be from year to year only and determinable at will to prove such assertion. DEEN DYAL SINGH *v.* HEERA SINGH [2 N. W., 338

31. ——————— Although a pottah purported to be a grant only to the particular person to whom it was made, yet as it passed from father to son, and son to grandson, and possession was taken under it and continued from between 75 and 80 years, and the pottah did not contain any word or expression barring inheritance or transfer,—*Held* that the tenure might fairly be presumed to be hereditary. NUBO DOORGA DOSSIA *v.* DWARKA NATH ROY . . . . . 24 W. R., 301

32. ——————— *Assessment, Right of.—Assessment in perpetuity.*—Where a lease of lands to be reclaimed from the sea by the lessee, granted by a former Government to plaintiff, stipulated that the lands should be held free of assessment (maafi) for thirty years, subject to assessment

**LEASE**—*continued.*

1. CONSTRUCTION—*continued.*

**Hereditary lease**—*continued.*

at R1 per bigha in the thirty-first year, to assessment increasing at the rate of ¼ of a rupee per bigha during the six following years, and at the expiration of that istawa (period of annually increasing assessment) should be held at the full assessment of R3 per bigha,—*Held* that, after the expiration of the first thirty-seven years, the lease was one in perpetuity, subject to the annual payment of the sum named as the full assessment and no more. COLLECTOR OF COLABA *v.* GONESH MORESHVAR MEHENDALE . . . . 10 Bom., 216

33. ——————— *"Talook," Meaning of.*—The word "talook" imports a permanent tenure, and where a chittah describes the land to which it relates as a "talook," the presumption, in the absence of any evidence to the contrary, is that it implies a permanent interest. KRISHNO CHUNDER GOOPTO *v.* MEER SAFDUR ALI . 22 W. R., 326

34. ——————— *Meaning of ta bahali bundobust sircar.*—A pottah, under the ordinary meaning of the words "ta bahali bundobust sircar," was to endure as long as the settlement. ODIT NARAIN *v.* MOHESHUR BUX SINGH [Agra, F. B., 52: Ed. 1874, 39

35. ——————— *Mokurrari istemrari.—Hereditary right.*—The words "mokurrari istemrari" contained in a pottah must be taken in themselves to convey an hereditary right in perpetuity. LAKHU COWAR *v.* ROY HARI KRISHNA SINGH . 3 B. L. R., A. C., 226: 12 W. R., 3

MUNRUNJUN SINGH *v.* LELANUND SINGH [3 W. R., 84

LEELANUND SINGH *v.* MONORUNJUN SINGH [5 W. R., 101

36. ——————— *"Mokurrari istemrari."—Quære,*—Whether, in the absence of any usage, the words "mokurrari istemrari" mean permanent during the life of the grantee, or permanent as regards hereditary descent. LILANUND SINGH *v.* MUNORUNJUN SINGH . . 13 B. L. R., 124 [L. R., I. A., Sup. Vol., 181

37. ——————— *Perpetual lease. —Suit for enhancement of rent.*—A zemindar in the district of Cuttack granted the following lease: "In the Chawdnak 1236 Amli, 17th day of the month of Brisa, Sri Hari Chuckerbutty grants to Nared Manti this istemrari (permanent) pottah. For that I execute istemrari pottah of my Khardigi Ayma in mouzah Bhimpore. Jote land, measuring four bighas, being previously to this in our occupation, you will cultivate and cause to be cultivated hereafter. Mokurrari (fixed) rent at R8-12 sicca you will pay from year to year. In case of flood or drought you will be allowed a reduction of rent according as such reduction will be allowed to others. To this Hari Chuckerbutty assents." A subsequent purchaser of the zemindari right obtained a fresh settlement of the zemindari under Government. The son and grandson of the

**LEASE**—*continued.*

1. CONSTRUCTION—*continued.*

**Hereditary lease**—*continued.*

grantee held successively under the lease. In a suit by the zemindar against the holder for enhancement of rent,—*Held* that the pottah was a hereditary lease fixing the rent in perpetuity, and that it was binding on the representatives of the grantor. KARUNAKAR MAHATI *v.* NILADHRO CHOWDHRY

**[5 B. L. R., 652: 14 W. R., 107**

**38.** ——————— *Mokurrari.—Words of inheritance.*—In 1798 a mokurrari pottah of a portion of a zemindari was granted to *A.* at a consolidated jumma of R6 for the term of four years, and at a uniform rent of R25 from the expiration of that period, to be paid year after year. The pottah provided that the mokurraridar should make improvements; that profits arising therefrom should belong to him, and not to the grantor; and that he should not dispose of any portion of the land granted without the permission of the grantor. No words of inheritance were used in the grant. The grantee died in 1875, when the heirs of the grantor sued to recover possession of the estate from the heirs and assigns of *A.* The defendants contended that the grant was transferable and hereditary, and that *A.* his heirs, and assigns were entitled to it in perpetuity. *Held* that the grant was for the life of *A.*, only, and not in perpetuity. The use of the word "mokurrari" alone in a lease raises no presumption that the tenure was intended to be hereditary, and therefore, in order to decide whether a mokurrari lease is hereditary, the Court must consider the other terms of the instrument under which it is granted, the circumstances under which it was made, and the intention of the parties. SHEO PERSHAD SINGH *v.* KALLY DASS SINGH . **I. L. R., 5 Calc., 543: 5 C. L. R., 138**

In the same case on appeal to the Privy Council, *Held*—The word "mokurrari" does not necessarily import perpetuity, although it may do so. Used in connection with the grant of an ijara in a pottah, this word is not inconsistent with such interest being only for life. By a pottah was granted a mokurrari ijara at a fixed rent in a mouzah, consisting mainly of waste lands, part of the grantor's zemindari, without words of inheritance. On the death of the grantee, who brought the land under cultivation and died in possession many years after, the question arose whether the pottah was for life, or for a heritable and transferable estate. *Held* that there being in the pottah no words importing perpetuity, notwithstanding the use of the word "mokurrari," the question was whether the intention of the parties that the grant should be perpetual was shown with sufficient certainty in any other way,—*e.g.*, by the other terms of the instrument, its objects, the circumstances under which it was made, or the conduct of the parties to it. *Held*, also, that such intention was not shown. BILASMONI DASI *v.* SHEOPERSHAD SINGH

**[I. L. R., 8 Calc., 664: L. R., 9 I. A., 33: 11 C. L. R., 215**

**39.** ——————— *Meaning of the words "istemrari mokurrari" in connection with grant of lands.—Intention of parties.*—The words "istemrari mokurrari" in a pottah granting land do not of themselves denote that the estate granted is an estate of inheritance. Not that such an estate cannot be so granted unless, in addition to the above words, such expressions as "bafurzundan," or "naslan bad naslan," or similar terms are used. Without the latter, the other terms of the instrument, the circumstances under which it has been made, or the conduct of the parties, may show the intention with sufficient certainty to enable the Courts to pronounce the grant to be perpetual; the above words not being inconsistent therewith, though not themselves imparting it. *Held*, accordingly, that where the words "mokuarrari istemrari" were used in connection with a grant in a pottah (as it was also held in another case where the instrument was termed "mokurrari ijara pottah"), that the question was whether the intention of the parties that the grant should be perpetual had, or had not, been shown with sufficient certainty in any other way,—*e.g.*, by the other terms, by the objects or circumstances, of the grant, or by the acts of the parties. And held that in the present case the intention was so shown. TULSHI PERSHAD SINGH *v.* RAMNARAIN SINGH

**[I. L. R., 12 Calc., 117: L. R., 12 I. A., 205**

**40.** ——————— *Istemrari pottahs.—Hereditary title.—Construction of pottah.*—In an instrument described as a perpetual lease (pottah istemrari) the lessor covenanted as follows: "So long as the rent is paid, I shall have no power to resume the land. The lessees shall have no power to sell the land in any way. I have therefore executed these few words by way of a perpetual lease, that it may be used when needed." Upon the death of one of the lessees, his heir, who was in possession of the land which formed the subject of the lease, claimed to be the lessee of a moiety thereof on the ground that the lease was one creating a heritable interest. The claim was allowed by the settlement officer, and the lessor thereupon brought a suit to have it declared that he was entitled to eject the defendant, under section 36 of the N.-W. P. Rent Act (XII of 1881), as being a tenant-at-will, and to set aside the settlement officer's order. *Held* that the mere use of the word "istemrari" in the instrument did not *ex vi termini* make the instrument such as to create an estate of inheritance in the lessee; that the words "so long as the rent is paid I shall have no power to resume the land" did not show any meaning or intention that the lease was to be in perpetuity; and that the defendant (even should he be the legal heir and representative of one of the lessees) could not resist the plaintiff's claim. *Tulshi Pershad Singh* v. *Ramnarain Singh, L. R., 12 I. A., 205*, followed. *Lakhu Kowar* v. *Harikrishna Singh, 3 B. L. R., 236*, dissented from. GAYA JATI *v.* RAMJIAWAN RAM

**[I. L. R., 8 All., 569**

**41.** ——————— **Amount of land leased.**—*Boundaries.—Estimated area.*—In order to ascertain what land is actually leased, it is necessary to look to the boundaries mentioned in the lease, and

**LEASE**—*continued.*

1. CONSTRUCTION—*continued.*

**Amount of land leased**—*continued.*

not to the estimated area. ABDOOL MANNAH *v.* BARODA KANT BANERJEE . **15 W. R., 394**

**42.** ——— *Boundaries.—Estimated area.*—Where a pottah purports to convey so many bighas of land "more or less" within certain boundaries, the test of what is really conveyed is not the area of the land but its boundaries. SHEEB CHUNDER MAHNEEAH *v.* BROJONATH ADITYA **[14 W. R., 301**

**43.** ——— *Ascertainment by measurement.—Provision for rate of rent.*—Plaintiff let to defendant a quantity of land, of which he was not certain how much was in cultivation and how much was jungle, at a total jumma to be eventually settled on the footing of 12 annas per bigha culturable, and 10 annas per bigha jungle, on the number of bighas of each sort which existed at the end of the year next preceding the date of the pottah, the calculation of the rent to be made permanently by effecting a measurement within six months, until which time defendant should pay a provisional jumma at 12 annas a bigha on a given number of bighas, amounting to a specified sum. Plaintiff sued for arrears of rent, no measurement having taken place, though years had elapsed. *Held* that, until ascertainment by measurement of a settled jumma, the rent due under the terms of the pottah would be the provisional sum mentioned above; but if the delay in such ascertainment were due to default of plaintiff, defendant would be entitled to set up the state of things which he believed would be arrived at if measurement were effected. BHARUTH CHUNDER ROY *v.* BEPIN BEHAREE CHUCKERBUTTY **[9 W. R., 495**

**44.** ——— *Excess land, Rent of.*—*B.* having covenanted to take from *A.* without enquiry 18 bighas of land at a rent of R1 a bigah, with a stipulation that if on enquiry any excess land should be found he would pay the same rate of rent for such excess; or if the area should be found less than 18 bighas, that he would receive a proportionate deduction from his rent. A measurement took place, and an excess was discovered. *A.* then sued *B.* for rent on the entire quantity of land. *Held* that *B.* was liable to pay rent for the excess at the rate of R1 a bigha, and that the tender of a pottah by *A.* to *B.* was not necessary. RADHIKA PROSUNNO CHUNDER *v.* NEHALEE CHURN DEY . **15 W. R., 410**

**45.** ——— **Grant at fixed annual rent.**—*Resumption by Government, Effect of.*—A zemindar granted his zemindari by pottah or lease as a putni talook at a fixed annual rent. Adjacent to the demised lands were other lands called bheel bhuruttee lands, in which the zemindar had only a temporary interest, but which lands were included in the pottah. The bheel bhuruttee lands were afterwards resumed by Government under Bengal Regulation II of 1819, and assessed separately from the zemindari, the jumma being paid by the lessee for a period of

**LEASE**—*continued.*

1. CONSTRUCTION—*continued.*

**Grant at fixed annual rent**—*continued.*

nine years. *Held*, in a suit brought by the lessees against the lessor's representative for remission of the rent paid on the resumed lands, out of the fixed annual rent, that by the terms of the pottah the bheel bhurrutee lands were not included in the fixed annual rent. PRANNATH CHOWDRY *v.* SURNOMOYE DOSSEE . . . **9 Moore's I. A., 431**

**46.** ——— **Covenant in lease to grant a new lease.**—*Subsequent lease without covenant for renewal.—Held*, by the Court of first instance, and confirmed on appeal, that a covenant in a lease for years to grant a new lease on the expiration of the existing term under and subject to all covenants, as in the first lease contained, is satisfied, if such new lease contain the like covenants as the former lease, except the covenant for renewal. PENINSULAR AND ORIENTAL STEAM NAVIGATION COMPANY *v.* KONNOYLALL DUTT . . . . **2 Hyde, 21**

**47.** ——— **Stipulation to renew lease.**—*Re-letting.—Holding over.*—Where a kabuliat stipulates that *A.*, the tenant, shall not, on the expiry of his lease, be liable to pay a rent higher than that reserved in the lease, and that the landlord shall not then let the land to any other tenant, but that *A.* shall not be entitled to erect any permanent building, or to excavate a tank, it was held that under these stipulations the landlord was not bound to re-let the land to *A.* at the close of the term of the lease. *Held*, also, that the fact of his allowing the tenant to hold over did not affect the landlord's right to resume possession after due notice. FUKEEROONISSA BEGUM *v.* CHUNDER MONEE DOSSEE . . **12 W. R., 538**

**48.** ——— **Covenant for renewal.**—*Ambiguous covenant.—Right to remove soil and open mines.—Interpretation by acts of the parties.—Estoppel.—Confirmation.—Land Acquisition Act, X of 1870.*—A lease for ninety-nine years made in 1794 by the East India Company to *W.* contained a covenant that the said Company, upon application of the heirs, executors, administrators, and assigns of the said *W.*, would re-grant and renew the said lease thereby made "on the terms and conditions above mentioned," &c. *Held* that the above covenant was not a covenant for perpetual renewal of the lease, but a covenant for a single renewal only. The above lease granted to the said *W.*, his heirs, executors, administrators, and assigns, Bhandarvada Hill "*with the house, buildings, offices, stablings, garden and wells, &c., &c., thereon standing and now in his own occupation or possession.*" It was contended that this clause, if not on the face of it granting the right to remove and sell the soil, was, at all events, ambiguous, and had been interpreted by the subsequent conduct of the parties themselves, who had always recognised the right of the holders of the lease to the soil and stones of the land in question. It appeared that in 1864 the holders of the lease had permitted the E. Company to enter upon the land and to remove the earth and stones of the hill for purposes of reclamation; and that on May 10th, 1870, an indenture had been executed to which

**LEASE**—*continued.*

1. CONSTRUCTION—*continued.*

**Covenant for renewal**—*continued.*

the Secretary of State, the E. Company, and all persons interested in the lease were parties, which indenture recited the above facts and contained mutual releases by the persons interested in the lease, the E. Company, and the Secretary of of State in respect of any claims that might be made against any of them on account of the excavation of the said hill and the removal of the earth and stones therefrom. The said indenture also contained a confirmation, by the Secretary of State, of the lease of 1794. A schedule to the indenture described the property comprised in the lease and specified (*inter alia*) the "*quarries* situated at Bhandarvada Hill." *Held* that the words of the lease of 1794 were not ambiguous, and gave no right to remove the soil and stones, and that the acts of the parties could not be admitted to affect the construction of the lease. *Quære,*—Whether the acts of the parties in removing soil, which removal was not proved to have taken place earlier than 1863, could be called in aid of the interpretation of ambiguous words in the lease of 1794. There was no "*contemporanea expositio.*" Even if the words *quarries* or *mines* had been used in the lease of 1794, they would have given no right to work quarries or mines other than those open when the tenant came in, which, moreover, he might have worked in the absence of such words. To allow the opening of new quarries or mines an express power to that effect must be given. *Held*, also, that the Secretary of State was not estopped by the indenture of May 10th, 1870, from disputing the claimant's right to remove the soil and stones. The claimant's position had not been altered so as to make it inequitable in the Secretary of State now to assert his claims under the lease. *Held*, also, that the indenture of May 10th, 1870, did not operate as a fresh demise of the premises in their condition at the date of the indenture. A confirmation does not operate so as to make the estate confirmed subject to the incidents which it would have had if granted in the condition at the date of the confirmation. IN RE PURMANANDAS JEEWANDAS . **I. L. R., 7 Bom., 109**

49. ——— **Provision for indigo concern passing into hands of others.**—*Assignment of lease from two joint lessees to one of them.*—*N.* and *D.*, having taken a lease of certain lands, jointly gave a kabuliat, agreeing that if within the term of the lease they die, or if in any other way the concern passed into the hands of others, then their heirs, or those who would succeed to their rights, would pay the rent. After the kabuliat was given, *N.* made over his interest in the lease to *D.* *Held* that, in passing from *N.* and *D.* to *D.* alone, the lease had passed into the hands of "others" within the meaning of the kabuliat, and that *D.* occupied the position of the persons contemplated by the terms "those who will succeed to our rights." BHOBANEE CHUNDRA MITTER *v.* MACNAIR . . . **10 W. R., 464**

50. ——— **Joint lease.**—*Joint liability for rent.*—When a lease is granted jointly to two tenants, both are jointly liable for the rent due under the lease, and one of them cannot divide this joint

**LEASE**—*continued.*

1. CONSTRUCTION—*continued.*

**Joint lease**—*continued.*

liability. JOGENDRA DEB ROY KUT *v.* KISHEN BUNDHOO ROY . . . . **7 W. R., 272**

ROOPNARAIN SINGH *v.* JUGGOO SINGH **[10 W. R., 304**

BHOLANATH SIRCAR *v.* BAHARAM KHAN **[10 W. R., 392**

GOUR MOHUN ROY *v.* ANUND MUNDUL **[22 W. R., 295**

51. ——— *Definition of right of each lessee in pottah.*—*Separation of tenures.*—The fact that at the foot of a pottah the right of each lessee was defined was held not to bind the lessor to recognise each part as an independent and separate tenure, and the subsequent separate payments of rents by the tenants was held not to vary the nature of the tenure. BULORAM PAUL *v.* SUROOP CHUNDER GOOHO . . . . . **21 W. R., 256**

52. ——— **Lease of jungle lands.**—*Suit alleging interruption of lease to cut trees, &c.*—*Form of lease.*—Where an application for a lease for farming jungle lands was in its nature general, but the answer was specific and clear, and granted the lease on certain conditions, the answer determined the contract, and was the only contract between the parties. A lessee who sues, alleging that there has been an interruption to his lease to cut or sell the trees on the land included therein, must base his right, first, upon its being a necessary incident of the lease by reason of the objects of the lease; or, secondly, under some positive law; or, thirdly, under some custom to be incorporated in the lease; or, fourthly, under the express terms of the lease. RUTTONJEE EDULJEE SHET *v.* COLLECTOR OF THANNA **[10 W. R., P. C., 13 : 11 Moore's I. A., 295**

53. ——— **Breach of covenant not to injure trees.**—*Construction of kabuliat.*—A kabuliat on which the tenant undertook to preserve certain trees in a jungle and not to injure them in any way, providing that if he relinquished the talook after destroying the jungle he would pay R2,000 as the value of the trees, was construed to contain two distinct covenants, the second being a covenant not to injure the trees, on breach of which damages could be recovered. WOOMA SOONDUREE DOSSEE *v.* RAJKISTO ROY . . . **21 W. R., 366**

54. ——— **Lease of jungle lands by Government.**—*Right to cut timber.*—Where jungle land was let by Government to a tenant for the express purpose of being brought into cultivation, and the lease contained no reservation of the rights of the Government in respect of the cutting of timber trees, the Court held that the parties contemplated that the cutting of such trees by the tenant would be necessary for carrying out the purposes of the lease. KOTUN RAM DOSS *v.* COLLECTOR OF SYLHET **[22 W. R., 523**

55. ——— **Agreement for certain dues in nature of rent.**—*Subsequent Government noti-*

LEASE—*continued.*

1. CONSTRUCTION—*continued.*

**Agreement for certain dues in nature of rent—*continued.***

*fication as to tenure.*—By an agreement entered into between the predecessors of the plaintiff, durmakurtahs of a temple, and the defendants, it was provided that the defendants should have a permanent right of cultivating certain lands belonging to the temple upon payment of the circar tirva and a swamibogam mentioned in the agreement. Subsequently to the agreement the Government notified that the melvarum payable to the Government would be thenceforth permanent and not according to the nerick ascertained by reference to the market prices in certain towns, and the Government stated that any advantage arising from the change of system should go to the ryots themselves. The plaintiffs sued the defendants to recover the balance of the market value of the produce of the land cultivated by the defendants after deducting the amount of circar kist paid by them. *Held* (reversing the decree of the lower Court) that the defendants were only liable to pay the amount of swamibogam mentioned in the agreement, and that no right was acquired by the plaintiffs by virtue of the subsequent arrangement made by the Government. THESIKAM IYENGAR *v.* GANAPATHY IYER . . . . . **4 Mad., 320**

56. ——— **Fishery pottah.**—*Deprivation of fishery by order of Court.*—The provision in a fishery pottah that the lessee cannot sue for recovery if, through his own neglect or otherwise, he fail to catch fish, was held to be no bar to the lessee's claim to a refund of rent from the time that possession of the subject of the lease was taken away, by order of a competent Court, from his lessor, and consequently from him. RAM GOPAL SEIN *v.* ALLUM MULLICK **[7 W. R., 405**

57. ——— **Payment of rent.**—*Provision for payment by instalments.*—Where a pottah, after providing for payment of rent by the dur-putnidar "year by year, month by month, and kist by kist," contained a distinct declaration that if the dur-putnidar did not at the end of each month pay up the amount due for that month he should from the first day of the succeeding month pay interest upon the amount in arrear, the Court held that the Judge below was not correct in his construction of the pottah that the dur-putnidar was not bound to pay rent in equal monthly kists, nor liable to interest if he did not so pay it. BHYRUB CHUNDER BANERJEE *v.* AMEEROODEEN . . . **17 W. R., 173**

58. ——— *Payment by instalments.*—It is contrary to usage to pay by monthly kists unless there is a special agreement to that effect. JOY KISHEN MOOKERJEE *v.* JANKEE NATH MOOKERJEE . . . . . **17 W. R., 471**

59. ——— **Proviso for re-letting in case of default in payment of rent.**—*Lease in perpetuity.*—A lease purporting to be for a certain term of years contained a proviso that if at any time the lessee should make default in payment of rent the lessor should be at liberty to let the lands to

LEASE—*continued.*

1. CONSTRUCTION—*continued.*

**Proviso for re-letting in case of default in payment of rent—*continued.***

another lessee. *Held* that the introduction of this proviso did not make the lease operate as a grant in perpetuity so long as the rent was paid, but merely had the effect of enabling the lessor to determine the lease within the term, in case of default by the tenant in paying the rent. SHAHYE ROYEE *v.* BARTON **[Marsh., 250: 2 Hay, 14**

60. ——— **Proviso for default in payment of rent.**—*Appointment of sezawal.—Condition precedent.*—A lease for a term of years contained a proviso that if in any year the rent should be three kists in arrear the lessor might appoint a sezawal, and the lessee would pay his salary; and if, notwithstanding the appointment of such sezawal, the arrears of rent were not paid by the end of the year, the lessor should be at liberty to rescind the lease. *Held* that it was a condition precedent to the right of the lessor to rescind the lease, that he should have appointed a sezawal. LALL LUTCHMEE PERSHAUD *v.* BHOODHUN SINGH . . . **Marsh., 474**

61. ——— **Right of re-entry for non-payment of rent.**—*Act X of 1859, s. 22.*—Where a lease provided that in case of a default in the payment of rent, the lessor should have the power of re-entry without expressly mentioning the mode of effecting it, the lessor was bound to exercise this power according to the provisions of the law, section 22, Act X of 1859. SOLANO *v.* HOORMUT BAHADOOR **[1 Hay, 573**

62. ——— **Right of re-entry.**—*Implied right of re-entry.*—Although a pottah does not contain words specifying the right of re-entry, the Court will give effect to words which, reasonably construed, involve that right. SHADHOO JHA *v.* BHUGWAN CHUNDER OPADHIA . **1 Ind. Jur., N. S., 75 [5 W. R., Act X, 17**

63. ——— *Conditional lease.—Right to recover property.*—If a party leases an estate in putni, reserving to himself the right of re-entry on condition of his wishing to hold the property khas, he cannot sue to recover possession for the purpose of leasing it to a third party. RUGHOONATH COONDOO *v.* HURISH CHUNDER ROY **[W. R., 1864, 326**

64. ——— *Hereditary tenures.—Lessor's right of re-entry.—Cause of action.*—Where there are no words in a lease extending its provisions to other parties beyond the lessee, its term must be interpreted as applicable to the lessee only, unless the Court is able, from the conduct of the parties and the surrounding circumstances, to come to a different conclusion. Where a lease contains a condition whereby the lessor agrees not to put an end to the mokurrari of his lessee, except on the occurrence of a fresh settlement on the part of Government, it does not follow that the lessor intends to constitute a hereditary lease if no Government settlement took place. In such a case a lessor's right to

**LEASE**—*continued.*

1. CONSTRUCTION—*continued.*

**Right of re-entry**—*continued.*

re-entry arises on the death of the lessee; but if the representatives of the lessee have been allowed to hold over by the heirs of the lessor, to whom they have paid rent, the cause of action to a purchaser of the lessor's rights and interests arises on the refusal of the lessee's representatives to permit him to re-enter. LEKHRAJ ROY *v.* KANHYA SINGH . 14 W. R., 262

65. ——— **Proviso against sub-letting.** —*Breach of condition in lease.—Omission of clause for re-entry.—Act X of 1859, s. 23, cl. 5.—Suit for ejectment.*—A lease contained a stipulation that the ryot should give up such part of the land as was under for the cultivation of indigo, and should not sublet the same. *Held* that as the lease contained no proviso for forfeiture, or right of re-entry for the breach of this covenant, the landlord was not entitled upon such breach to maintain a suit under Act X of 1859, section 23, clause 5, to eject the ryot. GOOROOPERSAUD SIRCAR *v.* PHILIPPE

[Marsh., 366: 2 Hay, 451

66. ——— *Breach of condition.*—Where a lease contained a stipulation against sub-letting without the lessor's consent, and the lease violated this stipulation, it was held that the stipulation was a reasonable one, and that the lessor might either bring an action for damages for its breach, or a suit for an injunction to restrain such sub-letting by the lessee. MOHANA *v.* SADODIN

[7 Bom., A. C., 69

67. ——— **Right to assign or sub-let.** —*Conditions attached to zemindar's estate.—Construction of lease.*—The right to assign or sub-let is as well established an incident of a tenancy at a rent for a determinate period when the contract of letting is silent on the subject, as it is of an estate for life or of inheritance, and there is nothing in the nature of the conditions attached to a zemindari estate which renders an assignment of a lease of such estate an exception to the general rules. *Held*, on the construction of a lease, that the language did not evidence a contract purely personal to the lessee and his heir so as to exclude the right to assign. VENKATASAMY NAICK *v.* MUTHUVIJIA RAGUNADA RANI KATHAMA NATCHIAR *alias* KULANDAPURI NATCHIAR . . . . . 5 Mad., 227

68. ——— **Prohibition against alienation.**—A pottah which provided that the grantor was not to alienate or lease the property to any other party during the term of the pottah, without giving the lessees under the pottah the refusal, was upheld. MOHIMA CHUNDER SEIN *v.* PITAMBUR SHAHA

[9 W. R., 147

69. ——— *Mulgeni tenure, History and nature of.—Alienation not a necessary incident.—Clause against suffering attachment and sale valid.—Right of re-entry.—Clauses against alienation.—Policy of the law.—Transfer of Property Act, IV of 1882.*—The plaintiff sued to establish his right to attach and sell certain land in execution of a decree obtained by him against a third party who held the land from the defendant under a mulgeni lease. The lease contained a clause which, after forbidding the tenant from alienating it by mortgage, sale, or lease, stipulated that the tenant was not to let it be sold, or attached and sold in satisfaction of judgment-debts, and that if he did, the landlord might take away the land and give it to others for cultivation. The defendant contended that the land could not be attached and sold by reason of this clause. The lower Courts held that the clause was invalid, both because such a restriction on alienation was repugnant to the mulgeni tenure in contemplation of law, and because occurring in a lease which was virtually in perpetuity, it would make the land for ever inalienable, and was, therefore, against public policy. On appeal to the High Court,—*Held* that the clause was not invalid on either ground. The nature and history of the mulgeni tenure considered. The policy of the law, as evidenced by the Transfer of Property Act, IV of 1882, with regard to clauses against alienation, considered. *Held*, also, that if the tenant allowed the land to be attached and sold by not taking measures to satisfy his judgment-debts, it would be a breach, both according to the letter and spirit of the clause in the lease, and would give the lessor a right of re-entry. *Held*, further, that although technically there would be no breach or right of re-entry until attachment and sale had been suffered by the tenant, yet, as the attachment of itself could be of no use to the creditor, since the debtor was already prevented by his lease from alienating, and as it would be necessary, even if the attachment were allowed, to forbid the sale by a concurrent order, the attachment itself, which would under those circumstances be futile, should not be permitted. VYANKATRAYA *v.* SHIVRAMBHAT

[I. L. R., 7 Bom., 256

70. ——— *Lease to an undivided Hindu family. — Partition. — Covenant against alienation.—Alienation voluntary or by act of law.—Attachment and sale.—No clause of forfeiture or re-entry.—Non-payment of rent.—Rights of the muli or landlord.*—The plaintiff leased his land under a mulgeni chetti, or lease at a fixed rent, to defendant No. 1, who then lived in union with his brothers, defendants 2 and 3, and acted as manager of the family. The lease contained a clause against alienation by the lessee by mortgage, sale gift, or otherwise, but did not provide for re-entry or forfeiture in case of breach. A partition of the land among the brothers subsequently took place. The shares of defendants 1 and 2 were afterwards sold, the former at a Court sale in execution of a decree, and the latter by private contract, and were purchased respectively by defendants 4 and 5, who entered into possession. Plaintiff now sued to recover his land, contending that the breach of the covenant against alienation had worked a forfeiture, and likewise for one year's rent, claiming the whole of it from defend-

LEASE—*continued.*

1. CONSTRUCTION—*continued.*

**Prohibition against alienation**—*continued.*

ant No. 1. *Held*, following the decision in *Vienkatraya* v. *Shivrambhat, I. L. R., 7 Bom., 256*, that the restriction against alienation was valid, but went no further than to prohibit alienation by the act of the parties themselves, and then even did not provide for forfeiture or re-entry on breach, and had no application to the case of an alienation by act of law, as by attachment and sale in execution of a decree. That the plaintiff had, therefore, no right to recover possession from any of the defendants,—his only remedy being in damages for breach of the covenant against alienation. *Held*, further, that defendants 1, 2, and 3 were severally liable for the whole amount of the rent claimed, as the lease was taken by defendant No. 1 for the benefit of the undivided family, and the plaintiff was no party to the partition, neither had he at any time recognised defendants 4 and 5 as his tenants. TAMAYA v. TIMAPA

[I. L. R., 7 Bom., 262

2. ZUR-I-PESHGI LEASE.

71. ——— **Nature of zur-i-peshgi lease.**—*Mortgage.*—A zur-i-peshgi lease is nothing but a simple mortgage, and may at any time be cancelled on the advance being proved to have been discharged with interest from the usufruct, or otherwise liquidated by the mortgagor, notwithstanding the non-expiry of the term mentioned in the deed. NUND LALL v. BALUK . . . . . 2 Agra, 122

PULTUN SINGH v. RESHAL SINGH . 1 W. R., 7

72. ——— **Suit to set aside zur-i-peshgi lease.**—*Act X of 1859, s. 25.—Ejectment.*—A zur-i-peshgi lease (which does not provide for its cancelment in the event of a breach of any of its conditions, but provides for the cancelment of all sub-leases) cannot be set aside because of the act of the zur-i-peshgidar granting a kutkina. The kutkina may be set aside, and the zur-i-peshgidar be liable in damages for any injury which may have accrued to the zemindar. Section 25, Act X of 1859, was not applicable to such a case, but only to cases when the period of the lease had expired. But as a zur-i-peshgi lease has always been treated as a mortgage, a suit to set it aside cannot be brought in the Collector's Court unless the terms of the lease distinctly provide for such a course of procedure in the event of a breach of any of its conditions. MAHOMED ALI v. BATOOK DAO NARAIN SINGH

[1 W. R., 52

RUTTUN SINGH v. GREEDHAREE LALL

[8 W. R., 310

73. ——— **Rent not paid when due.**—*Right to set off against advances.*—Where a plaintiff let out in zur-i-peshgee certain property for a fixed period at a certain rental, in consideration of a sum of money advanced, and the defendant withheld and did not tender the rent as it fell due,—*Held* that the plaintiff was entitled to set off the rent so withheld against the money advanced, and was entitled to

LEASE—*continued.*

2. ZUR-I-PESHGI LEASE—*continued.*

**Rent not paid when due**—*continued.*

claim an account as against the defendant, although the period for which the zur-i-peshgi lease had to run had not expired. NURSINGH NARAYAN SINGH v. LUKPUTTY SINGH . . I. L. R., 5 Calc., 333

74. ——— **Collection of rents by zemindar.**—*Right to recover rents so collected.*—A zemindar, after he had granted a zur-i-peshgi lease, collected the rents from the ryots. *Held*, first, that the lessee was entitled to treat the rents so received as a payment of rent under the lease; and, secondly, was entitled to recover from the zemindar the amounts of rents so received in excess of the rent due under the lease. RAMPERSHAD VOGUT v. RAMTOHUL SINGH . . . . . Marsh., 655

75. ——— **Suit by mortgagee for balance uncollected.**—A mortgagor granted a ticca lease of the mortgaged land for ten years to *B. R.*, and under an assignment executed by the mortgagor it was arranged between him and the mortgagee that the latter should pay himself off the ticca rents at a certain rate annually until the realisation of the mortgage-debt with principal and interest. *Held* that, until the mortgagee could prove that something had happened to disturb the arrangement made between him and the mortgagor under the terms of the deed of assignment, he could not, either according to law or the terms of the contract, call upon the mortgagor or his representatives to pay the balance of the mortgage-debt, or to have that balance realised from the sale of the mortgaged property. JUNESSUR DASS v. LALLA RAMDHUNEE LALL. 17 W. R., 263

76. ——— **Usufructuary lease.**—*Right to have property sold.*—Where a lease gives the lessee the right to continue in possession until money borrowed from him is liquidated, the lessor is put in the position of a mortgagor, and, to the extent of the security given, the lessee is in the position of a mortgagee, but the lessee is not entitled to have the property sold. KEWUL SAHOO v. RASH NARAYAN SINGH . . . . . 13 W. R., 445

LEASEHOLD PROPERTY.

*See* SECURITY FOR COSTS—SUITS.

[7 B. L. R., Ap., 60

LEAVE TO APPEAL GRANTED WITHOUT AUTHORITY.

*See* PRIVY COUNCIL, PRACTICE OF—SPECIAL LEAVE TO APPEAL

[15 B. L. R., 221

LEAVE TO APPEAR AND DEFEND.

*See* NEGOTIABLE INSTRUMENTS, SUMMARY PROCEDURE ON— 6 B. L. R., Ap., 64

[1 Ind. Jur., N. S., 395

9 B. L. R., 441

LEAVE TO DEFEND SUIT WITHOUT FEES.

*See* INSOLVENT ACT, s. 36.

[7 B. L. R., Ap., 61

**LEGACY.**

*See* HUSBAND AND WIFE.
[I. L. R., 1 All., 762, 772

*See* CASES UNDER WILL—CONSTRUCTION.

——— Suit for—

*See* JURISDICTION—CAUSES OF JURISDICTION—CAUSE OF ACTION—LEGACY.
[16 W. R., 305

*See* PARTIES—PARTIES TO SUITS—LEGACY, SUIT FOR— . 13 B. L. R., 142

*See* WILL—CONSTRUCTION.
[8 B. L. R., 244
9 B. L. R., Ap., 4

——— Assignment of, to executors.—*Void assignment.—Semble,*—That an assignment by a legatee to an executor of a legacy is void. VAUGHAN *v.* HESELTINE . . . I. L. R., 1 All., 753

*See* HURST *v.* MUSSOORIE BANK
[I. L. R., 1 All., 762

and BEERESFORD *v.* HURST
[I. L. R., 1 All., 772

**LEGAL NECESSITY.**

*See* CASES UNDER HINDU LAW—ALIENATION—ALIENATION BY WIDOW.

**LEGAL PRACTITIONERS ACT (XVIII OF 1879).**

*See* CRIMINAL PROCEEDINGS.
[I. L. R., 6 Mad., 252

*See* FALSE EVIDENCE—GENERALLY.
[I. L. R., 6 Mad., 252

*See* SUPERINTENDENCE OF HIGH COURT—CIVIL PROCEDURE CODE, 1882, s. 622.
[I. L. R., 9 Mad., 375

——— s. 10.

*See* MOOKTEAR . I. L. R., 4 All., 375

*See* PLEADER—REMOVAL, SUSPENSION, AND DISMISSAL . I. L. R., 4 All., 375

——— s. 12.

*See* PLEADER—REMOVAL, SUSPENSION, AND DISMISSAL . I. L. R., 7 All., 290

——— s. 15.

*See* PLEADER—REMOVAL, SUSPENSION, AND DISMISSAL . I. L. R., 10 Calc., 256

——— ss. 27, 28, & 30.

*See* PLEADER—REMUNERATION.
[I. L. R., 9 Mad., 375

——— s. 32.

*See* MOOKTEAR . I. L. R., 4 All., 375

*See* PLEADER—REMOVAL, SUSPENSION, AND DISMISSAL . I. L. R., 4 All., 375

——— s. 40.

*See* PLEADER—REMOVAL, SUSPENSION, AND DISMISSAL . I. L. R., 10 Calc., 256

**LEGAL REMEMBRANCER, APPEARANCE BY—**

*See* PRACTICE—CRIMINAL CASES.
[I. L. R., 4 Calc., 20

**LEGISLATURE, POWER OF—**

*See* APPEAL TO PRIVY COUNCIL—CASES IN WHICH APPEAL LIES—SUBSTANTIAL QUESTION OF LAW.
[I. L. R., 1 Calc., 431

*See* BENGAL REGULATION III OF 1818.
[6 B. L. R., 392, 459

*See* BOMBAY ACT I OF 1865, ss. 35, 48.
[I. L. R., 1 Bom., 352

*See* DIVORCE ACT, s. 2.
[I. L. R., 10 Bom., 422

*See* GOVERNOR OF BOMBAY IN COUNCIL.
[8 Bom., A. C., 195
I. L. R., 8 Bom., 264

*See* GOVERNOR OF MADRAS IN COUNCIL.
[2 Mad., 439

*See* JURISDICTION OF CRIMINAL COURT—EUROPEAN BRITISH SUBJECTS.
[7 Bom., Cr., 6
14 B. L. R., 106

*See* JURISDICTION OF CRIMINAL COURT—GENERAL JURISDICTION.
[I. L. R., 3 Calc., 63
I. L. R., 4 Calc., 172

*See* OFFENCE COMMITTED ON THE HIGH SEAS . . . 7 Bom., Cr., 89
[8 Bom., Cr., 63

*See* SMALL CAUSE COURT, MOFUSSIL—PRACTICE AND PROCEDURE—MISCELLANEOUS CASES . I. L. R., 1 All., 87

**LEGITIMACY.**

*See* CASES UNDER HINDU LAW—MARRIAGE.

*See* CASES UNDER MAHOMEDAN LAW—ACKNOWLEDGMENT.

**LEPROSY, INCURABLE—**

*See* CASES UNDER HINDU LAW—INHERITANCE—DIVESTING OF, EXCLUSION FROM, AND FORFEITURE OF INHERITANCE—LEPROSY.

**LESSEE, RIGHT OF—**

*See* ABATEMENT OF RENT
[B. L. R., Sup. Vol., 70

**LESSEE OF GOVERNMENT.**

*See* LIMITATION ACT, 1877, ART. 149 (1859, s. 17) . 1 B. L. R., A. C., 134

**LESSOR AND LESSEE.**

*See* JURISDICTION OF CIVIL COURT—RENT AND REVENUE SUITS, N.-W. P.
[I. L. R., 1 All., 338

**LESSOR AND LESSEE**—*continued.*

*See* CASES UNDER LANDLORD AND TENANT.

*See* CASES UNDER TRANSFER OF PROPERTY WHILE TRANSFEROR IS OUT OF POSSESSION.

**LETTER FROM JUDGE.**

*See* EVIDENCE—CIVIL CASES—MISCELLANEOUS DOCUMENTS—LETTERS.
[1 C. L. R., 239

**LETTER OF ADVICE.**

*See* EVIDENCE ACT, S. 32, CL. 2.
[9 B. L. R., Ap., 42

**LETTER OF LICENSE.**

*See* CONSIDERATION.
[2 Ind. Jur., N. S., 243

**LETTERS BETWEEN MEMBERS OF JOINT FAMILY AND KURTA OF THE FAMILY.**

*See* EVIDENCE—CIVIL CASES—MISCELLANEOUS DOCUMENTS—LETTERS.
[12 B. L. R., 317
19 W. R., 356

**LETTERS OF ADMINISTRATION.**

*See* CASES UNDER CERTIFICATE OF ADMINISTRATION.

*See* COSTS—SPECIAL CASES—LETTERS OF ADMINISTRATION.
[I. L. R., 2 Bom., 9

*See* CASES UNDER COURT FEES ACT, SCH. I, ART. 11.

*See* ILLEGITIMACY . 11 B. L. R., Ap., 6

*See* PRACTICE—CIVIL CASES—LETTERS OF ADMINISTRATION.
[1 Ind. Jur., N. S., 10

——— Duty payable on—

*See* CASES UNDER COURT FEES ACT, SCH. I, ART. 11.

——— with will annexed, Grant of—

*See* SUCCESSION ACT, S. 258.
[I. L. R., 1 Calc., 149

1. ——— **Jurisdiction of High Court.**—*British-born subject dying at Moulmein.*—In the case of a British-born subject dying and leaving assets in Moulmein but none in Calcutta, and a will dated 5th August 1865, before Act X of 1865 came into operation,—*Held* that the executrix could not obtain probate or letters of administration with the will annexed from the High Court in Bengal. SAUNDERS *v.* NGA SHOAY GEEN . . 8 W. R., 3

2. ——— *High Court, N.-W. P.—Administrative operation in Bengal.*—A British subject died intestate, leaving property within the jurisdiction of the High Court of the N.-W. Provinces and of the High Court at Fort William. General letters of administration were granted by the High Court of the N.-W. Provinces to the Administrator General of Bengal, who was not then aware that the deceased had left property within the jurisdiction of the High Court at Fort William. On discovering that the deceased had left property within the jurisdiction of the latter Court, the Administrator General applied to that Court for general letters of administration, which were granted by the Court, on condition that he would apply to have the letters of administration granted by the High Court of the N.-W. Provinces recalled. The High Court at Fort William has power to grant to the Administrator General letters of administration which shall operate throughout the whole of the Presidency of Bengal. IN THE GOODS OF NECHTERLEIN
[1 B. L. R., O. C., 19

3. ——— *Attorney of executor.—Administrator General.*—The High Court had no power to grant letters of administration to the attorney of the executor of a deceased in respect of assets situate in the Punjab. The High Court has power to grant letters of administration in respect of such assets to the Administrator General. IN THE GOODS OF DUNCAN . . 1 B. L. R., O. C., 3

4. ——— *Succession Act (X of 1865), ss. 212, 213.—Attorney within jurisdiction of Court.*—Under sections 212 and 213, Act X of 1865, it is necessary that the attorney applying for letters of administration should be within the jurisdiction of the Court. IN THE GOODS OF NESBITT. IN THE GOODS OF BRIANT
[4 B. L. R., Ap., 49

5. ——— *Letters of administration or probate from Supreme Court.*—The obtaining of probate or letters of administration from the late Supreme Court is no ground for subjecting the party obtaining them to the jurisdiction of the High Court in matters connected with the estate in respect to which probate or letters of administration were so obtained. LESLIE *v.* INGLIS . 1 Hyde, 67

6. ——— *Widow not resident in any zillah.—Act XXVII of 1860.—Act VIII of 1865.*—Where a widow, not being resident in any zillah, has not been able to get a certificate under Act XXVII of 1860, letters of administration were, on the consent of the widow, directed to issue to the Administrator General. IN THE MATTER OF DAMOODAR DOSS . . Bourke, Test., 6

7. ——— **Jurisdiction of Recorder's Court.**—The Recorder's Court had the same powers in respect to the grant of probates to the estates of natives as the High Court before and after the passing of the Indian Succession Act,—*i.e.*, it could not grant probates of the will of a Hindu in any case in which, according to the Hindu law of inheritance and succession, the testator had no power to make a will; and, in dealing with the will after probate has been granted, the Court could not give effect to

**LETTERS OF ADMINISTRATION.—Jurisdiction of Recorder's Court—*continued.***

it, so far as it is contrary to the Hindu law of inheritance. *Quære,*—Whether the Recorder's Court has power to grant letters of administration, or such letters with a will annexed, to the estates and effects of a native of British India; but in all cases it must be guided in granting them by the law of inheritance or succession of such native, and it cannot grant administration to the estate of a Hindu, Mahomedan, or Bhuddist which would interfere with such law. IN THE MATTER OF THE PETITION OF FUKEEROODREN ADAM SHAH . **11 W. R., 413**

8. ——— **Administration with will annexed.**—*Act VIII of 1855, s. 17.—Pecuniary legatee.—Administrator General.*—A pecuniary legatee is not entitled to letters of administration with will annexed in preference to a creditor, and therefore is not entitled, under sections 10 and 17 of Act VIII of 1855, to a grant of administration in preference to the Administrator General. IN THE GOODS OF VIEGAS . . . . **1 Bom., 103**

9. ——— **Ground for refusing letters of administration.**—*Act VIII of 1855, s. 30.*—The statement of a belief by the Administrator General that applicants for probate are about to make charges which section 30, Act VIII of 1855, prohibits, and thereby renders it illegal for them to "receive or retain," is not a sufficient ground for inducing the Court to refuse letters of administration to applicants otherwise well entitled, and whose application is altogether *dehors* the Administrator General's Act. IN THE GOODS OF BELLASIS. FOGGO *v.* LOUDON **[1 Ind. Jur., O. S., 139**

10. ——— *Minor Hindu widow.—Guardian.—Special citation.—Caveat.*—Upon an application by the father of an infant Hindu widow for the grant of letters of administration to him as her guardian and as guardian of the estate of her deceased husband, and of the estate of the husband's mother, it appeared that the only property of the husband consisted of a sum of money ordered to be paid to him under a certain decree, upon his constituting himself the representative of the mother. This he had not done. It also appeared that there were no unliquidated debts due by the husband. The sum of money in question was in the hands of the Official Trustee. *Held* that letters of administration could not be granted to the father, but that the widow could apply when she came of age, and that until that time the Official Trustee could pay the income to her next friend for her maintenance. A special citation had been served on the step-mother of the husband, and she had entered a caveat. *Held* that she had no right to enter a caveat simply because she had received a special citation. IN THE GOODS OF HURRY DOSS BONERJEE . **I. L. R., 4 Calc., 87**

11. ——— **Limited grant.**—*Succession Act (X of 1865), s. 190.—Hindu Wills Act (XXI of 1870).*—If Hindus take out letters of administration at all, they must take out general letters. Letters of administration limited to certain property cannot be granted. IN THE GOODS OF RAM CHAND SEAL **[I. L. R., 5 Calc., 2: 4 C. L. R., 290**

12. ——— *Grant to Hindu.—Probate Act, V of 1881, s. 4.*—Certain joint property in which five brothers were interested being the subject of a suit in which the rights of all parties were fully ascertained and decreed; one of such parties (who died after the decree) was declared entitled to a 5-30th share in the joint estate. Subsequently to this decree several orders were made in the suit, appointing a receiver, ordering partition and excluding certain properties from partition, and directing an account. On partition, a 5-30th share in the properties ordered to be partitioned was allotted and made over to the guardian of the infant children of the sharer who had died, the remainder of the unpartitioned property being in the hands of the receiver. On the taking of the account, it was ascertained that the deceased sharer had during his lifetime overdrawn from the joint estate, and that the sum so overdrawn by him would have to be made good out of the 5-30th share decreed to him. It being alleged by the present petition that the sum allotted to him would be insufficient to cover the deficiency, and there being certain Government securities and a small sum in cash belonging to the private estate of such deceased sharer in the hands of the Bank of Bengal, the Court, on an application made for the purpose, directed letters of administration, limited to the Government securities and cash, to issue, considering that the facts of the case warranted a departure from the rule laid down in *In the goods of Ram Chand Seal, I. L. R., 5 Calc., 2.* IN THE GOODS OF SUTTYA KRISHNA GHOSAL **[I. L. R., 10 Calc., 556**

13. ——— **Grant in respect of immoveable and moveable property.**—*Estate of deceased Hindu, consisting of immoveable and moveable property.*—Except under special circumstances, letters of administration to the estate of a deceased Hindu must be taken out in respect of the immoveable as well as the moveable property forming part of such estate. IN THE GOODS OF GRISH CHUNDER MITTER . **I. L. R., 6 Calc., 483: 7 C. L. R., 593**

14. ——— **Lost will.**—*Administration with will annexed.—Succession Act (X of 1865), ss. 208-209.—Hindu Wills Act (XXI of 1870), s. 2.*—The fact that a will has been lost is not, if its contents be satisfactorily proved, any bar to obtaining a grant of letters of administration with will annexed. Sections 208 and 209 of the Succession Act (X of 1865) apply to the cases of granting letters of administration with will annexed to the estates of Hindus, where the will was executed after the 1st of September 1870. ISHUR CHUNDER SURMAH *v.* DOYAMOYE DEBEA . **I. L. R., 8 Calc., 864: 11 C. L. R., 135**

15. ——— **Administrator of estate of deceased Hindu.**—*Suits brought and attachments issued before grant of letters of administration.*—The legal status of the administrator of the estate of a

**LETTERS OF ADMINISTRATION.—Administrator of estate of deceased Hindu—*continued.***

deceased Hindu, as compared with the legal status of the administrator of the estate of a deceased person, who in his lifetime was governed by English law, pointed out. Where a Hindu died leaving a widow and no male issue, and two of the creditors of the deceased brought suits against such widow as the legal representative of the deceased, and attached before judgment certain property of the deceased and afterwards obtained judgments against the widow, an application on behalf of the Administrator General, who at the widow's request, but after the judgments were obtained, took out letters of administration to the estate of the deceased, to have such attachments removed, was refused, though the Judge's order, directing that the letters should be issued to the Administrator General, was prior in time to the passing of the judgments; and the judgment-creditors were held entitled to be paid out of the property attached so far as the same proved sufficient for that purpose. LALLCHAUND RAMDAYAL *v.* GUMTIBAI. GHELLA PEMA *v.* GUMTIBAI . . 8 Bom., O. C., 140

16. ——— **Khoja Mahomedan estate.**—*Succession in cases of intestacy of Khoja Mahomedans.—Custom.*—A Khoja, having died intestate and without leaving issue, was survived by his mother (a widow), his wife, and a married sister. *Held* that, according to the custom of the Khojas, his mother was entitled to the management of his estate, and therefore to letters of administration in preference to his wife or sister. HIRBAI *v.* GORBAI [12 Bom., 294

17. ——— *Mahomedan Khoja administrator, Powers of.*—The powers of a Khoja Mahomedan executor or administrator, like those of a Cutchi Mahomedan executor or administrator, seem to be generally limited to recovering debts and securing debtors paying such debts. Where a will gave the executor full powers with regard to the payment of the testator's debts,—*Held* that an administrator with the will annexed who was a Khoja Mahomedan succeeded to those powers, and in a suit brought against him as such administrator by an alleged creditor of the testator's estate represented all the persons interested in the estate. AHMEDBHOY HABIBHOY *v.* VULLEEBHOY CASSUMBHOY [I. L. R., 6 Bom., 703

*See* IN THE MATTER OF ISMAIL HAJI ABDULLA [I. L. R., 6 Bom., 452

18. ——— **Joint letters of administration.**—*Applicant indebted to estate.*—Where there were grounds for believing that one brother was indebted to the estate of a deceased brother, the lower Court, it was held, exercised a wise discretion in refusing to grant letters of administration to such brother jointly with the other brothers of the deceased. IN THE GOODS OF STEPHEN [1 B. L. R., S. N., 3: 10 W. R., 90

19. ——— **Grant of, to Administrator General.**—*Administrator General's Act II of 1874.—Act XIII of 1875.—Rules of High Court, 21st June 1875.*—Grants of letters of administration to the Administrator General are made to him by virtue of Act II of 1874 (the Administrator General's Act), and are not in any way affected by the provisions of Act XIII of 1875 (the Act to amend the Succession Act). The form of grant should be general and unlimited. IN THE GOODS OF HEWSON [I. L. R., 4 Calc., 770: 4 C. L. R., 42

20. ——— **Suit by Hindu widow as administratrix of her husband leaving a minor son.**—*Parties.—Manager.*—A Hindu widow, who has obtained letters of administration from the High Court of the estate of her husband who has left a minor son, is not entitled in such character to maintain a suit with respect to immoveable property left by him. The Court refused to allow such a suit to proceed adding the son as a party, or to treat the plaintiff as manager of the infant, but dismissed the suit with costs. KADUMBINEE DOSSEE *v.* KOYLASH KAMINEE DOSSEE . . I. L. R., 2 Calc., 431

21. ——— **Attorney of executor in England.**—*Costs of entering caveat.—L.*, a British subject possessed of property both in India and England, died in England, leaving a will, by which he appointed four persons to be his executors in England, and *W. D.* his executor in India, "the latter accounting to the former for his intromission, upon which he will charge a commission of three per cent." Probate was granted to the four English executors, but *W. D.* renounced probate. On an application for letters of administration with the will annexed, to be granted to *D. G. L.*, the attorney in India of the English executors, the Court, after directing a special citation to issue to the Administrator General, held that the English executors were intended by the testator to have power of administering his assets in India as well as in England, and therefore *D. G. L.*, as their attorney, was entitled to letters of administration. IN THE GOODS OF LECKIE [15 B. L. R., Ap., 8

22. ——— **Security from administrator of Hindu estate.**—*Personalty.*—The security required from the administrator of the effects of a deceased Hindu extends, as in the case of an English administrator, only so far as to cover the personalty of the deceased. IN THE GOODS OF GOUR CHUNDER THAKOOR . . . 1 Ind. Jur., N. S., 229

**LETTERS OF ASSIGNMENT.**

*See* STAMP ACT, 1869, s. 3, CL. 11. [I. L. R., 2 Calc., 58

**LETTERS PATENT, HIGH COURT, 1865.**

——— *Creation and continuation of High Court.*—The High Court as now existing was continued, not created, by the Letters Patent of 1865. BARDOT *v.* THE "AUGUSTA" . 10 Bom., 110

1. ——— **cl. 10.**—*Giving instructions to counsel.—Reference from Small Cause Court.—Attorney.*—Giving instructions to counsel in a reference

**LETTERS PATENT, HIGH COURT, 1865, cl. 10**—*continued.*

from the Small Cause Court is acting for the suitor within clause 10 of the Letters Patent of the High Court, and can only be done by an attorney of the Court. MORAN v. DEWAN ALI SIRANG [8 B. L. R., 418

2. ——————— *Civil Procedure Code, 1859, s. 17.—Recognised agent.*—Under this clause a "recognised agent" described in section 17, Act VIII of 1859, has not the option of addressing the Court, as the suitor himself may do. PRANNATH CHOWDHRY v. GANENDRO MOHUN TAGORE . 3 W. R., 108

——————cl. 12.

*See* APPEAL—LETTERS PATENT, CL. 12. [13 B. L. R., 91 21 W. R., 204

*See* CASES UNDER JURISDICTION—CAUSES OF JURISDICTION—CARRYING ON BUSINESS OR WORKING FOR GAIN.

*See* CASES UNDER JURISDICTION—CAUSES OF JURISDICTION—CAUSE OF ACTION.

*See* CASES UNDER JURISDICTION—CAUSES OF JURISDICTION—DWELLING OR RESIDENCE.

*See* CASES UNDER JURISDICTION—SUITS FOR LAND.

*See* PRACTICE—CIVIL CASES—LEAVE TO SUE OR DEFEND [I. L. R., 3 Calc., 370

1. ——————— *Jurisdiction of High Court.—Cases under R100.*—The High Court, under Letters Patent, 1862, clause 12, had jurisdiction in all cases where the amount claimed is over R100, whatever may be the amount received. SIKUR CHUND v. SOORINGMULL . . . . 1 Hyde, 272

2. ——————— *Jurisdiction of High Court.—Stat. 15 & 16 Vict., c. 76, ss. 18 and 19; and 9 & 10 Vict., c. 95, s. 128.—Decisions of English Courts.*—The decisions of the English Courts on sections 18 and 19 of the Common Law Procedure Act (15 and 16 Victoria, Cap. 76), relating rather to matter of procedure than of jurisdiction, are not so much in point with regard to the interpretation of clause 12 of the Letters Patent, 1865, as the decisions on section 128 of the English County Courts Act (9 and 10 Victoria, Cap. 95), which are directed to the marking out and limiting of the jurisdiction of the Court. SUGANCHAND SHIVDAS v. MULCHAND JOHARIMAL . . . . . 12 Bom., 113

——————cl. 13.

*See* CASES UNDER TRANSFER OF CIVIL CASE—LETTERS PATENT, HIGH COURT, CL. 13.

——————cl. 15.

*See* APPEAL TO PRIVY COUNCIL—CASES IN WHICH APPEAL LIES—APPEALABLE ORDERS . . 7 B. L. R., 730

**LETTERS PATENT, HIGH COURT, 1865, cl. 15**—*continued.*

1. ——————— *Right of appeal.—Appeal after new Letters Patent.*—Where two Judges decided a case of original civil jurisdiction under the original Letters Patent, but the decree was sealed, and appeal preferred after the amended Letters Patent had come into operation,—*Held* that the right of appeal to the High Court, constituted so as to hear an appeal from two Judges, which existed in such a case under clause 14 of the old Charter, was taken away by clause 15 of the new Charter, as there was no reservation therein that parties should retain any right of appeal which existed before its publication in respect of suits then pending, of judgments given, or of decrees made but not executed. FRAMJI BOMANJI v. HORMASJI BARJORJI . 3 Bom., O. C., 49

2. ——————— *"Judgment."—"Decree."—Per* PEACOCK, *J.*—A judgment under this section means a judgment in the nature of a decree on which action can be taken by the parties, and not merely the opinion expressed by the Judge, whether verbal or in writing, before a decree has been formally drawn out. DOUCETT v. WISE . 2 Ind. Jur., N. S., 280

3. ——————— *Appeal.—"Judgment."—Appealable order.—Order granting mandamus.—Held* (*per* COUCH, *C. J.*, and MARKBY, *J.*, on appeal), the word "judgment" in clause 15 of the Letters Patent of 1865 means a "decision," whether final or preliminary, or interlocutory, which affects the merits of the question between the parties by determining some right or liability. The order of the Court below, that a writ of mandamus should issue, was not a "judgment," therefore no appeal lay from it. JUSTICES OF THE PEACE FOR CALCUTTA v. ORIENTAL GAS COMPANY [8 B. L. R., 433: 17 W. R., 364

*See* HOWARD v. WILSON [I. L. R., 4 Calc., 231: 2 C. L. R., 488

4. ——————— *Interlocutory order.—Quære,*—Whether an interlocutory can be made the subject of an appeal. BAMASOONDERY v. NILMONEY CHUNDER . . . . . Cor., 56

5. ——————— *Appeal from interlocutory order.*—Under clause 15 of the Letters Patent and under the rules of the Bombay High Court an appeal to the High Court from an interlocutory order made by one of its Judges only lies in those cases in which an appeal is allowed under the Code of Civil Procedure and its amending Acts. SONBAI v. AHMEDBHAI HABIBHAI . . . 9 Bom., 398

6. ——————— *Appeal.—Judgment.—Decision on settlement of issues.—Interlocutory order.—Held* that no appeal lay from a decision upon the settlement of issues that a certain hibbanama relied upon by the appellants was invalid. *Per* GARTH, *C. J.*—The word "judgment" in clause 15 of the Letters Patent, 1865, means a judgment or decree which decides the case one way or the other in its entirety, and does not mean a decision or order of an interlocutory character which merely decides some isolated point not affecting the merits or result of

**LETTERS PATENT, HIGH COURT, 1865, cl. 15**—*continued.*

the entire suit. *Per* MARKBY, *J.*—The matter is one more of convenience and procedure than strict law. EBRAHIM *v.* FUCKHURNNISA BEGUM

[I. L. R., 4 Calc., 531: 3 C. L. R., 311

7. ——— *Appeal.—Remand order.*—At the hearing of an appeal before a single Judge of the High Court, the case was remanded to the lower Court for the trial of certain issues of fact, the case being in the meantime retained on the file of the Court. *Held* that the order was not appealable under clause 15 of the Letters Patent. KALIKRISTO PAUL *v.* RAMCHUNDER NAG

[I. L. R., 8 Calc., 147: 9 C. L. R., 461

8. ——— *Civil Procedure Code, ss. 629, 632.—Appeal from one Judge of High Court.*—Clause 15 of the Letters Patent for the High Court of Judicature at Madras, which allows an appeal to the High Court from the judgment of one Judge of that Court, is controlled by section 629 of the Code of Civil Procedure, which provides that an order of a Civil Court rejecting an application for review of judgment shall be final. ACHAYA *v.* RATNAVELU

[I. L. R., 9 Mad., 253

9. ——— *Civil Procedure Code, ss. 588, 592.—Order of Judge of High Court rejecting application for leave to appeal as a pauper.*—Clause 15 of the Letters Patent of the High Court at Madras being controlled by section 588 of the Code of Civil Procedure, no appeal lies from the order of a single Judge of the High Court made under section 592 of the Code of Civil Procedure rejecting an application for leave to appeal *in formâ pauperis.* IN RE RAJAGOPAL . . I. L. R., 9 Mad., 447

10. ——— *Appeal from decision of Division Bench in exercise of civil appellate jurisdiction.—Held* (JACKSON, *J.*, doubting), an appeal lies under clause 15 of the Letters Patent, 1865, from the judgment (not being a sentence or order passed or made in any criminal trial) of a Division Court in the exercise of appellate jurisdiction, when the Judges of such Court are equally divided in opinion, and do not amount in number to a majority of the whole of the Judges. SURNOMOYEE *v.* LUCHMEEPUT DOOGUR

[B. L. R., Sup. Vol., 694: 7 W. R., 52, 512

11. ——— *Difference of opinion between Judges.—Appeal.*—In cases heard by the High Court in its appellate jurisdiction, where the Judges are equally divided in opinion, a party desirous of appealing is bound to appeal under clause 15 of the Letters Patent before he can appeal to the Privy Council. COURT OF WARDS *v.* LEELANUND SINGH

[14 W. R., 298

12. ——— *Difference of opinion between Judges.—Appeal.*—The difference of opinion between Judges constituting a Division Bench of the High Court, which entitles parties to an appeal to the High Court under clause 15 of the Letters Patent, must be a difference of opinion as to the final and complete decision of the appeal, and not a difference of opinion upon one or more of the points arising in the appeal. IN THE MATTER OF THE PETITION OF OMRAO BEGUM . . . . 13 W. R., 310

**LETTERS PATENT, HIGH COURT, 1865, cl. 15**—*continued.*

13. ——— *Judgment.—Appeal.—Appealable order.—Order rejecting review.*—An order passed by the senior of two Judges of a Division Bench who differed in opinion, dismissing an application for the review of their judgment, is not appealable. Such an order is not a judgment within the meaning of clause 15 of the Letters Patent. RAKU BIBI *v.* MAHOMED MUSA KHAN

[4 B. L. R., A. C., 10

S. C. RUGHOO BIBEE *v.* NOOR JEHAN BEGUM

[12 W. R., 459

14. ——— *Appeal. — Difference of opinion between Judges in review.* — Where two Judges of a Division Bench have concurred in a final decree, the fact that there is a difference of opinion as to one point, amongst others, raised in review on the judgment on which such final decree is based, is no ground for an appeal under clause 15 of the Letters Patent. IN THE MATTER OF THE PETITION OF HURBUNS SAHAY. HURBUNS SAHAY *v.* THAKOOR PERSAD

[I. L. R., 10 Calc., 108: 13 C. L. R., 285

15. ——— *Appealable order.—Judgment.—Decree.—Order passed in suit referred to Commissioner to take Accounts.*—The question whether or not an order is appealable is one for the decision of the Court. An order passed in a suit, referring it to the Commissioner to take the accounts between the parties, is a decree. An order passed on a certificate given (under Rule 371 of the Equity Rules of the Supreme Court) by the Commissioner subsequently to the order of reference, is appealable. *Sonbai* v. *Ahmedbhai, 9 Bom., 398,* explained. *Justices of the Peace of Calcutta* v. *The Oriental Gas Company, 8 B. L. R., 433,* distinguished. HIRJI JINA *v.* NARRAN MULJI . . 12 Bom., 129

16. ——— *Order of Judge in original jurisdiction.*—Under clause 15 of the Letters Patent an appeal lies from an order passed by a single Judge in the original civil jurisdiction of the High Court. KRISTO KISSOR NEOGHY *v.* KADERMOYE DOSSEE

[2 C. L. R., 583

17. ——— *Order allowing commission to Administrator General.*—An order passed by a single Judge of the High Court under Act II of 1874, section 27, allowing to the Administrator General commission at a certain rate, is subject to appeal to the High Court under the 15th clause of the Letters Patent. *Justices of the Peace of Calcutta* v. *Oriental Gas Company, 8 B. L. R., 433;* and *Sonbai* v. *Ahmedbhai Habibhai, 9 Bom., 398,* distinguished from *De-Souza* v. *Coles, 8 Mad., 384,* and from the present case. Though such order, being discretionary, would not under ordinary circumstances be interfered with on appeal, yet, where it is not in accordance with the rule laid down in section 54 of the Act, the Appellate Court will interfere to rectify it. IN THE GOODS OF

**LETTERS PATENT, HIGH COURT, 1865, cl. 15**—*continued.*

LEE CHENGALROYA NAICKER. SOMASUNDARAM CHETTI *v.* ADMINISTRATOR GENERAL
[I. L. R., 1 Mad., 148

18. ——————— *Appeal from decision of Judge in original jurisdiction refusing leave to institute suit under cl. 12 of Letters Patent.*—An appeal lies from the decision of a Judge exercising original jurisdiction refusing to give leave to institute a suit on the original side of the High Court, in a case in which the cause of action has arisen in part within the ordinary original jurisdiction of the High Court; but the Appellate Court ought not to interfere with the discretion exercised by the Judge in such a matter. DESOUZA *v.* COLES . . 3 Mad., 384

19. ——————— *Order refusing to stay proceedings.—Fresh suit after withdrawal without payment of costs.*—An order refusing to stay proceedings where the plaintiff, after being allowed to withdraw a suit with leave to bring another, and the payment of the costs of the former suit has not been made a condition precedent to the bringing of the fresh suit, is an order of an interlocutory character and is not appealable. CHITTO *v.* MUZZUR HOSSAIN
[2 Hyde, 212

20. ——————— *Payment.—Order refusing to confirm award.*—In a suit referred to arbitration under Act VIII of 1859, the arbitrator informed the parties that he had determined to award the plaintiff R1,500 with costs; but a few days afterwards, in consequence of a communication made by the defendant, the arbitrator held another meeting, at which the defendant for the first time contended that, as before the matter was referred to arbitration he had offered the plaintiff R1,500, he ought not to be made to pay the costs of the arbitration, and in support of his contention produced a letter written by the plaintiff's attorneys to his attorneys, which was stated to be "without prejudice," and thereupon the arbitrator decided not to give the plaintiff costs. An application to confirm the award was refused by the learned Judge of the Court of first instance, upon the ground that the defendant had acted improperly in using the letter. *Held*, on appeal by the defendant, that the refusal to confirm the award was a judgment upon the whole subject-matter of the suit, and that an appeal would lie from such a judgment. HOWARD *v.* WILSON
[I. L. R., 4 Calc., 231: 2 C. L. R., 488

21. ——————— *Order of committal for contempt of Court.—Procedure.*—Contempts are in the nature of offences, and, therefore, under clause 15 of the Letters Patent, 1865, an appeal lies from an order of committal for contempt. In dealing with an appeal from such an order, the Appellate Court will not go behind the order the disobedience to which constitutes the contempt. NAVITAHOO *v.* NAROTAMDAS CANDAS . . . I. L. R., 7 Bom., 5

22. ——————— *Act VI of 1874.—Order granting appeal to Privy Council.*—Under clause 15 of the Letters Patent, no appeal lies to the High Court from an order of the Judge in the Privy Council Department granting a certificate that a case is a fit case for appeal to Her Majesty in Council. MOWLA BUKSH *v.* KISHEN PERTAB SAHI
[I. L. R., 1 Calc., 102

S. C. MOWLA BUKSH *v.* HODGKINSON
[24 W. R., 150

23. ——————— *Appeal from order of Judge in Privy Council Department refusing certificate of appeal.*—The Judge in the Privy Council Department refused an application for a certificate, but was stopped from giving his reasons by the petitioner's counsel, who had hopes of making a compromise. The attempt at compromise having failed, the petitioner afterwards appealed under clause 15 of the Letters Patent, when the Judge in the Privy Council Department was referred to, and was not able to deliver any judgment. *Held* that, under such circumstances, no appeal lay to the High Court. TARA CHAND BISWÀS *v.* RADHA JEEBUN MUSTOFEE
[24 W. R., 148

24. ——————— *Appeal from order of Judge granting certificate of appeal to Privy Council.—Act VI of 1874.*—Where an appeal was made from an order of a Judge of the High Court granting a certificate, under Act VI of 1874, to the effect that the subject-matter of a certain suit was of the value of R10,000, and thus allowing an appeal to the Privy Council,—*Held* by a Bench of the Court, that as Act VI of 1874 did not confer the right of such an appeal, it could only be allowed now if it could be shown that the right existed before the passing of that Act; and found that, as a matter of fact, such a right did not previously exist. Although, under clause 15 of the Charter of 1865, an appeal is given to the High Court from any judgment of a single Judge, an order or certificate of a Judge allowing an appeal to the Privy Council cannot properly be considered a judgment of the High Court. Such an order has its origin in an Act of Parliament for the better administration of justice in the Privy Council, and belongs rather to Privy Council proceedings than to the legitimate province of the High Court. In this view it is immaterial whether an order and certificate are for admission or refusal of appeal to the Privy Council. AMIRUNNISSA *v.* BEHARY LALL. KESHUB CHUNDER ACHARJEE *v.* HURRO SOONDUREE DEBEA
[25 W. R., 529

25. ——————— *Order by Judge of the High Court presiding over the Privy Council Department.—Judgment.—Certified copy of order of the Privy Council.—Civil Procedure Code (Act X of 1877), s. 610.*—A decree obtained on appeal by certain defendants in the High Court was appealed to the Privy Council by one only of the two plaintiffs to the suit, and the decision of the High Court was reversed; the plaintiff who had appealed assigned her share in the order of the Privy Council to one of the defendants, and delivered him the certified copy of the decree made in the Privy Council. The plaintiff who had not appealed to the Privy Council applied to the High Court for leave to transmit the

**LETTERS PATENT, HIGH COURT, 1865, cl. 15**—*continued.*

order to the Court of first instance for execution of the share decreed to him, but, on account of the assignment above mentioned, was unable to produce the certified copy of the decree of the Privy Council. The Judge presiding over the Privy Council Department in the High Court held that the production of a certified copy of the order of the Privy Council was excusable under the circumstances, but refused the application, on the ground that the decree of the Court of first instance, which was affirmed by the Privy Council, could only be executed as a whole and not partly by one of the plaintiffs. *Held*, on appeal, *per* GARTH, *C. J.*—That the duties of a Judge in dealing with the meaning of decrees of the Privy Council are purely ministerial, and that any order made in such ministerial capacity could not be considered a judgment, and could not, therefore, be made the subject of an appeal to a Bench of the High Court under clause 15 of the Charter. *Per* WHITE and MITTER, *JJ.*—An order of a Judge presiding over the Privy Council Department in the High Court, rejecting an application for execution, is a final order, and is a judgment within the meaning of clause 15 of the Charter, and is therefore appealable. IN THE MATTER OF THE PETITION OF KALLY SOONDERY DABIA. KALLY SOONDERY DABIA *v.* HURISH CHUNDER CHOWDHRY

**[I. L. R., 6 Calc., 594: 7 C. L. R., 543**

In the same case on appeal to the Privy Council,—*Held*—A decision by the Judge appointed to dispose of matters relating to appeals to Her Majesty in Council, refusing to transmit for execution Her order restoring a decree, is a judgment within the meaning of clause 15 of the Letters Patent of 1865, and is appealable to the High Court. *Held*, also, that a refusal to transmit such an order for execution was not a misapprehension on the part of the Judge of the extent of his jurisdiction, although, if it had been, this itself would have been a ground of appeal. HURRISH CHUNDER CHOWDHRY *v.* KALISUNDERI DEBI. **I. L. R., 9 Calc., 482: 12 C. L. R., 511**

**26.** ——————— *Application for leave to appeal to Privy Council.—Judgment of one Judge.—Ministerial and judicial acts.*—The plaintiff obtained a decree in the Court of first instance. On appeal to the High Court, the decision of the lower Court was upheld, but the decree was varied in respect of some matters relating to the mode in which the relief to which the plaintiff was declared entitled should be granted. The defendant applied for leave to appeal to the Privy Council, but the application was refused, on the ground that the judgment in the High Court and the Court of first instance were in effect concurrent judgments, and that no substantial point of law was involved in the case. The defendant appealed under clause 15 of the Letters Patent. *Held* that no appeal would lie. *Amirunnissa* v. *Behary Lall, 25 W. R., 529*, followed. MANLY *v.* PATTERSON

**[I. L. R., 7 Calc., 339: 9 C. L. R., 166**

**27.** ——————— *Civil Procedure Code, 1882, s. 575.—Right of appeal.*—Section 575 of Act XIV of 1882 does not take away the right of appeal which is given by clause 15 of the Letters Patent. When the judgment of a lower Court has been confirmed under section 575 of the Code of Civil Procedure, by reason of one of the Judges of the Appeal Court agreeing upon the facts with the Court below, an appeal will lie against such judgment, notwithstanding the terms of section 575. GOSSAMI SRI 108 SRI GRIDHARIJI MAHARAJ TICKAIT *v.* PURUSHOTUM GOSSAMI . **I. L. R., 10 Calc., 814**

**28.** ——————— *Time for preferring appeal.*—An appeal under section 15 of the Letters Patent from the judgment of a Division Bench of the High Court must be preferred within thirty days from the date of the judgment, unless good cause be shown to the contrary. IN THE MATTER OF HURRUCK SINGH . . . **11 W. R., 107**

**29.** ——————— *Filing petition of appeal.—Practice.—Per* PEACOCK, *C. J.*, and KEMP and MACPHERSON, *JJ.*—A petition of appeal under clause 15 of the Letters Patent, from a decision of an Appellate Division Bench, may be presented within thirty days from the time when the written judgments of the Division Bench are put in. The difference of practice on the original and appellate jurisdictions of the High Court contrasted. HARRAK SING *v.* TULSI RAM SAHU . . **5 B. L. R., 47**

S. C. HURUCK SINGH *v.* TOOLSEE RAM SAHOO

**[12 W. R., 458**

**30.** ——————— *Arguments on appeal.—Practice.*—On appeal under clause 15 of the Letters Patent, no other points may be argued than those which were argued before the Division Bench. HAJRA BEGUM *v.* KHAJA HOSSEIN ALI KHAN

**[4 B. L. R., A. C., 86**

HIRANATH KOER *v.* RAM NARAYAN SINGH

**[9 B. L. R., 274: 17 W. R., 316**

**31.** ——————— *Civil Procedure Code, s. 257.—Act XXIII of 1861, s. 23.—Arguments on appeal.—Practice.*—Clauses 15 and 36 of the Letters Patent of the High Court must be treated as qualifying section 257 of Act VIII of 1859. Under the Letters Patent of 1865, in lieu of the former practice under Act XXIII of 1861, section 23,—namely, that when the Appeal Court consisted of only two Judges, and there was a difference of opinion between them upon a point of law, the case was re-argued upon that question before one or more of the other Judges,—when the Judges of a Division Court are equally divided in opinion as to the decision to be given on any point, the opinion of the senior Judge is to prevail, subject, however, to a right of appeal from such judgment of the Division Court. The judgment passed on such appeal, and not the judgment of the Division Court, will be "final." In appeal under clause 15 of the Letters Patent, 1865, no point can be argued except a point on which the two Judges of the Division Bench have differed in opinion. ROY NANDIPAT MAHATA *v.* URQUHART

**[4 B. L. R., A. C., 181: 13 W. R., 209**

**LETTERS PATENT, HIGH COURT, 1865**—*continued.*

——— **cl. 16.**

*See* SUPERINTENDENCE OF HIGH COURT—CHARTER ACT, S. 15 . **7 W. R., 430**

——— *Power of High Court to hear appeals.*—*Per* MARKBY, MITTER, and AINSLIE, *JJ.*—Clause 16 of the Letters Patent of 1865 empowers the High Court to hear appeals in all cases in which an appeal lay under Act VIII of 1859. RUNJIT SINGH *v.* MEHERBAN KOER **[I. L. R., 3 Calc., 662 : 2 C. L. R., 391**

——— **cl. 18.**

*See* CASES UNDER INSOLVENT ACT, S. 5.

——— **cl. 19.**

*See* CONTRACT ACT, S. 27. **[14 B. L. R., 76**

——— **cl. 24 (Bombay).**

*See* HIGH COURT, JURISDICTION OF—HIGH COURT, BOMBAY—CRIMINAL. **[I. L. R., 9 Bom., 288**

*See* JUDICIAL SUPERINTENDENT OF RAILWAYS . . **I. L. R., 9 Bom., 288**

——— **cl. 25.**

*See* CONFESSION—CONFESSIONS TO POLICE OFFICERS . **I. L. R., 2 Bom., 61**

——— **cl. 26.**

*See* APPEAL IN CRIMINAL CASES—CRIMINAL PROCEDURE CODES. **[2 Bom., 112 : 2nd Ed., 106**

*See* CHARGE TO JURY—MISDIRECTION. **[I. L. R., 10 Calc., 1079**

——— **Case certified by Advocate General under—**

*See* CONFESSION—CONFESSIONS TO POLICE OFFICERS . **I. L. R., 1 Calc., 207 [I. L. R., 2 Bom., 61**

1. ——— *Prisoner sentenced by Sessions Judge to rigorous, for an offence punishable only with simple, imprisonment.*—Where the Judge at Sessions sentenced a prisoner to rigorous imprisonment for a crime punishable only with simple imprisonment,—*Held* that this was an error which might be reviewed on the Advocate General's certificate under the Charter of 1865, section 26. REG. *v.* YED ALI KHAN . **1 Ind. Jur., N. S., 424**

2. ——— *Charge under s. 467, Penal Code.*—*Felony or misdemeanour.*—*Separation of jury.*—Where the Judge, on a charge under section 467 of the Penal Code, permitted the jury to separate on the first day of the trial and before verdict,—*Held* that the exercise of his discretion was not a matter to be reviewed by the High Court under section 26 of the Letters Patent, 1865, there being no error in any point of law, as the offence charged was only a misdemeanour under the law in force before the Penal Code took effect. REG. *v.* DAYAL JAIRAJ **[3 Bom., Cr., 20**

**LETTERS PATENT, HIGH COURT, 1865, cl. 26**—*continued.*

3. ——— *Power of High Court where point of law is reserved.*—*Alteration of sentence.*—*Held* (BAYLEY, *J. dissentiente*) that the High Court, in considering a point of law reserved under clause 26 of the Letters Patent, where it is of opinion that evidence has been improperly admitted as to one of two heads of charge of which a prisoner stands convicted (the two heads of charge relating to distinct and separate offences), and that the conviction on such head of charge is bad, has power to review the whole case, and, if it appears that the evidence improperly admitted could not reasonably be supposed to have influenced the jury as to the latter head of charge, ought not to set aside the conviction on that head of charge, but should proceed to pass judgment and sentence on it. *Semble,*—Section 167 of the Evidence Act applies to criminal trials by jury in the High Court. REG. *v.* NAVROJI DADABHAI . . . . . **9 Bom., 358**

4. ——— *Reserving point of law for High Court.*—*Refusal to reserve.*—*Discretion of Judge*—*Review.*—*Non-direction.*—*Certificate of Advocate General.*—The statement of a Judge, who presides at a criminal trial, is, upon a case reserved under the 25th clause of the Charter of the High Court, or upon a case certified by the Advocate General under its 26th clause, conclusive as to what has passed at the trial. Neither the affidavits of bystanders or of jurors, nor the notes of counsel or of short-hand-writers, are admissible to controvert the statement of the Judge. It is in the discretion of the Judge, who presides at a criminal trial, whether or not he will reserve a point of law for the opinion of the High Court, and such discretion will not be reviewed by the High Court, sitting as a Court of review, under clause 26 of the Letters Patent. *Semble,*—Non-direction by a Judge is not a matter upon which the Advocate General should grant a certificate under clause 26 of the Letters Patent. REG. *v.* PESTANJI DINSHA **[10 Bom., 75**

——— **cl. 29.**

*See* CASES UNDER TRANSFER OF CRIMINAL CASE—LETTERS PATENT, HIGH COURT, CL. 29.

——— **cl. 36.**

*See* APPEAL IN CRIMINAL CASES—PROCEDURE. **[2 B. L. R., F. B., 25 : 10 W. R., Cr., 45**

1. ——— *Division Bench of two Judges differing in opinion.*—*Practice of Privy Council.*—A cause was heard before a single Judge of the High Court, and a decree made by him dismissing the suit. An appeal was made to the same Court in its appellate jurisdiction before two Judges. The Court was divided in opinion; the Chief Justice holding that the judgment should be reversed, and the Puisne Judge that it should be affirmed; and under the 36th section of the Letters Patent of 1865 creating the High Court a decree of reversal was ordered. On appeal, the Judicial Committee, without expressing

**LETTERS PATENT, HIGH COURT, 1865, cl. 36—*continued.***

any opinion whether the 36th section was applicable, having regard to the 26th Rule of the High Court, directed the appeal to be heard on the merits. MILLER *v.* BARLOW . . **14 Moore's I. A., 209**

2. ——— *Civil Procedure Code, 1877, ss. 575 and 647.*—The provision of the Letters Patent of 1865, section 36, that when the Judges of a Division Bench are equally divided in opinion, the opinion of the senior Judge shall prevail, has been superseded by section 575 of the Civil Procedure Code (Act X) of 1877 (which is extended to miscellaneous proceedings of the nature of appeals by section 647 of that Code) so far as regards cases to which section 575 is applicable. APPAJI BHIVRAV *v.* SHIVLAL KHUBCHAND . **I. L. R., 3 Bom., 204**

——— cl. 37.—*Discretion as to costs in civil suits.*—The 37th clause of the Letters Patent constituting the High Court does not give the Court an uncontrolled discretion as to costs in civil suits. SUBAPATI MUDALIYAR *v.* NARAYANSVAMI MUDALIYAR . . . . . **1 Mad., 115**

——— cl. 39.

*See* APPEAL TO PRIVY COUNCIL—CASES IN WHICH APPEAL LIES—APPEALABLE ORDERS . . **1 B. L. R., F. B., 1**
**[7 B. L. R., 730**
**13 B. L. R., 103**
**I. L. R., 1 Calc., 431**
**1 W. R., Mis., 13**
**5 W. R., Mis., 17**

——— cl. 40.

*See* APPEAL TO PRIVY COUNCIL—CASES IN WHICH APPEAL LIES—APPEALABLE ORDERS . . . . **9 Bom., 398**

——— cl. 41.

*See* APPEAL TO PRIVY COUNCIL—CRIMINAL CASES . . **7 Bom., Cr., 77**

——— cl. 42.

*See* APPEAL TO PRIVY COUNCIL—CASES IN WHICH APPEAL LIES—APPEALABLE ORDERS . . **1 B. L. R., F. B., 1**

**LETTERS PATENT, HIGH COURT, N.-W. P.**

——— cl. 10.

*See* LIMITATION ACT, 1877, s. 12.
**[I. L. R., 2 All., 192**

1. ——— *Appeal from judgment of Division Court.*—To allow of an appeal to the High Court against the judgment of a Division Court, under the provisions of clause 10 of its Letters Patent, there must be such a judgment on the part of all the Judges who may compose the Division Court as disposes of the suit on appeal before it. GHASI RAM *v.* NURAJ BEGAM . **I. L. R., 1 All., 31**

2. ——— *Difference of opinion between Judges of Division Bench.—Held* (SPANKIE, *J.*, dissenting) that the appeal given to the Full Court under clause 10, Letters Patent, is not confined to the point on which the Judges of the Division Court differ. RAM DIAL *v.* RAM DAS
**[I. L. R., 1 All., 181**

**LETTERS PATENT, HIGH COURT, N.-W. P.—*continued.***

——— cl. 12.—*Lunatic.—Native of India.—Act XXXV of 1858, s. 23.—Original jurisdiction of High Court in respect of the persons and estates of lunatics who are natives of India.*—The High Court has not, under clause 12 of its Charter, any original jurisdiction in respect of the persons and estates of lunatics who are natives of India. IN THE MATTER OF THE PETITION OF JAUNDHA KUAR
**[I. L. R., 4 All., 159**

——— cls. 18 & 19.

*See* REVIEW—CRIMINAL CASES.
**[I. L. R., 7 All., 672**

——— cl. 27.

*See* REFERENCE FROM SUDDER COURT, AGRA . . . **6 B. L. R., 283**

——— *24 & 25 Vict., c. 104, s. 13.—Difference of opinion between Judges of Division Bench.*—Section 13 of Act 24 and 25 Victoria, Cap. 104, and section 27 of the Letters Patent of the High Court, applied to the Court in its revisional as well as in its appellate jurisdiction. *Held*, by MORGAN, *C. J.*, and TURNER, *J.* (ROSS and SPANKIE, *JJ.*, dissenting), that when a case is heard by a Division Bench, and a difference of opinion arises, the opinion of the senior Judge must prevail, and the order must issue in accordance with his judgment, a reference to a third Judge being beyond the competency of such Division Bench, and an order in accordance with the views of such third Judge and the junior Judge was not valid. QUEEN *v.* NYN SINGH . **2 N. W., 117**
**[S. C. Agra, F. B., Ed. 1874, 196**

——— cl. 31.

*See* APPEAL TO PRIVY COUNCIL—CASES IN WHICH APPEAL LIES — APPEALABLE ORDERS . . **I. L. R., 1 All., 726**

**LEX FORI.**

*See* LIMITATION—LAW OF LIMITATION.
**[5 Moore's I. A., 234**

**LIABILITY FOR NUISANCE CAUSED BY WORKS.**

*See* RAILWAY COMPANY.
**[10 B. L. R., 241**

**LIBEL.**

*See* CASES UNDER DEFAMATION.

——— **Restraining publication of—**

*See* INJUNCTION—SPECIAL CASES—PUBLIC OFFICERS WITH STATUTORY POWERS.
**I. L. R., 1 Bom., 132**

1. ——— **Comments on acts of public men.**—*Newspapers.—Privilege.*—Every subject has a right to comment on those acts of public men which concern him as a subject of the realm if he does not make his comments a cloak for malice and slander. A writer in a public paper has the same right, and it is his privilege to comment on the acts of public men which concern not himself only, but which concern the public. Where a writer makes the public con-

**LIBEL.—Comments on acts of public men** —*continued.*

duct of a public man the subject of comment, and it is for the public good, the writer is not liable to an action if the comments are made honestly, and he honestly believes the facts to be as he states them. HOWARD *v.* NICOLL . . 1 Bom., Ap., 85

2. ——— **Defamatory communications by Consul to his Government.**—*Privileged communications.—Limitation.*—Where the Consul of a foreign State wrote some defamatory letters to his Government, reflecting on the character of a commercial house in Calcutta, the Court held that, although the libellous matter was not known to the plaintiffs for a long time subsequently, the suit for damages must be dismissed under the Statute of Limitations, which confined the bringing of such suit within the year,—*Held* that such communications were not privileged; and the Court assessed damages subject to the opinion of the Appellate Court on the point of limitation. ROBERT *v.* LAMBARD [1 Ind. Jur., N. S., 192

3. ——— **Privileged communication.**—*Malicious prosecution.—Reasonable and probable cause.*—*L. M.*, an inspector of the *O. G. Co.*, on visiting the company's works at N., was informed that the superintendent, *W. M.*, had misappropriated the company's money, and obtained money wrongfully from their workmen, and otherwise mismanaged the factory. On further enquiry and inspection of *W. M.'s* books, his suspicions being confirmed, he communicated them by letter to the resident director. The company having declined to prosecute, *L. M.* presented a charge of breach of trust against *W. M.*, on which he was arrested, and after a magisterial enquiry the charge was dismissed. It appeared from the evidence that the defendant had reasonable and probable cause for supposing that the plaintiff was guilty of the misconduct he was charged with, and there was no proof that the defendant was actuated by malice. *Held*, dismissing the suit with costs, that a communication such as the above is a "privileged communication:" that when an overseer has reasonable and probable cause for supposing that a workman has committed a breach of trust, and prosecutes him for it, the employers having declined to, no enquiry is to be made into the motives that prompted him to do so. MILLS *v.* MITCHELL . Bourke, O. C., 18

4. ——— *Statements made by defendants to protect their own interest.*—Plaintiffs and defendants were the members of two firms, each creditors of an absconded debtor, one *B*. The plaintiffs' firm brought a suit to recover the sum alleged to be due to them by the said *B.*, and pending that suit the defendants' firm presented a petition to the Court which contained the statements complained of, which were principally to the effect that the plaintiffs had prejudiced the petitioners by suing the said *B.* for sums greatly in excess of their just claims against him. The Judge found that there was no malice in fact, but that the statements were untrue and calculated to damage, and he accordingly gave a decree to the plaintiffs with damages. *Held*, on appeal, reversing the decision of the

**LIBEL.—Privileged communication**—*continued.*

lower Court, that as the defendants were creditors of an absconded debtor and deeply interested in seeing th t his estate was not swept off in satisfaction of an excessive claim made by the earliest suitor, they, in presenting a petition pointing out what they considered suspicious elements in the plaintiffs' claim against such debtor, were at all events entitled to the qualified privilege of persons acting in good faith and making communications with a fair and reasonable purpose of protecting their own interest. HINDE *v.* BAUDRY . . . . I. L. R., 3 All., 18

5. ——— **Publication.**—*Privilege.—Bom. Act I of 1873.—Practice.—Costs.*—The Trustees of the Port of Bombay, who are, under the provisions of their Act of Incorporation (Bombay Act I, of 1873), bound to keep minutes of their proceedings and resolutions, and to forward copies of such minutes to the Secretary to the Local Government, passed, in relation to the hiring by them to the plaintiff of one of their steamers, the following resolution: "Mr. Shepherd's (the plaintiff's) offer of R520 in full of all claims should be accepted, but any further transactions with him should be avoided if possible." Copies of this resolution, made by clerks in the employ of the Trustees, were recorded in two books kept in the office of the Trustees, and other copies, also made by such clerks, were forwarded to the Secretary to the Local Government and to the plaintiff himself. *Held*, first, that the words of the resolution amounted in law to a libel; second, that the act of the Trustees, in transmitting a copy to the Secretary to the Local Government, was a publication of the libel; third, that such publication was privileged. *Quære,*—Whether the giving of the resolution to be copied by clerks of the defendants was a publication; but, if it were,—*Held* that such a publication was also privileged. *Semble,*—That had the defendants succeeded on the plea of privilege only, each party should have borne their own costs, but held that as the plaint contained allegations of express malice and want of *bona fides* on the part of the Trustees in passing and publishing the libellous resolution complained of, which allegations obliged the Trustees to plead justification, on which plea also they were successful, the plaintiff must pay the costs of the suit. SHEPHERD *v.* TRUSTEES OF THE PORT OF BOMBAY . . . I. L. R., 1 Bom., 477

6. ——— *Letter given by manager of firm to clerk to copy.—Reflections on professional man.*—Defamatory matter is privileged only when written *bonâ fide*, and shown to a third party to give information which the third party ought to have. A letter was written by order of the manager of a firm reflecting upon the character of a professional man, and signed by the manager and handed over in the ordinary way to a clerk in the office to copy in the office copy letter book, which was open to all the members of the firm. *Held* that such instructions to copy amounted to publication. HECKFORD *v.* GALSTIN . Cor., 134: 2 Hyde, 274

7. ——— *A.* brought an action against *B.* for damages for defamation of

**LIBEL.—Publication—*continued.***

character. The alleged libel was contained in a letter written and sent as an ordinary private letter by post by *B.* to *A.* No publication was alleged or proved, and the only damage alleged was injury to *A.'s* feelings. *Held* that the suit was rightly dismissed. KAMAL CHANDRA BOSE *v.* NABIN CHANDRA GHOSE . 1 B. L. R., S. N., 12: 10 W. R., 184

MAHOMED ISMAIL KHAN *v.* MAHOMED JAHIR *alias* MOTER MEAN . . 6 N. W., 38

8. ——— **Proof of injury to plaintiff.**—*Loss of caste—Malice.*—Suit for libel in describing the plaintiff, who was a Jounpore bunniah, as a Telee, whereby the plaintiff lost his caste, &c. The alleged libel was contained in an answer to a suit. *Held* that the action was not maintainable, as it did not appear that the plaintiff had lost his caste or otherwise been damnified, or that defendant had knowingly misdescribed the plaintiff. FUTTICK CHUND SAHOO *v.* MAKUND JHA [Marsh., 224: 1 Hay, 539

9. ——— **Rejection of plaint.**—*Ironical publication.*—On the presentation of a plaint for libel, the Court must see whether the alleged libellous matter set out in the plaint is really libellous: if it is not, there is no ground of action, and the plaint ought not to be admitted. If the words which are set out in the plaint are not a libel, the plaintiff cannot, by alleging that they were printed and published by the defendant with the intent to injure the plaintiff, and bring him into public scandal and disgrace, and to expose him to public scorn and ridicule, and to cause it to be suspected that the plaintiff was a dishonest person, and had been actuated by sinister and fraudulent motives, make them a libel; nor can the plaintiff, by alleging that words are spoken ironically, make them libellous, if they do not appear to the Court to be so. WYMAN *v.* BANKS [10 B. L. R., 71: 18 W. R., 516

**LICENCE TO PRACTISE AS A PLEADER, WITHDRAWAL OF—**

*See* RECORDER'S ACT, S. 17. [6 B. L. R., 180

**LICENCE TO SELL LIQUOR.**

*See* ACT XXI OF 1856 S. 43. [19 W. R., Cr., 34
8 W. R., Cr., 4

*See* EXCISE ACT. [I. L. R., 1 All., 630, 635, 638

*See* MANDAMUS . 11 B. L. R., 250

**LIEN.**

*See* BAILMENT . I. L. R., 6 All., 139

*See* CASES UNDER DEPOSIT OF TITLE-DEEDS.

*See* CASES UNDER MORTGAGE—MONEY-DECREES ON MORTGAGES.

*See* CASES UNDER VENDOR AND PURCHASER—LIEN.

**LIEN—*continued.***

——— **by custom for price of seed.**

*See* INDIGO FACTORY. [I. L. R., 3 Calc., 231

——— **Effect of money-decree on—**

*See* CASES UNDER MORTGAGE—MONEY-DECREES ON MORTGAGES.

——— **for disbursements.**

*See* BOTTOMRY BOND . 6 B. L. R., 323

——— **for master's wages.**

*See* BOTTOMRY BOND . 5 B. L. R., 258

——— **of mortgagee, Document acknowledging extinction of—**

*See* REGISTRATION ACT, 1877, S. 17. [I. L. R., 1 Bom., 197

——— **Suit for declaration of—**

*See* LIMITATION ACT, 1877, ART 11. [3 B. L. R., Ap., 122

1. ——— **Creation of lien.**—*Agreement for specific appropriation.—Possession.*—To constitute a lien on any property, there must be a clear agreement for the specific appropriation of the property; and, further, the property must be in the possession of the party who claims the lien. IN RE THE CLAIM OF DADIA BIBEE. DEBNARAIN BOSE *v.* LEISK [2 Hyde, 267

2. ——— *Contract between Hindus.—Deposit of title-deeds.*—A lien created by verbal contract and deposit of title-deeds of immoveable property in the Island of Bombay by a Hindu in favour of a Hindu upheld. JIVANDAS KESHAVJI *v.* FRAMJI NANABHAI . . 7 Bom., O. C., 45

3. ——— *Deposit of shares for special purpose.*—Where certain shares were deposited with a bank as security for the depositor overdrawing his account for a time, which, in fact, he never did, and other documents were deposited as security for drafts drawn on Eccles, Cartwright, & Co., against cotton, to which these latter documents referred, and Eccles, Cartwright, & Co., failed,—*Held* that the bank had no lien on the shares in respect of the cotton transactions. GENTLE *v.* BANK OF HINDOSTAN, CHINA, AND JAPAN [1 Ind. Jur., N. S., 245

4. ——— **Existence of lien.**—*Deposit of shares with power of sale.—Unjustifiable revocation of power.—Effect of, on right of lien.*—The defendant, being largely indebted to the plaintiff company, had, from time to time prior to the 22nd November 1865, deposited with them certain shares and share certificates in various joint stock companies as security for the repayment (as alleged by the plaintiffs) of all moneys due or which might hereafter become due from time to time to them for principal and interest, and had executed several powers of sale and transfers and letters of pledge in favour of the plaintiffs. On the 22nd November 1865 the defendant executed a

**LIEN.—Existence of lien—*continued.***

power of attorney authorising the plaintiffs to sell or dispose of the said shares and gave them a promissory note for R1,90,000 with interest at 11 per cent. per annum. Between the 22nd November and 2nd January 1866 the plaintiffs caused their right of lien over the said shares to be registered by the various joint-stock companies concerned. On the 1st February 1866 the defendant, being found on adjustment of accounts to be indebted to the plaintiffs for R1,82,173, and being pressed for payment, gave them a second promissory note for that amount with interest at 12 per cent. per annum. On taking the second note the plaintiffs gave up the first one and put a receipt on the back of it. In April 1870 the defendant wrote to the plaintiffs revoking the power of attorney given by him to the plaintiffs, publicly notified such revocation, and refused to pay the debt on the ground that it was barred by limitation. In a suit by the plaintiffs for the amount of the debt, and for a declaration of their right of lien and power of sale over the shares pledged with them by the defendant, and for an order for a sale of the shares sufficient to pay off the debt,—*Held* that the original debt continued to exist; that the first promissory note and the shares were given as a security for that loan; that the second promissory note was also given as a security for the loan, no new debt being created; that the plaintiffs had a right to exercise the power given to them of selling the securities, notwithstanding the revocation of the power of attorney, the act of the defendant in trying to prevent such exercise of power by revoking the power of attorney, being unjustifiable, and that, therefore, the plaintiffs were entitled to have the power declared valid and subsisting, and generally to have the relief they asked for. STEWART *v.* DELHI AND LONDON BANK [17 W. R., 201

5. ——————— *Lien of letter of boats on goods placed in the boat.*—The mere letter of boats for hire has not a lien for his hire upon goods which may be placed in the boats, and should he cause loss to the owner of the goods by wrongfully opposing their removal, he will be liable for the same. GOBIND PERSHAD *v.* RUDDELL [5 N. W., 160

6. ——————— *Entire contract.—Wharfinger's lien.—Contract Act (IX of 1872), ss. 170, 171.*—Where a person does work under an entire contract with reference to goods delivered at different times such as to establish a lien, he is entitled to that lien on all goods dealt with under that contract. *Chase* v. *Westmore, 5 M. & S., 180,* followed. The fact that a manufacturer has a wharf upon which he receives goods brought to him by customers, does not entitle him to claim a lien as a wharfinger upon such goods. MILLER *v.* NASMYTH'S PATENT PRESS COMPANY [I. L. R., 8 Calc., 312

7. ——————— *Charge created by tenant, Duration of.*—A charge on premises created by a tenant can only be a valid charge so long as his right and interest in the property continues. It must cease with the cessation of such right and interest. ZALIM SINGH *v.* BISHESUR KANDU [7 N. W., 181

8. ——————— *Tainzas or revenue certificates, Endorsement of—Sale of timber.—Vendor and purchaser.*—Where tainzas or revenue certificates have been granted by the Conservator of Forests to the owners of timber, such timber cannot be parted with to third parties, except on the understanding that it is burthened with that lien, even although the tainzas are unendorsed. KO KYWETNEE *v.* KO KOUNG BANE . . . 5 W. R., 189

9. ——————— *Lien on exchanged property.*—Where *A.* mortgaged to *B.* certain property by deed of conditional sale, and afterwards at a partition received other land in lieu of what was conditionally sold,—*Held,* in a suit by *B.* against *C.,* the purchaser of the property in execution of a decree against *A.,* that *B.* had no lien on such property. PURSOO RAM *v.* BYJNATH LALL . 10 W. R., 475

10. ——————— *Agreement not to alienate.—Suit to set aside putni lease.—R.,* as mortgagee, sued the *D.s* for possession after foreclosure. A razinamah and safinamah were put in and a decree passed thereon under which the *D.s* and others as principals, and their co-sharers as sureties, bound themselves not to alienate any portion of their property in the estate till the debt was satisfied, and that on failure the decree should be executed, the shares of the principals being sold first. After this the co-sharers granted a putni of a portion of the estate to the defendants in this suit. Subsequently the rights of the *D.s* were sold in execution to *B.,* who again sold them to plaintiffs, who had previously acquired twelve annas of the right and interest of *R.* under the razinamah and safinamah and decree, the remaining four annas having passed to *G.,* now represented by defendant *K.* The present suit was brought to set aside the putni lease as being in derogation of plaintiffs' right. *Held* that the plaintiffs, to the extent of their share, had a valid lien upon the estate, and were entitled to priority over any right under the putni lease and to hold possession until their claim was satisfied. DHUNKEISTO SEIN *v.* ERSKINE & Co. . . . 16 W. R., 54

11. ——————— *Lien on land.—Payment by mortgagee on account of revenue assessed on land mortgaged as lakhiraj.*—An usufructuary mortgagee, to whom was pledged as lakhiraj land which was not valid lakhiraj, and which was subsequently assessed with revenue, is entitled to a lien against the mortgagor for sums of money paid by the former in discharge of the public revenue. NURJOON SAHOO *v.* MOOJEEROODDEEN . . . . 3 W. R., 6

12. ——————— *Money-decree.—Lien on property of judgment-debtor.*—The holder of a simple money-decree does not acquire a lien on the property of his judgment-debtor. MOHOHUR DASS *v.* KALLY DHUN DOBEY . . . 8 W. R., 116

Upholding on review, MOONA *v.* CHAND MONEE GOSSAIN . . . . . 7 W. R., 20

**LIEN.—Existence of lien—*continued.***

*See* LUCHMUN SUHAE CHOWDRY *v.* GUJRAJ JHA [4 W. R., 45

13. ——————— *Receipt of money in execution of decree.—Repayment to judgment-debtor on reversal of decree by High Court.—Subsequent reversal by Privy Council.*—A decision of the Principal Sudder Ameen, which declared the decree-holders entitled to satisfy their decree by the sale of certain hypothecated properties, having been reversed by the High Court, an appeal was preferred to the Privy Council, which reversed the decree of the High Court and affirmed the original decision, and provided for the payment of costs. *Held* that the lien established by the Privy Council decree was not lost to the decree-holders by their previous conduct in receiving a portion of the decretal money by the sale of part of the mortgaged premises, which money was subsequently returned by them to the judgment-debtor, on the decision of the Principal Sudder Ameen having been reversed by the High Court. LALLA ROODER PERSHAD *v.* HUR PERSHAD DOSS [23 W. R., 194

14. ——— **Lien on indigo factory.**—*Act X of 1859, ss. 110, 111.—Sale in execution of decree.*—A 10-annas shareholder (*C.*) in a factory, who was also manager of the whole, executed a 'kabuliat stipulating that as long as he was the mooktear the lessor (plaintiff) was at liberty, in the event of the rent not being paid punctually, to take khas possession, or to lease the property to other parties; and that in case of another mooktear being appointed, or the property being sold, the factory as well as the mooktear or purchaser would be responsible for any arrears accruing before or after. *C.* then mortgaged the factory to *L.*, who subsequently obtained a decree entitling him to satisfy his mortgage by the sale of the factory. Plaintiff sued *C.* and *L.* to obtain a declaratory decree to the effect that the factory could be sold in satisfaction of his decree for rent under Act X of 1859, free of incumbrances created by the bonds. *Held* that, as no money was advanced for the lease, and no debt was due from the lessee to lessor, plaintiff had no lien on the factory in satisfaction of a debt. *Held* that plaintiff could have proceeded under section 110, Act X, and then under section 111, if *L.* objected to the sale of the factory; but having no prior lien upon the factory he had no cause of action as against *L.* CHUMUN LALL CHOWDHRY *v.* RUGHOONUNDUN SINGH . . 11 W. R., 194

15. ——— **Lien on attached property.**—The fact of *A.* obtaining a declaration of his lien upon certain property for an amount of debt, is no bar to *B.'s* attaching and selling that property, but the purchaser will be bound by that lien. MONOHUR PAL *v.* WISE . . . . 15 W. R., 246

16. ——— **Right of lien.**—*Pleading.—Setting up adverse title.*—In order that a defendant may set up his right of lien as a defence, he must be prepared to show that when the suit was brought he was ready to give up the property over which he claimed the lien, on being paid the amount due to

**LIEN.—Right of lien—*continued.***

him, and, therefore, he cannot plead his right of lien when he denies and contests the plaintiff's title to the property. JUGGERNAUTH DOSS *v.* BRIJNAUTH DOSS . I. L. R., 4 Calc., 322: 3 C. L. R., 375

17. ——— **Lien for advances made to manager of indigo estate.**—*Consignee of West India Estate.—Salvage lien.—Estoppel.—Knowledge.—Acquiescence.*—*M.*, the manager of an indigo concern, under section 243, Act VIII of 1859, by a deed dated the 1st February 1873, in which the owners of the concern joined, which was duly registered, and which was made with the Court's sanction, mortgaged the concern, and pledged and assigned the season's crop to *A.* and *B.*, who were purda-nashins, to secure repayment of a large sum of money, consisting partly of the balance of previous loans from the husband of *A.* and *B.*, and partly of a new loan to the extent of what was described in the deed as the estimated outlay of the season. The deed provided that *A.* and *B.* should have a first charge upon the indigo to be manufactured in the season in respect of the moneys secured thereby; that the indigo should be sold subject to *A.'s* and *B.'s* direction; that until the debt was paid *M.* should have no power to transfer, sell, or mortgage the properties thereby mortgaged, pledged, and assigned, or in any way to deal with the sale proceeds of the manufactured indigo; and that *A.* and *B.* should have full power to arrange for the appointment and dismissal of the servants of the concern, and for its better management. Previously to this,—namely, in October 1872,—*M.* had, in pursuance of his letter of appointment, filed an estimate for the season's outlay largely exceeding the sum mentioned in the deed as the estimated outlay, and had alleged that, at the time of executing the mortgage-deed, he had informed one *C.*, who was the general manager of *A.* and *B.*, and as such was the only medium of communication between *M.* and *A.* and *B.*, that further advances would be necessary. According to *M.'s* account, *C.* told him that *A.* and *B.* were unable to make further advances, and that he could, if they were needed, obtain them on the usual terms from the plaintiffs, who were indigo brokers. In previous years, during the lifetime of the husband of *A.* and *B.*, who had held similar mortgages of the concern and of the crop in those years to secure advances made by him, such advances had, with the mortgagee's knowledge, been supplemented by loans obtained from the plaintiffs on the security of a first charge upon the crop to the extent of such loans; and it was alleged by *M.* that it was upon the understanding that the same course was to be followed in the present instance that the mortgage-deed to *A.* and *B.* was executed. The moneys advanced by the latter were wholly expended by April, when *M.*, without communicating with *A.* and *B.*, and with only the verbal sanction of the Court, applied to the plaintiffs for money, and on the 26th April the plaintiffs wrote to *M.* that they would make advances to the extent of R50,000, upon his assigning to them and giving them a first charge on the first 250 maunds of indigo to be manufactured in the season, and they enclosed a form of assignment

**LIEN.—Lien for advances made to manager of indigo estate—*continued.***

for *M.'s* signature which he duly signed, and returned to the plaintiffs on the 3rd May. This document bore a R2 stamp. In September and October, *M.* obtained further advances from the plaintiffs in respect of other indigo, giving them similar letters of assignment, which also bore R2 stamps. Of the moneys thus advanced by the plaintiffs, R5,000 was paid to *C.* for *A.* and *B.*, by a bill drawn upon the plaintiffs. About R17,000 was applied towards the expenditure of the following season, and the remainder was applied in the production of the then season's indigo, and *M.* stated that without it he could not have manufactured any indigo whatever that season. The indigo, when manufactured, was claimed by *A.* and *B.* under their mortgage, and their claim being resisted by *M.*, who set up against them the plaintiffs' rights under the letters of assignment, *A.* and *B.* brought a suit to enforce the provision of their mortgage-deed. In this suit the indigo was attached before judgment and sent to Calcutta for sale. The plaintiffs now sued *A.*, *B.*, *M.*, and the holders for sale to establish their first charge in respect of their advances to *M.* upon 360 maunds of the indigo on the strength of their letters of assignment. *Held, per* GARTH, *C. J.*, and PHEAR, *J.*, that the plaintiffs were neither in the position of managers of the concern nor of consignees of the indigo, and were therefore not entitled to any lien upon the indigo, similar to the lien possessed by the manager or the consignee of a West India estate. *Held, per* PHEAR, *J.*, that the plaintiffs could not claim a lien on the indigo on grounds of a salvage character; it being essential to such a lien that the person spending the money of which he claims reimbursement should have some interest in the property, or some right or duty towards the owners who are to be affected by the claim, impelling him to make the expenditure. A mere volunteer can in general claim no such lien. *Held* on the facts *per* GARTH, *C. J.*, PHEAR and MACPHERSON, *JJ.*, that there was not evidence of such knowledge and acquiescence on the part of *A.* and *B.* with respect to the advances by and the assignments to the plaintiffs as would estop them from disputing the plaintiffs' claim. MORAN *v.* MITTU BIBEE

[I. L. R., 2 Calc., 58

18. ——— Lien on tea garden.—*Priority of lien.—Agreement by purchaser of moiety to pay working expenses to be charge on estate.—Valuation to purchaser of moiety for whole estate.*—Where a firm had purchased a moiety in a tea estate and engaged to pay all its working expenses, on the condition that the purchase-money should be a charge on the estate and be repaid from its produce before any profits were declared, and that the working expenses should be repayable in the same manner as the purchase-money of the moiety,—*Held* that the firm had a charge upon the original owner's moiety in priority to a bank mortgage which had been effected on it after the conveyance of the first moiety to the purchasing firm. On a question arising as to the price at which the firm should secure the whole property,—*Held*, that the original owner's moiety

**LIEN.—Lien on tea garden—*continued.***

should be purchased at the price which the bank's surveyor had valued it, and not at the market value at the time of the purchase, because the original owner having died in the interval, and the firm having been allowed to recover no portion of the advances which it had made for the working of the estate after his decease, it could not be required to pay again for the improvement in value of the estate which had resulted from its own advances. BROUGHTON *v.* SPINK . . . . . 25 W. R., 243

**LIGHT AND AIR, RIGHT TO—**

*See* CASES UNDER PRESCRIPTION—EASEMENT—LIGHT AND AIR.

**LIGHT AND AIR, OBSTRUCTION TO—**

*See* INJUNCTION—SPECIAL CASES—OBSTRUCTION TO RIGHTS OF PROPERTY.

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**LIGHTS, OBLIGATION OF VESSELS TO CARRY—**

*See* SHIPPING LAW—COLLISION.

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**LIMITATION.**


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*See* CASES UNDER BENGAL RENT ACT, 1869, s. 27.

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*See* BENGAL RENT ACT, 1869, s. 31.

[I. L. R., 4 Calc., 714

*See* CASES UNDER BENGAL RENT ACT, 1869, s. 58.

LIMITATION—*continued.*

*See* BENGAL RENT ACT, 1869, s 100 (1859, s. 144) . Marsh., 470 : 2 Hay, 597
[3 W. R., Act X, 139

*See* BOND . B. L. R., Sup. Vol., 618
[3 B. L. R., Ap., 112
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[I. L. R., 6 Bom., 528

*See* CASES UNDER CIVIL PROCEDURE CODE, 1877, ss. 257, 258.

*See* CONFISCATION OF PROPERTY IN OUDH.
[I. L. R., 4 Calc., 727

*See* EXECUTION OF DECREE—TRANSFER OF DECREE FOR EXECUTION, &c.
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*See* LANDLORD AND TENANT—PAYMENT OF RENT—NON-PAYMENT.
[I. L. R., 4 Calc., 661

*See* N.-W. P. RENT ACTS, 1873, 1881, s. 94 . . I. L. R., 1 All., 512

*See* CASES UNDER ONUS PROBANDI—LIMITATION AND ADVERSE POSSESSION.
[I. L. R., 5 Calc., 36

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[I. L. R., 6 Bom., 628

*See* CASES UNDER POSSESSION—ADVERSE POSSESSION.

*See* POSSESSION—EVIDENCE OF TITLE.
[I. L. R., 3 Calc., 768
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*See* POSSESSION—NATURE OF POSSESSION.
[I. L. R., 4 Calc., 216, 870
2 B. L. R., Ap., 29
7 B. L. R., Ap., 20
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*See* CASES UNDER SALE IN EXECUTION OF DECREE—INVALID SALES—DECREES BARRED BY LIMITATION.

*See* CASES UNDER TITLE—EVIDENCE AND PROOF OF TITLE—LONG POSSESSION.

*See* TRUSTEE AND CESTUI QUE TRUST.
[3 B. L. R., A. C., 409

LIMITATION—*continued.*

*See* WAGING WAR AGAINST THE QUEEN.
[7 B. L. R., 63

*See* WASTE . . 4 B. L. R., O. C., 1
[7 B. L. R., 131

## 1. LAW OF LIMITATION.

1. ——— **Nature of law.**—*Prescription.*—*Lex fori.*—The law of prescription or limitation is a law relating to procedure, having reference only to the *lex fori*. Where a Court entertains a cause of action which originated in a foreign country, the rule is to adjudicate according to the law of that country, yet the Court proceeds according to the prescription of the country in which it exercises jurisdiction. RUCKMABOYE *v.* LALLOBHOY MOTTICHUND
[5 Moore's I. A., 234

2. ——— **Operation of law.**—*Cause of action.*—The Statute of Limitations never begins to run until there has been a cause of action. KHURUCKDHAREE SINGH *v.* REWUT LALL SINGH
[12 W. R., 168

3. ——— *Application to enter up judgment on warrant of attorney.*—The Statute of Limitations is no answer to a rule *nisi* to enter up judgment on a warrant of attorney. SOOJAN MULL *v.* HYDER SINGH
[1 Ind. Jur., O. S., 58

4. ——— *Agreement of parties.*—*Held* that the operation of the Law of Limitation cannot be prevented by any act of the parties or arbitrators unless as provided by law, and a suit beyond time cannot be entertained by the Courts merely because the person entitled to assert the right was by some arrangement or negotiation prevented from asserting it within the statutable period. JEHANDAR KHAN *v.* MUNNOO
[1 Agra, 248

DAVIS *v.* ABDOOL HAMED . . 8 W. R., 55

5. ——— *Rule of Court.*—Nor can its operation be prevented by a rule of Court. KAMBINAYANI JAVAJI SUBBA RAJALU NAYANI VARU *v.* UDDIGHIRI VENKATARAYA CHETTY
[2 Mad., 268

6. ——— **Right of Government to defence of.**—*Suits against Government by creditors of ex-King of Delhi.*—The Government of India, taking upon themselves to pay debts due against the estate of the ex-King of Delhi out of the assets of the estate of the ex-King, are entitled to avail themselves of the Statute of Limitations in a suit brought against the estate; but if a suit could justly, and in equity and conscience, be substantiated against the ex-King, it ought to be allowed before the Government officers, irrespective of technical difficulties which might have attended legal proceedings against the King during his sovereignty. NARAIN DOSS *v.* ESTATE OF THE EX-KING OF DELHI
[10 W. R., P. C., 55

S. C. LALLA NARAIN DOSS *v.* ESTATE OF EX-KING OF DELHI . . 11 Moore's I. A., 277

LIMITATION—*continued.*

2. QUESTION OF LIMITATION.

7. ——— **Adding defendant.**—*Civil Procedure Code (Act XIV of 1882), ss. 32, 363, 364.*—No question of limitation can arise with respect to the Court's power to make an order adding a party defendant to a suit. ORIENTAL BANK CORPORATION *v.* CHARRIOL . . I. L. R., 12 Calc., 642

8. ——— **Right of Appellate Court to go into facts on question of limitation.**—There is no law which prevents a lower Appellate Court from looking into all the facts of a case before coming to a conclusion on the point of limitation. KEDARNATH GHOSE *v.* KASIM MUNDUL [8 W. R., 364

9. ——— **Extension of period of limitation.**—*Beng. Reg. II of 1805, s. 3, cl. 2.—Question of limitation.—Plaint.*—Clause 2, section 3, Bengal Regulation II of 1805, required the plaintiff in his plaint or replication to set forth distinctly the ground on which he claimed an extension of the period of limitation, and the Zillah Judge had no authority to raise the question of limitation where it was not mooted in the Court below. KISHEN CHUNDER ROY *v.* RAMKANAYE DOSS . 1 Ind. Jur., O. S., 23

RAMKANAYE DOSS *v.* KISHEN CHUNDER ROY [Marsh., 22: 1 Hay, 55

10. ——— **Question not raised by parties.**—*Pleading.—Small Cause Court Rule 19.—Per* PEACOCK, *C. J.*, and NORMAN, *J.*—It is competent for a Judge of the Court of Small Causes, of his own motion, to notice the point of limitation, and to decide a case upon that issue, such issue not having been raised by the defendant. *Per* MARKBY, *J.*—It is not competent for such Judge to raise the point, and decide the case thereon, after the case of both parties is closed. Lapse of time does not oust the jurisdiction of the Court. PAYNE *v.* CONSTABLE [1 B. L. R., O. C., 49

11. ——— **Plea struck out irregularly by first Court for prolixity of written statement.**—Where a plea of limitation was set up in the defendant's written statement, and the first Court, considering the written statement to be prolix, directed the pen to be run through a large part of it, the defendant, dissatisfied with this proceeding on the part of the first Court, appealed to the Judge complaining that no adjudication had been given on the plea of limitation. *Held* that the power of a Court to deal with written statements which appear to contain irrelevant matter, or to be argumentative or unnecessarily prolix, is regulated by section 124, Act VIII of 1859; and that as the plea of limitation must be assumed to have been properly before the Judge, he was bound to adjudicate upon it. BOOLEE SINGH *v.* HUROBUNS NARAIN SINGH [7 W. R., 212

12. ——— **Question raised on appeal.**—*Remand.—Power of Appellate Court.*—Where in the lower Court an issue was raised whether the plaintiff's claim was barred by limitation, and the

LIMITATION—*continued.*

2. QUESTION OF LIMITATION—*continued.*

**Question raised on appeal**—*continued.*

Judge decided it was not, and decreed the case on the merits; and the decree was appealed against by the plaintiff; and the Appellate Court did not deal with the question of limitation, but remanded the case for a new trial on the merits,—*Held* that, on appeal from the new decree, the Appellate Court could entertain the question of limitation; and that the lower Court might have re-tried that issue on the facts found on the new trial. PHOOL COOMAREE BEBEE *v.* OONKUR PERSHAD BOISTOBEE [2 Ind. Jur., N. S., 50

S. C. PHOOL KOOMAREE BEBEE *v.* WOONKAR PERSHAD RUSTOBY . . 7 W. R., 67

NILJAREE *v.* MUJEEBOOLLAH . 19 W. R., 209

13. ——— *Question not raised in lower Appellate Court.*—A plea of limitation overruled in the Court of first instance, and not brought before the lower Appellate Court, cannot be entertained by the High Court in special appeal. KASHEE CHUNDER TURKOBHOOSUN *v.* KALLY PROSUNNO CHOWDHRY . . 9 W. R., 452

14. ——— *Limitation depending on facts.*—Where a plea of limitation can only be properly decided with reference to facts found in connection with the question of possession and dispossession, and where appellants have omitted to press evidence on the point, though they had every opportunity before the lower Appellate Court, it cannot be admitted to be taken in special appeal. RAMDHONE DASS *v.* RAM RUTTUN DUTT [10 W. R., 425

15. ——— *Point for which evidence is necessary.*—Where the Statute of Limitations was not pleaded in the original Court,—*Held* that it might be set up in the Appellate Court if evidence could be taken there in reply to such plea. On special appeal the Statute of Limitations cannot for the first time be pleaded, unless where the facts which raise the plea are admitted. NARASU REDDI *v.* KRISHNA PADAYACHE . . 1 Mad., 358.

Nor in review. SARASVATI *v.* PACHANNA SETTI [3 Mad., 258

*See*, however, RAMANATHA MUDALI *v.* VAITHALINGA MUDALI . . . 2 Mad., 238

where it was held that the principle of the decision in *Narasu Reddi* v. *Krishna Padayache, 1 Mad., 358*, should not be extended.

It is now expressly laid down by section 4 of the Limitation Act, 1877, that the question of limitation must be taken into consideration whether raised as a defence or not.

16. ——— *Power of Appellate Court.—Appeal on portion of case.—Limitation Act, 1877, s. 4.*—Where a suit, which ought to have been dismissed under section 4 of the Limitation Act, although limitation was not set up as a defence, is not dismissed, the defendant, in order that the

LIMITATION—*continued.*

2. QUESTION OF LIMITATION—*continued.*

**Question raised on appeal**—*continued.*

question of limitation may be dealt with by the Appellate Court, must appeal on the whole case. ALIMUNNISSA KHATOON *v.* HOSSEINALI [6 C. L. R., 267

17. ——— *Cross-appeal.—Jurisdiction of Appellate Court.—Question of limitation not raised in cross-appeal.—Limitation Act. 1877, s. 4.*—On an application for execution of decree the application was granted, but the interest claimed by the decree-holder on the amount of the decree was disallowed. The decree-holder appealed from the order, but the judgment-debtor filed no cross-appeal. On the hearing of the appeal the application for execution was dismissed, on the ground that the execution of the decree was barred by limitation. *Held* that, under the circumstances of the case, the Appellate Court was not competent to take the question of limitation into consideration. *Alimunnissa Khatoon* v. *Hossein Ali. 6 C. L. R., 267,* followed. RUGHU NATH SINGH MANKU *v.* PARESHRAM MAHATA . I. L. R., 9 Calc., 635: 13 C. L. R., 89

18. ——— *Omission to decide question.*—The Judge in appeal is bound to decree according to the Law of Limitation applicable to the case as stated by the plaintiff himself, although the objection may not be raised in the grounds of appeal; and his omitting to do so is an error or defect in the decision of the case on the merits and a ground of special appeal. SAHIJI KESRAJI *v.* RAJSANGJI JALMSANGJI . 2 Bom., 169: 2nd Ed., 162

19. ——— **Question in reference for accounts to be taken.**—*Waiver.*—In a suit for an account, where the defendant, while alleging the balance to be in her favour, contended that the plaintiff's claim was barred by the Limitation Act, and the accounts were afterwards referred by consent to the commissioner, who refused without special direction to notice the defence of limitation, and the Judge of the Division Court amended the order of reference, by directing the commissioner to investigate the accounts with reference to the operation of the Act, —*Held,* on appeal (by COUCH, *C. J.,* and WESTROPP), that the order of amendment was justified by the circumstances of the case, and that the defendant having raised the defence of limitation, and not having subsequently abandoned it, that question should be first decided. PIRBHAI RAVJI *v.* NENBAI [3 Bom., O. C., 164

20. ——— **Question raised after remand on special appeal.**—*Law under the Limitation Act, 1859.*—A defence of limitation under Act XIV of 1859 could not be raised for the first time after there had been a remand on special appeal from the decree of the Court which has heard the cause on remand. *Buzl Ruheem* v. *Sreenath Bose, 6 W. R., 178,* followed; *Kuria* v. *Gururav, 9 Bom., 282,* distinguished; *Parker* v. *Elding, 1 East., 352,* and *Lila* v. *Vasudev, 11 Bom., 283,* distinguished. *Semble, per* WESTROPP, *C. J.,* doubting *Saluji* v. *Rajsanji, 2 Bom., 162, A. C* and *Davlata* v. *Beru, 4 Bom., 197, A. C.,* the Court ought not, even upon a special appeal in a case in which there has not been any remand, so to raise such question. MORU BIN PATLAJI *v.* GOPAL BIN SATU [I. L. R., 2 Bom., 120

LIMITATION—*continued.*

2. QUESTION OF LIMITATION—*continued.*

**Question raised after remand on special appeal**—*continued.*

21. ——— **Point of limitation taken for the first time in second appeal.**—*Omission of Court of first instance to reject a plaint for limitation, Effect of.*—The plaintiff's suit to recover certain lands was dismissed by the Court of first instance and by the lower Appellate Court, but on second appeal was remanded for determination of plaintiff's alleged right of perpetual cultivation of the land. On remand the District Judge gave a decision in favour of the plaintiff. The defendant appealed to the High Court, and then for the first time raised the point of limitation. *Held* that the objection was taken too late. The defendant had the opportunity of raising the objection under the Limitation Act, and, if necessary, of getting any question, on which it depended, tried by the Courts below; and as he took no steps to this end he should be taken to have waived his right to raise the objection. The omission of the Court of first instance to reject the claim if erroneous gave the defendant a right of appeal which he might renounce, and virtually did renounce. The obligation resting on the Court of first instance to reject a plaint, which on the face of it is barred by limitation, is not expressly laid on each successive Court whenever the objection comes to view, and ought not to be assumed by inference. DATTU *v.* KASAI . . I. L. R., 8 Bom., 535

22. ——— **Question in execution of decree.**—*Jurisdiction of Court where decree was passed.—Transfer of decree for execution.—Code of Civil Procedure, ss. 223, 239, 248.*—On the 4th of March 1884 a decree-holder applied to the Court of the Subordinate Judge of Moorshedabad (where the decree was passed) for transfer of the decree to the District Court of Beerbhoom for execution. The transfer was made, and, on application by the decree-holder, the judgment-debtor's properties in Beerbhoom were attached. Thereupon the judgment-debtor objected to the attachment, and obtained an order, under section 239 of the Code of Civil Procedure, staying the execution proceedings. The judgment-debtor then applied to the Court of the Subordinate Judge at Moorshedabad objecting to the execution of the decree on the ground that it was barred by limitation. The objection was overruled by the Subordinate Judge, and his decision was upheld on appeal to the District Judge. On second appeal to the High Court,—*Held* that the Moorshedabad Court was competent to hear and determine the plea of limitation. *Held,* also, that the fact of the judgment-debtor's not raising the plea of limitation in the Beerbhoom Court did not, under the circumstances, preclude him from relying on it in his subsequent application to the Court at Moorshedabad. SRIHARY MUNDUL *v.* MURARI CHOWDHRY [I. L. R., 13 Calc., 257

LIMITATION—*continued.*

2. QUESTION OF LIMITATION—*continued.*

**23. ——— Special and general question of limitation.**—*Minority.*—Where the issue of limitation raised in the first Court was a special issue as to the particular provision on the subject of minority found in section 11, Act XIV of 1859, plaintiffs were entitled to be heard on the issue of general limitation under clause 12, section 1, and to give evidence to show that the suit was not barred. BAHUR ALI *v.* SOOKRA BIBEE . . . 13 W. R., 63

**24. ——— Appeal from order overruling plea of limitation.**—*Interlocutory order.*—The order of a Judge overruling the defence of limitation, and remanding the suit for trial on the merits, if not immediately appealed against as a decree, may, as an interlocutory order, be objected to when the ultimate decision is appealed against. WUZEERUN BEEBEE *v.* WARRIS ALI . . . 1 W. R., 51

VITHAL VISHVANATH PRABHU *v.* RAMCHANDRA SADASHIV KIRKIRE . 7 Bom., A. C., 149

But *see* BEEKUN KOER *v.* MAHARAJAH BAHADOOR [Marsh., 66 : 1 Hay, 134

**25. ——— Decision on plea by implication.**—It is not necessary that the Court below should expressly overrule a plea of limitation; it is sufficient if the Court disposes of the question of limitation by implication. WISE *v.* ROMANATH SEN LUSKHUR . . . 2 Ind. Jur., O. S., 5

**26. ——— Right to raise plea.**—*Landlord and tenant.—Suit for possession.—Trespasser.*—In a suit to recover possession, the defendant, by admitting the right of the plaintiff as the owner of the land in dispute, and acknowledging himself to be the plaintiff's tenant, precludes himself from pleading adverse possession or limitation, in whatever form it may be that the plaintiff asserts his right to the land,—*i.e.*, whether he sues the defendant as a tenant or trespasser. WATSON & Co. *v.* SHURUT SOONDEREE DEBIA . . . . 7 W. R., 395

**27. ———** *Landlord and tenant.—False plea of tenancy.—Trespasser.*—The plea of limitation can be raised and determined in a suit brought by a landlord against a person who is really a trespasser, but who has set up a false case of tenancy. DINOMONEY DABEA *v.* DOORGAPERSAD MOZOOMDAR [12 B. L. R., F. B., 274 : 21 W. R., 70

**28. ———** *Landlord and tenant.—Adverse possession.*—Where the plaintiff sued for khas possession of land, it was held the defendants, tenants of the plaintiff, could raise the plea of limitation, on the ground that they had held possession of the land as bi-howladars for more than twelve years previous to the suit. RUTTONMONEE DABEE *v.* KOMOLAKANTH MOOKERJEE [12 B. L. R., 283, note : 12 W. R., 364

**29. ———** *Landlord and tenant.—Knowledge of adverse title.*—Limitation can be pleaded in a suit by a landlord against a tenant, but where the defendant claimed to hold on a mokurrari tenure, to make the possession adverse, it must be shown that the plaintiff knew of the title set up by the defendant. TEKAITNE GOWRA KUMARI *v.* BENGAL COAL COMPANY [12 B. L. R., 282, note : 13 W. R., 129

Affirmed by Privy Council . 19 W. R., 252

**30. ———** *Landlord and tenant.—Failure to prove talookdari right.*—Ryots failing to establish a talookdari right set up by them are not in a position to plead adverse possession as against their landlord's right to recover rent. LAKOO KHAN *v.* WISE . . . . 18 W. R., 443

**31. ———** *Landlord and tenant.—Defendant pleading tenancy and adverse possession.*—A defendant has a right to set up the plea of tenancy and at the same time to rely on the Statute of Limitations. *Dinomoney Dabea* v. *Doorgapersad Mozoomdar, 12 B. L. R., 274,* followed. *Tekaitne Gowra Kumari* v. *Bengal Coal Company, 12 B. L. R., 282, note,* distinguished. MAIDIN SAIBA *v.* NAGAPA . . I. L. R., 7 Bom., 96

**32. ———** *Landlord and tenant—Semble,*—A sub-lessee without title cannot plead limitation against his landlord either by himself or through his lessor. MAHARAM SHEIKH *v.* NAKOWRI DAS MAHALDAR . . 7 B. L. R., Ap., 17

S. C. MOHURUM SHAIKH *v.* NOWKURREE DASS MOHULDAR . . . 14 W. R., 357

But *see* NAZIMUDDIN HOSSEIN *v.* LLOYD [6 B. L. R., Ap., 130 : 15 W. R., 232

3. STATUTES OF LIMITATION.

(*a*) GENERALLY.

**33. ——— Construction of Limitation Act.**—Statutes of Limitation are, in their nature, strict and inflexible enactments, and ought to receive such a construction as the language in its plain meaning imports. LUCHMEE BUKSH ROY *v.* RUNJEET RAM PANDAY [13 B. L. R., P. C., 177 : 20 W. R., 375

S. C. in lower Court . . 12 W. R., 443

**34. ———** An Act of Limitation being restrictive of the ordinary right to take legal proceedings must, where its language is ambiguous, be construed strictly,—*i.e.*, in favour of the right to proceed. UMIASHANKAR LAKHMIRAM *v.* CHHOTALAL VAJERAM . . I. L. R., 1 Bom., 19

**35. ———** The applicability of the particular sections of Act XIV of 1859 must be determined by the nature of the thing sued for, and not by the status, race, character, or religion of the parties to the suit. FUTTEHSANGJI JASWANTSANGJI *v.* DESAI KULLIANRAIJI HAKOOMUTRAIJI [13 B. L. R., 254 : 21 W. R., 178 L. R., 1 I. A., 34

LIMITATION—*continued.*

3. STATUTES OF LIMITATION—*continued.*

(*a*) GENERALLY—*continued.*

**Construction of Limitation Act—*continued.***

36. ——— *Limits to enforcing rights.*—A Limitation Act is not intended to define or create causes of action, but simply to prescribe the periods within which existing rights may be enforced. JIVI *v.* RAMJI . I. L. R., 3 Bom., 207

37. ——— *Retrospective effect.*—The general rule as laid down in *Reg.* v. *Dorabji, 11 Bom., 117,*—that "an Act of limitation, being a law of procedure, governs all proceedings, to which its terms are applicable, from the moment of its enactment, except so far as its operation is expressly excluded or postponed,"—admits of the qualification that, when the retrospective application of a Statute of Limitation would destroy vested rights or inflict such hardship or injustice as could not have been within the contemplation of the Legislature, then the statute is not, any more than any other law, to be construed retrospectively. KHUSALBHAI *v.* KABHAI . . . . I. L. R., 6 Bom., 26

(*b*) STATUTE 21, JAC. I, C. 10.

38. ——— **Action of contract.**—*Cause of action.—Breach of contract and refusal to perform it.*—In actions of contract the breach of a contract is the cause of action, and the Statute of Limitations runs from the time of the breach, and not from the time of the refusal to perform the contract. In 1822 *A.* purchased at a Government sale at Calcutta a quantity of salt, part of a larger portion then lying in the warehouse of the vendors (the Government) where the salt was to be delivered. By the condition of sale it was declared that, on payment of the purchase-money, the purchaser should be furnished with permits to enable him to take possession of the salt: there was also a stipulation that the salt purchased should be cleared from the place of delivery within twelve months from the day of sale, otherwise the purchaser was to pay warehouse rent for the quantity then afterwards to be delivered. The purchaser paid the purchase-money, and received permits for the delivery of the salt, which was delivered to him in various quantities down to the year 1831, in which year an inundation took place which destroyed the salt in the warehouse, and there remained no salt to satisfy the contract. The purchaser petitioned the vendors for a return of the purchase-money, which was refused, on the ground that the loss happened through his negligence in not sooner clearing the salt from the warehouse. An enquiry, however, took place at the instance of the Government, who referred the matter to the Salt Collector. The Collector did not make his report till the year 1838, and upon that report the Government refused to return the purchase-money claimed in respect of the deficient salt. The purchaser then brought an action of assumpsit for recovery of the purchase-money of such part of the salt as had not been delivered, alleging, as a breach, the non-delivery thereof. To this the defendants pleaded the Statute of Limitations, that the cause of action had not accrued within the commencement of the suit. The Supreme Court at Calcutta found a verdict for the plaintiff. *Held* on appeal, reversing that decision, that when the purchaser applied for the residue of the salt and was told there was none to deliver, the contract was broken, and the cause of action accrued from the time of such breach, and that the subsequent enquiries by the Government did not suspend the operation of the Statute of Limitations till 1838, the time of the final refusal, and that the remedy was barred by the statute. *Semble,*—There may be an agreement that, in consideration of an enquiry into the merits of a disputed claim, no advantage should be taken of the statute in respect of the time employed in the enquiry, and an action might be brought for a breach of such agreement. EAST INDIA COMPANY *v.* ODITCHURN PAUL . . . 5 Moore's I. A., 43

(*c*) OUDH, RULES FOR—

39. ——— ss. 9 & 14.—*Suits on money bonds.—Bond executed before annexation of Oudh.*—By section 9 of the Limitation Rules for the guidance of Civil Courts in Oudh, as explained by the Circular Order of the Judicial Commissioner, 104 of 1860, the limitation of suits was fixed for three years in "suits for money lent for a fixed period, or for interest payable on a specified date or dates, or for breach of contract, unless there is a written engagement or contract; and where registry offices existed at the time, such engagement was registered within six months of its date." That section held not to apply in the case of a bond executed in 1855 before the annexation of Oudh, when there was no registry at the place where it was made and sued for in 1860, such transaction falling within section 14 of that Circular Order where the period of limitation is six years for "all suits on bonds registered within six months of their date, or on bonds formally attested when there was no means of registry, and all other suits for which no other limitation is expressly provided by these rules:" and a decree of the Judicial Commissioner of Oudh, holding that a suit on the bond was barred by the three years' limitation provided by section 9 of the rules, reversed on appeal. SALIGRAM *v.* AZIM ALI BEG . . 10 Moore's I. A., 114

(*d*) BENGAL REGULATION III OF 1793.

40. ——— s. 14.—*Exemption from limitation.—Good and sufficient cause.*—The Government having neglected for thirteen years to commence a regular suit, no "good and sufficient cause" precluding them from obtaining redress, according to the exception provided by Regulation III of 1793, section 14, could be presumed to justify the exemption of their suit from limitation. GOVERNMENT OF BENGAL *v.* SHURRUFFUTOONISSA

[3 W. R., P. C., 31: 8 Moore's I. A., 225

41. ——— *Exemption from limitation.—Distant residence.—Good cause for delay.*—

LIMITATION—*continued.*

3. STATUTES OF LIMITATION—*continued.*

(*d*) BENGAL REGULATION III OF 1793—*continued.*

s. 14—*continued.*

*Beng. Reg. II of 1805, s. 3.*—Where a party in possession of an estate is a *bonâ fide* purchaser for valuable consideration without notice, and the real owner had neglected for twenty-five years to assert her right to the estate, mere distant residence was held not to be a sufficient cause to preclude the owner from making an earlier assertion of her right so as to save her from limitation by bringing her within the exceptions of section 14, Regulation III, 1793, and section 3, Regulation II of 1805. IMDAD ALI *v.* KOOTHY BEGUM

[6 W. R., P. C., 24: 3 Moore's I. A., 1

42. ——————— *Deduction of time.—Non-suit.—Computation of limitation.*—According to the former procedure, when a suit before a competent tribunal ended in a non-suit, the period of limitation was computed from the accruing of the original cause of action, the time while the first suit was pending being deducted. PURBHOO NARAIN SINGH *v.* LELANUND SINGH . . . . 2 W. R., 256

43. ——————— *Deduction of time.— Suit by minor after attaining majority.—Non-allowance of pendency of suit by guardian.*—In a suit by a minor after attaining majority, no allowance can be made, under Regulation III of 1793, for the period of pendency of a suit brought by his guardian and eventually non-suited. LUCHMUN PERSHAD *v.* JUGGERNATH DOSS . . . . W. R., 1864, 2

44. ——————— *Deduction of time.—Suit in Collector's Court.—Reference to civil suit.*—A suit for proprietary right in certain rent-free land in respect of which the plaintiff had instituted a suit for rent before the Collector, which was dismissed, and the plaintiff referred to a civil suit,—*Held* that the plaintiff was not entitled to any deduction of the time during which the rent suit was proceeding, and that the date of accrual of plaintiff's right, and not that of the Collector's order of reference, was the cause of action in this case, and that the plaintiff's suit was barred by limitation, under section 14, Regulation III of 1793. HOSSAIN KHAN *v.* DINNOBUNDHOO PUNDAH . . . . 1 W. R., 35

OKHETOONISSA *v.* KOOCHIL SIRDAR

[2 W. R., 45

45. ——————— *Deduction of time.—Suit for excess of jumma.—Suit first brought in summary department.*—The time occupied in the summary department in recovering excess of jumma according to a decree should be deducted from the period of limitation for the regular suit which is afterwards brought for the same purpose, and to which the plaintiff was referred by the Court. HUROMONEE GOOPTIA *v.* GOBIND COOMAR CHOWDHRY

[5 W. R., 51

46. ——————— *Deduction of time.—Disputed title.—Sufficient cause.—Substitution of parties.*—The plaintiffs, as heirs of *R.*, the husband of one *B.*, more than twelve years after her death sued to recover lands alienated by her. As an answer to the plea of limitation, they alleged that, in a suit for other property brought against *B.* in her lifetime, they presented a petition after her death praying to be allowed to appear as her representatives, and were opposed by one *L.* claiming to be an adopted son of *R.*; that in March 1847, and within twelve years before suit, the Principal Sudder Ameen ordered the plaintiffs' names to be substituted for that of *B.* as defendants in that suit. *Held* by the majority of the Court (*dissentiente*, GLOVER, *J.*) that these proceedings did not bar the operation of the old Law of Limitation (section 14, Regulation III of 1793). RAMGOPAL ROY *v.* CHUNDER COOMAR MUNDUL

[2 W. R., 65

47. ——————— *Deduction of time.*—A party who had been endeavouring by resort to competent Courts to recover his rights was held to be entitled to avail himself of the exception in Regulation III of 1793, section 14, though part of the proceedings was erroneous in enforcing an order made by a single Judge of the Sudder Court, which was ineffectual by reason of its not being confirmed by a second Judge. DOORGAPERSAUD ROY CHOWDHRY *v.* TARAPERSAUD ROY CHOWDHRY

[4 W. R., P. C., 63: 8 Moore's I. A., 308

48. ——————— *Deduction of time.—Beng. Reg. II of 1805, s. 3.—Adverse possession.—Suit by heir for share of inheritance.—A.* died in 1813. At *A.'s* death one of his heirs entitled to a share in the succession of his estate obtained possession, claiming the entirety under a deed of gift. Another heir also claimed the entirety, first under a will, and in the alternative as customary heir. Suits were brought by the two claimants, in the course of which questions were raised as to who would be entitled in case both claimants should fail, but from the frame of the suits it was impracticable to deal with these questions till the adverse claims to the entirety were disposed of. Ultimately, in 1842, those claims were disposed of by the Judicial Committee of the Privy Council in one of the suits by a decision which in substance negatived the claims of both parties to the entirety, and decreed that the heirs of *A.*, according to the Shiah law of inheritance, were entitled, and directed the mesne profits to be brought into Court and divided among such heirs. A suit was in consequence instituted in 1852 by one of the heirs of *A.* to carry into execution the decree of the Privy Council made in 1842. *Held* that, although the claim which accrued so long ago as the death of *A.* would have been in ordinary circumstances barred by the Bengal Regulations III of 1793, section 14, and II of 1805, section 3, yet that, as the pendency of the appeal rendered it impracticable to bring the suit until the question was disposed of by the decree of the Privy Council in 1842, the suit must be considered as supplemental to that decree, and as it was brought within twelve years from that date, it was not barred by these Regulations. *Held*, also, that although one of

LIMITATION—*continued.*

3. STATUTES OF LIMITATION—*continued.*

(*d*) BENGAL REGULATION III OF 1793—*continued.*

s. 14—*continued.*

the original claimants had obtained possession under an order of the Court, and retained the same until the final decree in 1842, it was not such a quiet and undisturbed possession, under the circumstances, as to operate by Regulation II of 1805, section 3, as a bar to the suit. ENAYET HOSSEIN *v.* AHMED REZA [7 Moore's I. A., 238

(*e*) BENGAL REGULATION VII OF 1799.

49. ——— **Ineffectual execution proceedings in summary suit.**—*Beng. Reg. VIII of 1819, s. 18, cl. 4.—Cause of action.*—In a summary suit under Regulation VII of 1799, the plaintiff obtained a decree against his gomastah for certain moneys due from the latter, but failed in execution to recover the amount. He accordingly brought a regular suit under clause 4, section 18, Regulation VIII of 1819, in order to make the immoveable property of his gomastah available in satisfaction of the debt. *Held,* his cause of action in the regular suit was the same as his cause of action in the summary suit, and that the period of limitation must be reckoned from the time when that cause of action accrued, and not from the date of the summary decree, or from the time when the plaintiff discovered that he could not obtain satisfaction of such decree. SEEENATH GHOSAL *v.* BISSONATH GHOSE [B. L. R., Sup. Vol., Ap., 10: 5 W. R., 100

(*f*) BOMBAY REGULATION I OF 1800.

50. ——— s. 13.—*Offer to compromise suit.—Admission.—Residence of defendant out of jurisdiction.*—The offer of a specific sum of money by way of compromise, in no way involving an admission of the justice of the plaintiffs' demand further than what may be inferred from the offer of any compromise (an inference which is never permitted), could not bring the plaintiffs within the exception, in section 13, Regulation I of 1800, of the Bombay Code, under which a suit was barred by limitation if not brought within twelve years from accrual of the cause of action. The defendant's residence beyond the limits of the E. I. Co.'s Court was not a good and sufficient cause, within the meaning of the same exception, to excuse the plaintiffs' delay in suing beyond the twelve years. BHAEE CHUND *v.* PURTAB CHUND [5 W. R., P. C., 31: 1 Moore's I. A., 154

51. ——— *Suit for land.—Land attached to hereditary office.*—The Bombay Regulation I of 1800, section 13, limiting the right of action to twelve years, included suits on account of land as well as personal actions. Where, therefore, a suit was instituted for the share of certain lands some of which were attached to the hereditary office of desai, and no satisfactory proof was given that any demand had been made in respect thereof within that period, the right of action was held to be absolutely barred. NUNDRAM DYARAM *v.* DULA BHAEE KURPARAM [1 Moore's I. A., 414

LIMITATION—*continued.*

3. STATUTES OF LIMITATION—*continued.*

(*g*) MADRAS REGULATION II OF 1802.

52. ——— s. 18, cl. 4.—*Irregular proceedings of Court.*—A suit was not barred by limitation under clause 4, section 18, Regulation II, 1802, of the Madras Code, if the plaintiff preferred his claim within the prescribed period to a Court of competent jurisdiction, and was prevented from commencing his suit in proper time by no neglect on his part, but by the irregular proceedings of the Court to which his claim was preferred. NARAGUNTY LUCHMEDAVAMAH *v.* VENGAMA NAIDOO [1 W. R., P. C., 309: 9 Moore's I. A., 66

53. ——— ——— *Deduction of time bond was under attachment.—Good and sufficient cause.*—Where a bond was seized under legal process of attachment after it had become due, but before the lapse of twelve years from its date, and remained under attachment for several years,—*Held* that there was "good and sufficient cause" for the lapse of time within the meaning of Regulation II of 1802, section 18, clause 4, and that a suit on the bond was therefore not barred. KADABBACHA SAHIB *v.* RANGASVAMI NAYAK . . . . 1 Mad., 150

(*h*) BENGAL REGULATION II OF 1805.

54. ——— *Suit for rent.—Adverse possession.—Suit for ejectment.*—A suit instituted by a zemindar in 1857, for the recovery of rent, for six years and nine months preceding its commencement, of land held rent-free since 1796, under a grant alleged to be null and void under section 10 of Regulation XIX of 1793, was held barred by sixty years' peaceable and uninterrupted possession of the grantee and his representatives according to the provisions of Regulation II of 1805. *Held,* also, that a suit to eject would be similarly barred. CHUNDRA BULLEE DEBIA *v.* LUCKHEE DEBIA CHOWDHRAIN [1 Ind. Jur., N. S., 25, 141: 5 W. R., P. C., 1 10 Moore's I. A., 214

55. ——— *Suit for possession.*—Under Regulation II, 1805, sixty years is fixed as the absolute limit beyond which neither fraud nor any other special allegation will give a cause of action. In a suit by Government against ghatwals, the defendants were found to have been in possession "for a very long time," and although they had failed to prove possession in excess of sixty years, the *onus* was held to lie on the Government to prove possession within sixty years. BROMANUND GOSSAIN *v.* GOVERNMENT [5 W. R., 136

56. ——— s. 2, cl. 2.—*Suit for resumption and assessment by Government.*—The right of Government to institute proceedings by or before the Revenue Collector under Regulation II of 1819 for the resumption of lands for the purpose of assessment to the public revenue was barred by Regulation II of 1805, section 2, clause 2, after the lapse of sixty years from the cause of action. So held by the Judicial Committee of the Privy Council on appeal from a

LIMITATION—*continued.*

3. STATUTES OF LIMITATION—*continued.*

(*h*) BENGAL REGULATION II OF 1805—*continued.*

s. 2, cl. 2—*continued.*

decree made by the Special Commissioner, on a claim by Government where mahateran lands were held as lakhiraj by the Rajah of Burdwan before the Company's accession to the Dewany in 1765, and no claim had been made by Government to resume the lands for assessment till the year 1836. DHEERAJ RAJA MAHATAB CHUND BAHADOOR *v.* GOVERNMENT OF BENGAL . . . **4 Moore's I. A., 466**

57. ———— s. 3.—*Beng. Reg. XIX of 1793.—Lakhiraj.—Adverse possession.—Held* that under section 3, Regulation II of 1805, possession of land for a period upwards of sixty years since the passing of Regulation XIX of 1793, without payment of rent, barred the remedy of the zemindar to dispossess the holder, or to resume the land as mal. KASINATH KOOWAR *v.* BANKUBEHARI CHOWDHRY **[3 B. L. R., A. C., 446**

S. C. KASHEENATH KOONWAR *v.* BUNKO BEHAREE CHOWDHRY . . . **12 W. R., 440**

58. ———— *Beng. Reg. II of 1803, s. 18.—Violent and forcible possession.*—This case, which was originally instituted in the Zillah Court at the time when no regulation for the limitation of suits applicable to the suit existed but section 18, Regulation II, 1803, but which, having been appealed from the Zillah Court, was pending at the time that Regulation II of 1805, which corrected the Regulation of 1803, was passed, was held to be subject to the Regulation of 1805, as regards the forcible and violent possession taken by the defendants, who could not be allowed to plead their wrong in support of the plea of limitation. LALL DOKUL SINGH *v.* LALL ROODER PURTAB SINGH **[5 W. R., P. C., 95**

59. ———— *Fraudulent or forcible acquisition.*—Regulation II of 1805, section 3, which provides that the limitation of twelve years shall not be considered applicable to any private claims of right to immoveable property, if the party in possession shall have acquired possession by violence, fraud, or other unjust, dishonest means, must be considered with some strictness (otherwise the door would be opened widely to a large class of claims which ought properly to be barred), and the alleged fraudulent or forcible dispossession must be clearly established. RAJENDER KISHORE SINGH *v.* PERLHAD SEIN **[22 W. R., 165**

60. ———— *Maintenance, Liability to pay.*—The *nullum tempus* clause of section 3, Regulation II, 1805, does not apply to a case where the occupant was not a mortgagor or depositary, otherwise than as he was subject to pay a portion of the proceeds of the property to another during his lifetime. GORDON *v.* ABOO MAHOMED KHAN **[5 W. R., P. C., 68**

LIMITATION—*continued.*

3. STATUTES OF LIMITATION—*continued.*

(*i*) BOMBAY REGULATION V OF 1827.

61. ———— s. 1.—*Miras land.*—The law of limitation contained in section 1, Regulation V of 1827, applies to miras land as well as to all other descriptions of immoveable property. Special Appeals No. 2520 of 1850, *Morris, Sel. Dec., 51*; and No. 3064, *Morris, S. D. A. Rep., Vol. II*, overruled. SALU KOM RAGHUJI *v.* RAVAJI BIN RAMJEE **[1 Bom., 41**

62. ———— ss. 3 & 4.—*Claim for account by representative of deceased partner against surviving partners.*—A right to an account claimed by the representatives of a deceased partner in a firm against his surviving partners fell under section 4 of Regulation V of 1827, and was not a debt within the meaning of section 3 of that Regulation. BHAICHAND BIN KHEMCHAND *v.* FULCHAND HARICHAND **[8 Bom., A. C., 150**

63. ———— s. 7, cl. 2.—*Claim without binding decree having been made.*—A case was within the exception contained in clause 2, section 7, Regulation V of 1827, of the Bombay Code (Limitation of Suits), by reason of a claim having been preferred to the authority that was then the supreme power in the State, although a satisfactory and binding decree was not obtained. JEWAJEE *v.* TRIMBUKJEE **[6 W. R., P. C., 38: 3 Moore's I. A., 138**

64. ———— s. 7, cl. 3.—*Age of majority.*—*Held* that Regulation V of 1827, section 7, clause 3, did not alter the Hindu law of minority, but only defined the period of limitation in cases of minority generally. HARI MOHADAJI JOSHI *v.* VASUDEV MORESHVAR JOSHI . **2 Bom., 344: 2nd Ed., 325**

(*j*) ACT XXV OF 1857, s. 9.

65. ———— s. 9.—*Act IX of 1871, s. 1.—Minority, Disability arising from.—Forfeiture of property of rebel.—Repeal, Effect of.*—*B. S.*, the father of the plaintiff, who was in possession of an estate in Lohardugga, which had been granted to his ancestor by the Rajah of Chota Nagpore, was, on the 10th December 1857, after proceedings taken under Act XXV of 1857, declared to be a rebel, and it was ordered that all his property should be forfeited to Government. On the 16th April 1858, *B. S.* having been arrested was tried and convicted on a charge of rebellion, and sentenced to death. The sentence was carried out on the 21st April 1858, and an order was made on the same day by the Deputy Commissioner for the confiscation of his property. On the 1st April 1872, a suit was instituted by the plaintiff, then a minor, to recover possession of the estate of his father *B. S.* *Held* that the suit not having been instituted within one year from the seizure of the property, was barred by section 9, Act XXV of 1857, notwithstanding its repeal by Act IX of 1871. There being no exception in Act XXV of 1857 in favour of infants, the plaintiff was not entitled to deduct the time during which he was under

LIMITATION—*continued.*

3. STATUTES OF LIMITATION—*continued.*

(*j*) ACT XXV OF 1857, S. 9—*continued.*

S. 9—*continued.*

the disability of minority. KAPILNAUTH SAHAI DEO *v.* GOVERNMENT [13 B. L. R., 445 : 22 W. R., 17

66. ——— *Omission to adjudicate forfeiture of property.—Seizure of property of suspected person.*—The property in suit was attached by the Magistrate in 1858, and seized in 1862, without adjudication of forfeiture, as provided by Act XXV of 1857, and the owner did not surrender himself to undergo trial, and did not establish his innocence, or prove that he did not escape or evade justice, within one year from the date of seizure, as provided by section 8 of that enactment. *Held* that the suit was not barred by one year's limitation provided in section 9 of the said Act, it being applicable to suits and proceedings in respect of property seized after conviction of the offender if he is tried, or after an adjudication of forfeiture if he is not in person present to take his trial, and not where there is a mere seizure by a Magistrate of a suspected person's property without further proceedings. MAHOMED YUSUF ALI KHAN *v.* GOVERNMENT [1 Agra, 191

(*k*) ACT IX OF 1859.

67. ——— ss. 18 & 20.—*Involuntary absence.—Refusal to surrender.*—Although section 18, Act IX of 1859, deals with the property of an offender on conviction, and provides that the offender's failure to surrender himself within one year from the date of seizure would preclude the Courts from questioning the validity of seizure, yet the general terms of that section cannot, in the absence of express provision to that effect, be construed to mean that any involuntary absence would be treated as a default or refusal to surrender. *Held*, therefore, that plaintiff's suit, if he succeed in establishing that his absence within the limited period was involuntary, would be removed from the operation of that section. The plaintiff's suit was not barred by section 20, Act IX of 1859, which deals with the rights of persons who are not accused and suspected of the act of rebellion, and its operation according to ordinary rules of construction cannot be extended to cases not within the preceding portion of the section. MAHOMED YUSUF ALI KHAN *v.* GOVERNMENT . . . 1 Agra, 191

68. ——— s. 20.—*Forfeiture of rebel's property.*—Where the property of a rebel has been sold, any party claiming an interest in the thing sold is bound, under section 20, Act IX of 1859, to bring his suit within one year from the date of the order of confiscation. PROSUNNO PANDEY *v.* GUNGA RAM [W. R., 1864, 2

NEPAL SINGH *v.* RAM SARUN SINGH [W. R., 1864, 5

NUNDUN SINGH *v.* KOOLSOOM [W. R., 1864, 377

AMEEROONNISSA *v.* SHIB SUHAI . 1 Agra, 271

LIMITATION—*continued.*

3. STATUTES OF LIMITATION—*continued.*

(*k*) ACT IX OF 1859—*continued.*

S. 20—*continued.*

69. ——— *Attachment of rebel's property.*—The property of certain rebels was confiscated, and a list made of such property, which list did not specify the land in suit. *Held*, nevertheless, that, if the land in suit was actually attached as the property of the rebels, the plaintiff's suit could be barred by the special Limitation Law of Act IX of 1859. HAFIZ AMEER AHMED *v.* HAFIZ NUZAL ALI [1 Agra, 46

70. ——— *Disability of minority.—Forfeiture of rebel's property.*—Certain property, in the actual possession of a rebel, was confiscated by the Government in 1858. In a suit brought on 1st May 1865 to recover the property, it appeared that the plaintiffs were the sons and heirs of one *M.*, who died in 1854, legally entitled to, though not in possession of, the property in question; that, at the date of his death, and at the date of the confiscation, the plaintiffs were minors, and that they came of age in 1861 and February 1864 respectively. *Held* that the suit not having been brought within one year from the date of the confiscation, was barred by section 20, Act IX of 1859. There is no saving clause in Act IX of 1859 with respect to minors or parties under disability to sue, and such saving cannot be held to be implied upon any principle of equitable construction; nor can the saving clauses contained in the general Limitation Act, XIV of 1859, be imported into a special enactment. Act IX of 1859 is plainly retrospective in its operation, and applies to claims to forfeited property which had been confiscated before its passing. MAHOMED BAHADUR KHAN *v.* COLLECTOR OF BAREILLY [13 B. L. R., 292 : 21 W. R., 318 L. R., 1 I. A., 167

71. ——— *Forfeiture of property.—Cause of action.*—In cases of confiscation, limitation runs, not from the date on which confiscation is sanctioned by the Government, but rather from the date on which the property is actually attached on the part of the Government. DEO KARUN *v.* MOHAMED ALI SHAH . . . 3 N. W., 328

72. ——— *Foreclosure proceedings.*—Proceedings to foreclose are not the "suit" contemplated by section 20, Act IX of 1859. NUNDUN SINGH *v.* KOOLSOOM . . W. R., 1864, 377

73. ——— *Suit to redeem after confiscation of mortgagee's interest.*—Where the rights and interests of mortgagees only are confiscated and granted, the suit to redeem by a mortgagor is not barred by section 20, Act IX of 1859. RAMDHUN *v.* BHOWANEE SINGH . 3 Agra, 139

74. ——— *Suit by mortgagee for possession after foreclosure.*—A suit by a mortgagee for possession, on the ground of foreclosure, of rebel's property sold under Act IX of 1859, is barred by limitation if not brought within one year from the date of seizure or sale. Nothing in section 20 of the

LIMITATION—*continued.*

3. STATUTES OF LIMITATION—*continued.*

(*k*) ACT IX OF 1859—*continued.*

s. 20—*continued.*

Act allows a concurrent period of twelve years to sue in the ordinary Civil Courts for confirmation of civil rights. GOBIND PANDEY *v.* HEEMUT BAHADOOR [6 W. R., 42

75. ——— *Suit by mortgagee of confiscated property to enforce his lien against grantees.*—The plaintiff was the mortgagee of property confiscated in the Mutiny. He asserted his lien in May 1859 and when the property was afterwards granted to the defendants, it was granted subject to any claims that might be made in respect of it, and they in June 1859 executed an agreement, which had reference to the plaintiff's claim, binding themselves to take the risk of any liens subsisting on the property. In July 1861 they were informed by the Collector that they were answerable for the plaintiff's lien. The plaintiff sued the defendants to enforce his lien against the property. *Held* that the suit was not barred by limitation under Act IX of 1859. SIRDAR KHAN *v.* BULDEO SINGH [6 N. W., 99

(*l*) ACT XIV OF 1859.

*See* CASES UNDER LIMITATION ACT, 1877.

76. ——— **Application of Act.**—The provisions of the Limitation Act, XIV of 1859, did not apply to suits for arrears of rent under Act X of 1859, nor were the provisions of Act X of 1859 in any way affected by the provisions of Act XIV of 1859. POULSON *v.* MADHUSUDAN PAL CHOWDHRY . . . B. L. R., Sup. Vol., 101 [2 W. R., Act X, 21

*See* UNNODA PERSAUD MOOKERJEE *v.* KRISTO COOMAR MOITRO [15 B. L. R., P. C., 60, note: 19 W. R., 5

ASMEDH KOONWUR *v.* JOYKURM LALL [1 W. R., 349

STEPHEN *v.* GASPER . . . 1 W. R., 265

DABEE *v.* NUKEEMUNISSA [W. R., 1864, Act X, 116

SURNOMOYEE *v.* SINGHROOP BEBEE [W. R., 1864, Act X, 134

RAM SUNKUR SANAPATTY *v.* GOPAL KISHEN DEO [1 W. R., 68

MAYER *v.* SOWLATOONISSA [2 W. R., Act X, 96

MAHOMED KALEE SHIKDAR *v.* ALI HOSSEIN CHOWDHRY . . 3 W. R., Act X, 5

IN THE MATTER OF HOSSEIN ALI [13 W. R., 295

77. ——— **Operation of Act.**—The Act for limitation of suits (Act XIV of 1859) came into operation on the 1st January 1862. KAMBINAYANI JAVAJI SUBBA RAJALU NAYANI VARU *v.* UDDIGHIRI VENKATARAYA CHETTY . 2 Mad., 268

LIMITATION—*continued.*

3. STATUTES OF LIMITATION—*continued.*

(*l*) ACT XIV OF 1859—*continued.*

**Operation of Act**—*continued.*

78. ——— *Act XI of 1861.*—The periods of limitation specified in sections 19 to 23 of Act XIV of 1859 ran (under section 2, Act XI of 1861) from the 1st of January 1862. HUKUM CHAND TEKARAM *v.* BHUGVANTRA . 1 Bom., 94

*Contra,* EX PARTE KALIDAS DAMODHAR. EX. PARTE BAPUJI PITAMBHAR [3 Bom., A. C., 175

BAI UDEKUVAR *v.* MULJI NARAN [3 Bom., A. C., 177

79. ——— *Act XI of 1861.*—*Cases since Jan. 1862.*—Notwithstanding Act XI of 1861, suits instituted after January 1st, 1862, were held to be governed by the provisions of Act XIV of 1859. MOHIDIN SAHIB *v.* KHADER SAHIB 2 Mad., 42

80. ——— *Act XI of 1861.*—*Decree not in force at time of passing of Act XIV of 1859.*—Act XI of 1861 did not apply to decrees which were not in force at the time of the passing of Act XIV of 1859. SHAMEE MAHOMED SIRCAR *v.* BRINDA MUNDLE . . . 11 W. R., 100

81. ——— *Former character of lands entirely altered.*—Act XIV of 1859 was not applicable to a case where the former condition of the lands sued for became entirely altered and the former landmarks destroyed by diluvion. SHURUT SOONDERY DEBEE *v.* GOVERNMENT . 7 W. R., 42

82. ——— *Act IX of 1871.*—*Applications in suits.*—Act XIV of 1859, and not Act IX of 1871, applied to application in suits instituted before 1st April 1873. BHIKAMBHAT *v.* FERNANDEZ . . I. L. R., 5 Bom., 673

MONGOL PERSHAD DICHIT *v.* GRIJA KANT LAHURI . . . I. L. R., 8 Calc., 51 [L. R., 8 I. A., 123

BEHARY LALL *v.* GOBEEDHUN LALL [I. L. R., 9 Calc., 446

GURUPADAPA BASAPA *v.* VIRBHADRAPA IRSANGAPA . . . I. L. R., 7 Bom., 459

LUCHMEE PERSHAD NARAIN SINGH *v.* TILUCKDHAREE SINGH . . . 24 W. R., 295

JOYRAM LOOT v. PANI RAM DHOBA [8 C. L. R., 54

83. ——— ss. 20 & 21.—*Execution of decree, Application for.*—It was not necessary, under sections 20 and 21, that process of attachment should have been taken out within three years; but in order to determine whether execution was barred or not, it was necessary to see whether, at the time of application to execute next after the passing of the Act, any portion of the time theretofore limited by law for issuing process of execution still remained, unless these three years from the passing of the Act had already

LIMITATION—*continued.*

3. STATUTES OF LIMITATION—*continued.*

(*l*) ACT XIV OF 1859—*continued.*

ss. 20 & 21—*continued.*

expired. NOWARAJA CHOWDHRY *v.* RAM KANAYE DASS . . . . . 7 W. R., 330

84. ——— *Decree payable by instalments.*—Where a decree passed before 1859 authorised the judgment-debtor to pay by instalments extending over a period of thirteen years, and no proceedings in execution were taken within the time prescribed by sections 20 and 21, the execution of the decree was held barred by limitation even as to those instalments which were within time. TILUCK CHUNDER GOOHO *v.* GOURMONEE DEBEE [6 W. R., Mis., 92

85. ——— *Execution of decree.*—In the case of a decree which was passed in 1831, and part payment made on the 2nd of February 1859, so that it was in force at the time of the passing of Act XIV of 1859 (4th of May 1859), the Sudder Ameen rejected an application for execution made on the 19th April 1865; but the District Judge reversed his order, being of opinion that decrees referred to in section 21 of the Act might be saved from the operation of section 20, even though no process of execution had issued within the time provided for by section 21. *Held* that the right construction of the Act was to keep these sections distinct by applying section 20 to decrees or orders made after the passing of the Act, and section 21 to decrees or orders in force at the time of its passing; so that it was not necessary to resort to section 20 in construing section 21 if the word "may" in the latter section were read as equivalent to "must" or "shall," on the principle that affirmative words sometimes imply the negative of what was not affirmed, as strongly as if expressed. *Semble,*—Where the issuing of the execution within the time limited by section 21 was prevented by the delay of the Court which was to execute the decree, such Court would have power to prevent an unjust prejudice to the suitor by the delay unavoidably arising from its own act, by ordering the execution to issue as of the date when it would have been issued if there had been no such delay. BAI UDE KUVAR *v.* MULJI NARAN [3 Bom., A. C., 177

EXPARTE KALIDAS DAMODHAR. EX PARTE BAPUJI PITAMBHAR . . 3 Bom., A. C., 175

MAKUNDA VALAD BALACHARYA *v.* SITARAM [5 Bom., A. C., 102

86. ——— *Execution of decree, Application for.*—A decree was obtained in the Court of the Deputy Commissioner of Delhi on the 5th October 1866, prior to the date when Act XIV of 1859 was extended to the Punjab,—*viz.*, the 1st of January 1867. On the 22nd of October 1869, an application, admittedly *bonâ fide*, was made for execution, but the application was refused on the ground that it was barred by lapse of time, and no appeal was brought against that order. A subsequent application for execution was made on the 4th of May 1871, which was also refused on a similar ground. On appeal the Commissioner and Chief Court confirmed this order. *Held*, reversing the decision of the Court below, that execution of the decree was not barred by section 21, Act XIV of 1859. In construing section 21, Act XIV of 1859, the words "nothing in the preceding section shall apply to a judgment in force at the time of the passing of the Act," mean that nothing in the preceding section should prejudicially affect the right of a creditor under a judgment in force at the time of the passing of the Act: and the words "but process of execution may be issued," &c., mean that notwithstanding anything in the preceding section, execution might issue either within the time limited by the law in force when the Act was passed, or within three years next after the passing of the Act, whichever should first expire. DELHI AND LONDON BANK *v.* ORCHARD . . . I. L. R., 3 Calc., 47 [L. R., 4 I. A., 127

87. ——— s. 21.—*From what period it counts.*—Limitation under section 21, Act XIV of 1859, counted from May 5th, 1859 (the date of the passing of the Act), and not from the date of its coming into operation. COLLECTOR OF BEERBHOOM *v.* RAJ COOMAREE DASSIA . 2 W. R., Mis., 17

MAHOMED BUSEEROODDEEN *v.* MAHOMED KHAN KUZULBASH . . . 4 W. R., Mis., 13

88. ——— *Application for execution of decree.*—According to section 21, process of execution could not be issued in respect of a decree in force at the passing of that Act, except where an effectual application had been made, either within the time previously limited by law, or within three years next after the passing of the Act, whichever should first expire. Abortive, because unauthorised proceedings, cannot give the decree-holder any fresh start for computing limitations. BARODA DEBIA *v.* SREERAM CHOWDHRY . . 5 W. R., Mis., 21

89. ——— *Application of section*—Section 21 applied to the first application after the passing of that Act to execute a decree in force at the time of the passing of the Act; but on the next and subsequent applications, the rule contained in section 20 was to be followed. GREGORY *v.* JUGGAT CHUNDER BANNERJEE . 5 W. R., Mis., 17

DOORGA CHURN ROY *v.* DINO MOYEE DEBIA [6 W. R., Mis., 14

90. ——— *Issue of process of execution.*—The attachment of property in execution of a decree, although attachment was afterwards set aside, was a sufficient issuing of process of execution within the meaning of section 21, Act XIV of 1859. KALEE PERSHAD SINGH *v.* JANKEE DEO NARAIN [7 W. R., 9

91. ——— *Application for execution of decree.*—Where the holder of a decree which was in force when Act XIV of 1859 came into operation

LIMITATION—*continued.*

3. STATUTES OF LIMITATION—*continued.*

(*l*) ACT XIV OF 1859—*continued.*

s. 21—*continued.*

applied for execution on the 5th of December 1864, but allowed the application to drop, and again applied for execution on the 28th of March 1866, it was held that he was barred by the law of limitation. MAKUNDA VALAD BALACHARYA *v.* SITARAM [5 Bom., A. C., 102

(*m*) LIMITATION ACT, 1871.

92. ——— s. 1.—*Operation of Act.*—Clause (*a*), section 1, of Act IX of 1871, has reference only to suits actually instituted before that date. JOYRAM LOOT *v.* PANI RAM DHOBA . . 8 C. L. R., 54

MONGOL PERSHAD DICHIT *v.* GRIJA KANT LAHURI . . . . I. L. R., 8 Calc., 51 [L. L., 8 I. A., 123

BEHARY LALL *v.* GOBERDHUN LALL [I. L. R., 9 Calc., 446

GURUPADAPA BASAPA *v.* VIRBHADRAPA IRSANGAPA [I. L. R., 7 Bom., 459

93. ——— *Operation of Act.*—The law of limitation applicable to suits brought after 1st April 1873 upon causes of action which had accrued previously to that day, and which had not been barred under previous enactments, as well as to suits upon causes of action which accrue afterwards, was Act IX of 1871. RAMCHANDRA *v.* SOMA [I. L. R., 1 Bom., 305, note

And *see* NOCOOR CHUNDER BOSE *v.* KALLY COOMAR GHOSE . . . I. L. R., 1 Calc., 328

94. ——— *Operation of Act.—Appeals and applications.—General Clauses Act, 1868.*—The Limitation Act, 1871, came into operation from 1st July 1871 with respect to appeals and applications, and was not controlled by the General Clauses Consolidation Act, 1868, section 6. GOVIND LAKSHMAN *v.* NARAYAN MORESHVAR . . 11 Bom., 111

BALKRISHNA *v.* GANESH . 11 Bom., 116, note

RUGHOO NATH DOSS *v.* SHIROMONEE PAT MOHADEBEA . . . . . 24 W. R., 20

95. ——— *Operation of Act.—Suit barred when Act came into force.—Quære,*—Whether suits barred under Act XIV of 1859 before Act IX of 1871 came into force could, by reason of the alteration of the periods of limitation in the latter enactment, be sustained. ABDUL KARIM *v.* MANJI HANSRAJ . . . . . I. L. R., 1 Bom., 295

96. ——— *Operation of Act.—Revival of claim.—Repeal of Act.*—A claim barred by limitation when Act IX of 1871 came into force, was not revived by the passing of that Act. VINAYAK GOVIND *v.* BABAJI . . I. L. R., 4 Bom., 230

97. ——— *Operation of Act.—Suit for maintenance.*—A claim once barred cannot be revived by a change in the law of limitation. This

LIMITATION—*continued.*

3. STATUTES OF LIMITATION—*continued.*

(*m*) LIMITATION ACT, 1871—*continued.*

s. 1—*continued.*

principle applies as well to a claim for arrears of maintenance, or any other claims, as to one for possession of land. KRISHNA MOHUN BOSE *v.* OKHILMONI DOSSEE . . . . I. L. R., 3 Calc., 331

98. ——— *Operation of Act.—Suit on bond barred by Act XIV of 1859.*—The Limitation Act, 1871, did not give a new period of limitation to a suit on a bond which was barred by the Limitation Act of 1859 before the Act of 1871 came into force. VENKATTACHELLA MUDALI *v.* SASHAGHERRY RAU . . . . 7 Mad., 283

MOLAKATALLA NAGANNA *v.* PEDDA NARAPPA [7 Mad., 288

99. ——— *Suit on bond payable on demand.—Cause of action.*—In a suit brought in August 1873 on a bond, payable on demand, dated July 1868, on which payment had been demanded on three occasions—May 1871, September 1872, and May 1873, *Held* that, by the law in force at the time of execution of the document, the action was born in July 1868, and by the new as well as by the old law became barred in July 1871. The rule of the old as of the new law was that the time, having once begun to run, could not be stopped. The demand in 1871 could have no effect, for it was neither by the old nor the new law a mode of giving a new point of departure. VENCATARAMANIER *v.* MANCHE REDDY [7 Mad., 298

100. ——— s. 2.—*Bom. Reg. V of 1827, s. 1, cl. 1.—Prescriptive right.—Repeal of statute, Effect of.*—In 1873 the plaintiff sued for his share in certain ancestral property in the possession of the defendant, and alleged that the latter had been united with him in estate. He, however, admitted that he had lived separate from the defendant for forty years previously to the institution of the suit, and that he had not, during that period, received any portion of the profits of the ancestral property. The defendant pleaded limitation. Both the lower Courts held that the case was governed by Act IX of 1871, schedule II, article 127, and decreed in favour of the plaintiff on the ground that no demand by the plaintiff of his share and refusal to comply therewith had been proved. *Held* by the High Court, in special appeal, that the defendant had acquired, under Regulation V of 1827, section 1, clause 1, a prescriptive title in the immoveable estate sued for by his uninterrupted possession as proprietor for more than thirty years before Act IX of 1871 came into force, and that, therefore, the plaintiff's claim was barred, the effect of that Regulation being not only to bar the plaintiff's remedy, but to take away his right. The repeal of a statute or other legislative enactment cannot, without express words, or clear implication to that effect in the repealing Act, take away a right acquired under the repealed statute or other enactment while it was in force, and accordingly, although Act IX of 1871, section 2, schedule I, expressly repealed Regulation V of 1827, it did not affect any

LIMITATION—*continued.*

3. STATUTES OF LIMITATION—*continued.*

(*m*) LIMITATION ACT, 1871—*continued.*

s. 2—*continued.*

prescriptive right or title which had, under section 1 of that Regulation, been acquired before Act IX of 1871 was passed. SITARAM VASUDEB *v.* KHANDERAV BALKRISHNA . I. L. R., 1 Bom., 287

101. ——— sch. II.—*Suits before Act came into force.*—Act IX of 1871 did not apply to suits instituted before the 1st April 1873. LUCHMEE PERSHAD NARAIN SINGH *v.* TILUCKDHAREE SINGH [24 W. R., 295

102. ——— art. 168.—*Registration Act, 1871.—Registration of memorandum of decree under Act XX of 1866.*—The "Indian Registration Act" mentioned in the new Limitation Act (IX of 1871), schedule II, article 168, is the Registration Act of 1871, and that article cannot apply to a decree of which only a memorandum was registered under Act XX of 1866. RUGHOO NUNDUN SINGH *v.* COCHRANE . . . . 24 W. R., 372

LIMITATION ACT, 1877.

1. ——— Operation of Act.—*Matters barred by Act IX of 1871.*—Unless it can be shown that such was the express intention of the Legislature, none of the provisions of the present Limitation Act (XV of 1877) can be made applicable to any matter which, at the time when such Limitation Act came into force, had already become barred by the operation of the prior Limitation Act. SHUMBHONATH SHAHA *v.* GURUCHURN LAHIRI [I. L. R., 5 Calc., 894: 6 C. L. R., 437

2. ——— *Limitation Act, 1871, s. 1.—Suits before 1st April 1873.—Quære,*—Whether, inasmuch as Act IX of 1871 is repealed by Act XV of 1877 and the later Act contains no provision similar to that contained in section 1 of Act IX of 1871, Act XIV of 1859 can be said to have been repealed in respect of suits instituted before the 1st of April 1873. RADHA PROSAD SINGH *v.* SUNDUR LALL . . . . I. L. R., 9 Calc., 644

3. ——— *Limitation Act, 1871, s. 1.—Application for execution of decree.—General Clauses Consolidation Act, 1828, s. 6.—Held,* following *Mungul Pershad Dichit* v. *Grija Kant Lahiri, I. L. R., 8 Calc., 51,* that although there is no corresponding provision in Act XV of 1877 to that contained in section 1 of Act IX of 1871, all applications for execution of a decree are applications in the suit which resulted in that decree. *Held,* further, that under section 6 of Act I of 1868 the repeal of Act IX of 1871 by Act XV of 1877 does not affect any proceedings commenced before the repealing Act came into force. *Re Ratansi Kalianji, I. L. R., 2 Bom., 148,* followed. BEHARY LALL *v.* GOBERDHUN LALL [I. L. R., 9 Calc., 446: 12 C. L. R., 431

4. ——— *Application for execution, by what limitation governed.—Act XIV of 1859, s. 20.*—Act XV of 1877 operates from the date on which it came into force as regards all applications made under it. *Behary Lall* v. *Goberdhun Lall, I. L. R., 9 Calc., 446,* dissented from. BECHARAM DUTTA *v.* ABDUL WAHED [I. L. R., 11 Calc., 55

5. ——— *Limitation applicable to execution of decree passed when Act XIV of 1859 was in force.—Execution of decree.—Disability of decree-holder.—Minority.—Limitation Act (XIV of 1859, ss. 11, 14, and 20, and XV of 1877, s. 7).*—In execution of a decree, dated the 29th April 1862, certain proceedings were taken which terminated on the 5th September 1866, when the execution case was struck off the file. Between that date and the 25th September 1882, no further proceedings were taken. On the latter date an application was made for execution. The decree-holder was a minor when the decree was passed and did not attain his majority till the 25th September 1879. *Held* that the words to "bring an action" as used in section 11, Act XIV of 1859, must be taken to be synonymous with the words to "bring a suit," and that the word "suit" must be construed in the same way as the word "suit" used in section 14, and following the decision of the majority of the Full Bench in *Huro Chunder Roy Chowdhry* v. *Shoorodhonee Debia, B. L. R., Sup. Vol. 985: 9 W. R., 402,* must be taken to include execution proceedings; *Mothoora Dass* v. *Shumbhoo Dutt, 20 W.R., 53,* dissented from. *Held* therefore that, as Act XIV of 1859 was applicable to the case previous to the date on which Act XV of 1877 came into operation, and as under section 11 the decree-holder was entitled to have the time during which he was a minor deducted from the period during which limitation was running against him, his right to execution was not barred when Act XV of 1877 came into force; and that being so, and the present application being made within three years of the date on which he attained his majority, execution of the decree was not barred. *Gurupadapa Basapa* v. *Virbhadrapa Irsangapa, I. L. R., 7 Bom., 459,* discussed; *Behary Lall* v. *Goberdhun Lall, I. L. R., 9 Calc., 446: 12 C. L. R., 431,* dissented from; *Nursing Doyal* v. *Hurryhur Saha, I. L. R., 5 Calc., 897: 6 C. L. R., 489; Shambhu Nath Shaha Chowdhry* v. *Guru Churn Lahiri, I. L. R., 5 Calc., 894: 6 C. L. R., 437,* approved. JUG MOHUN MAHTO *v.* LUCHMESHUR SINGH . . . I. L. R., 10 Calc., 748

6. ——— *Debt, Suit for.*—The law of limitation governing a suit for a debt is that law which is in force at the date of its institution. MOHESH LAL *v.* BUSUNT KUMAREE [I. L. R., 6 Calc., 340 : 7 C. L. R., 121

BANSIDHAR *v.* HARSAHAI [I. L. R., 3 All., 340

——— s. 2.

*See* ART. 64 . I. L. R., 2 All., 872

1. ——— *Suit on promissory note payable on demand.—Limitation Act, 1871, sch. II, art. 72.*—Under Act IX of 1871, the limitation on a

promissory note payable on demand was three years from the date of making the demand. Under Act XV of 1877 the limitation is three years from the date of making the note. *Held* that the period of limitation so prescribed by Act XV of 1877 is shorter than that prescribed by Act IX of 1871 within the meaning of section 2 of Act XV of 1877. OMIRTO LALL DEY *v.* HOWELL . . **2 C. L. R., 426**

2. ——————— *Suit on promissory note payable on demand.*—Section 2 of Act XV of 1877 allows a plaintiff two years from the 1st October 1877, to bring his suit in cases where the period of limitation prescribed by that Act is shorter than the period prescribed by Act IX of 1871, but that allowance is not to be made where the period prescribed by the latter Act would expire before the completion of two years from the 1st October 1877. *Omrito Lall Dey* v. *Howell, 2 C. L. R., 426,* cited and distinguished. ADMINISTRATOR GENERAL OF BENGAL *v.* KEDAR NATH MOITRY . . **4 C. L. R., 102**

3. ——————— *Suit on promissory note on demand executed prior to October 1877.—Shortening period of limitation.*—As the Limitation Act XV of 1877, shortens the period of limitation in the case of promissory notes payable on demand, the period of limitation in respect of such notes executed prior to 1st October 1877 is governed by the provisions of section 2 of the Act. BANDI SUBBAYYA *v.* MADALA PALLI SUBANNA . . . **I. L. R., 3 Mad., 96**

4. ——————— and art. 73.—*Shorter period of limitation.*—The period of limitation prescribed by article 73 of the second schedule to Act XV of 1877 is a "shorter period of limitation" within the meaning of the last clause of section 2 of that Act than the period prescribed by article 72 of the second schedule to Act IX of 1871. The language of Acts IX of 1871 and XV of 1877 leads to the conclusion that by each of these enactments the starting point and period given in its schedule were to take the place of those given by the Act which preceded it in the case of all suits instituted after the date of the Act coming into force, and that the expiration of the period, calculated with reference to the Act in force at the date at which the note was executed, does not necessarily affect the remedy. APPASAMI *v.* AGHILANDA . . . . **I. L. R., 2 Mad., 113**

5. ——————— *Bond of 1869 payable on demand.—Curtailment of period of limitation.*—Where a suit was brought upon a registered bond dated 1869, payable on demand, and demand was made in September 1876,—*Held* that the period of limitation was in effect curtailed by Act XV of 1877, and that the plaintiff was entitled to two years from 1st October 1877 under the provisions of section 2, although under Act XIV of 1859 (in force when the bond was executed) the limitation period was six years from the date of the bond. SABAPATI CHETTI *v.* CHEDUMBARA CHETTI . **I. L. R., 2 Mad., 397**

6. ——————— *Registered bond payable on demand.—Act XIV of 1859 (Limitation Act).—Act IX of 1871 (Limitation Act).*—The cause of action in a suit on a registered bond bearing date the 2nd March 1870 was alleged to have arisen on the 5th January 1879, the date of demand. Under Act XIV of 1859 the limitation for such a suit was six years computed from the date of the bond. Before that period expired Act IX of 1871 came into force, which provided a limitation for such a suit of three years computed from the date of demand. *Held* that, as the cause of action and the institution of such suit occurred after the repeal of Act IX of 1871, the provisions of that Act were not applicable, and, accordingly, whether Act XIV of 1859 or Act XV of 1877 governed such suit, it was barred, as in either case limitation began to run from the date of such bond. BANSI DHAR *v.* HAR SAHAI . **I. L. R., 3 All., 340**

7. ——————— *Bond payable on demand.—Act IX of 1871 (Limitation Act).*—Act XV of 1877, by making the period of limitation for a suit on a bond payable on demand computable from the date of its execution, has shortened the period of limitation prescribed for such a suit by Act IX of 1871, under which the period was computable from the date of demand. *Held,* therefore, that, under the provisions of section 2 of Act XV of 1877, a suit on such a bond executed on the 14th December 1869, having been brought within two years from the date that Act came into force, was within time. RUP KISHORE *v.* MOHNI **[I. L. R., 3 All., 415**

8. ——————— *Bond.—Change in Limitation Acts.*—The defendant executed, on the 20th April 1875, a bond to the plaintiff, who, without making a demand for his money, filed a suit upon it on the 21st of June 1878. *Held* that, under section 2 of the Limitation Act, XV of 1877, the suit was not barred, although more than three years had elapsed since the date of the bond. ICHHASHANKAR *v.* KILLA **[I. L. R., 4 Bom., 87**

9. ——————— and art. 64.—*Suit on account stated—Act IX of 1871 (Limitation Act), sch. II, art. 62.*—The accounts in a suit on an account stated were stated when Act IX of 1871 was in force, and were not signed by the defendant or an authorised agent on his behalf. Had that Act been in force when the suit was instituted, the suit would have been within time under article 62 of schedule II of that Act. The suit was brought, however, after the passing of Act XV of 1877, and by reason of the accounts not being signed did not come within the scope of article 64 of schedule II of that Act. *Held* that the words in section 2 of Act XV of 1877, "nothing herein contained shall be deemed to affect any title acquired under the Act IX of 1871," did not save the plaintiff's right to sue on the account stated, a right to sue not being meant by or included in the term "title acquired," that term denoting a title to property and being used in contradistinction to a right to sue; that the last clause of that section was not applicable, because Act XV of 1877 did not prescribe a shorter period of limitation than that prescribed by Act IX of 1871, but attached a new condition to the suit, *viz.,*—that the accounts must be signed by the defendant or his agent duly authorised in that behalf; and that

**LIMITATION ACT, 1877, s. 2 and art. 64** —*continued.*

the suit was in consequence barred by limitation. JULFIKAR HUSAIN *v.* MUNNA LAL
[I. L. R., 3 All., 148

10. ——————— *Suit by person excluded from joint family property.—Limitation Acts, 1871, art. 127; and 1877, art. 127.*—Under Act IX of 1871, schedule II, clause 127, the limitation for a suit by a person excluded from joint family property, to enforce a right to share therein, was twelve years from the time when the plaintiff claimed and was refused his share. Under Act XV of 1877, schedule II, clause 127, the limitation for such a suit is twelve years from the time the exclusion becomes known to the plaintiff. *Held* that the period of limitation prescribed by the latter Act is shorter than the period prescribed by the former Act, within the meaning of section 2, Act XV of 1877. NARAIN KHOOTIA *v.* LOKENATH KHOOTIA
[I. L. R., 7 Calc., 461: 9 C. L. R., 243

11. ——————— and art. 134.—*Mortgage.—Redemption.—Suit against purchaser from mortgagee.—Purchase in good faith.—Limitation Act, IX of 1871, sch. II, arts. 134 and 148.*—Under the Limitation Act, IX of 1871, the period of limitation for suits to recover possession of property purchased from a mortgagee depended upon the good faith of the purchaser. A suit against a purchaser *in good faith* was barred after twelve years from the date of the purchase, under article 134 of schedule II. In other cases a suit might be brought against the purchaser within sixty years from the date of the mortgage, under article 148 of schedule II. Article 134 of the later Limitation Act, XV of 1877, by the omission of the words "in good faith" makes twelve years from the date of the purchase the period of limitation for all such suits, without reference to the question of good faith on the part of the purchaser. The result is that, in cases of a purchase *not in good faith* from a mortgagee, the period of limitation allowed by Act XV of 1877 for a suit to recover the property is shorter than the period allowed by Act IX of 1871; and, consequently, under the provisions of article 2 of the Limitation Act, XV of 1877, the plaintiff in such a suit has two years from the 1st October 1877. BAIVA KHAN DAUD KHAN *v.* BHIKU SAZBA . . . . I. L. R., 9 Bom., 475

12. ——————— *Suit filed after repeal of Act IX of 1871.*—A claim to attached property having been disallowed under section 246 of Act VIII of 1859, a suit was filed on the 17th February 1879. *Held* that by section 2 of the Limitation Act, XV of 1877, the suit was governed by the former Limitation Act, IX of 1871, by which the plaintiff was entitled to bring his suit within twelve years from the claim being disallowed. AMIR HOSSEIN *v.* IMAMBANDI BEGUM . . . . 11 C. L. R., 443

13. ——————— and art. 11.—*Claim to mortgaged property.—Execution of decree.*—In execution of a decree upon a mortgage, a claim to the mortgaged property was put in under section 246 of Act VIII of 1859 by certain persons,

**LIMITATION ACT, 1877, s. 2 and art. 11** —*continued.*

on the ground that they had purchased the right, title, and interest of the judgment-debtor in execution of a previous decree. The claim was allowed on the 26th July 1877. On the 29th March 1879, the mortgagee instituted a suit to establish his right to the property. The period of limitation for such a suit under Act XV of 1877 is one year from the date of the order, but under Act IX of 1871 a longer period was prescribed. Act XV of 1877 did not come into force until the 1st of October 1877. *Held* that the provisions of the last paragraph of section 2 of Act XV of 1877 applied, and that the suit was not barred. RAJ CHUNDER CHATTERJEE *v.* MODHOOSOODUN MOOKERJEE
[I. L. R., 8 Calc., 395: 10 C. L. R., 435

14. ——————— *Application to execute decree barred by Act IX of 1871.*—The words in section 2 of Act XV of 1877—"nothing herein shall be deemed to revive any right to sue"—should be used in their widest signification, and will include any application invoking the aid of the Court for the purpose of satisfying a demand. Where, therefore, a judgment-creditor sought, on the 25th September 1877, to execute a decree passed on the 27th May 1874 (which decree, at the time of the application for execution, was barred by article 167 of schedule II of Act IX of 1871), on the ground that he was entitled to take advantage of art. 179 of schedule II of Act XV of 1877, which was more favourable to him,—*Held* that, under the wording of section 2 of the latter Act, he was not entitled to do so. NURSING DOYAL *v.* HURRYHUR SAHA
[I. L. R., 5 Calc., 897: 6 C. L. R., 489

SHUMBHOONATH SHAHA *v.* GURUCHURN LAHIRI
[I. L. R., 5 Calc., 894: 6 C. L. R., 437

——————— s. 3.

*See* s. 26 . I. L. R., 5 Calc., 945

——————— s. 4 (1871, s. 4).

*See* s. 5 . . I. L. R., 1 All., 34

1. ——————— *"Applications."—"Appeal."—Pauper appeal.—Pauper application for review.*—In the Limitation Act it was intended to draw a clear distinction between what are styled "applications" and what are styled "appeals." LAKSHMI *v.* ANANTA SHANBAGA
[I. L. R., 2 Mad., 230

2. ——————— *Distinction between suits, appeals, and applications.—Jurisdiction.*—The distinction made for the purposes of limitation between suits, appeals, and applications by the Limitation Acts has no bearing upon a question of jurisdiction. IN RE BALAJI RANCHHODDAS
[I. L. R., 5 Bom., 680

3. ——————— *Presentation of plaint.—Transfer of case.*—A suit was instituted in Pubna, and on application to the High Court for authority to proceed with it in Pubna, the High Court ordered its transfer to Dacca. Instead of merely transferring

**LIMITATION ACT, 1877, s. 4**—*continued.*

the suit to Dacca, the Pubna Court returned the plaint, in order to its being presented anew in the Dacca Court. For the purpose of computing limitation, the suit was held to have been instituted on the day when it was admitted by the Pubna Court. TAKHUR-OODEEN MAHOMED ESHAN CHOWDHRY *v.* KURIM-BUX CHOWDHRY . . . . . **3 W. R., 20**

KHELLAT CHUNDER GHOSE *v.* NUSSEEBUNISSA BIBEE . . . . . **16 W. R., 47**

4. ——————— *Presentation of plaint.—Placing petition on table.*—It must be *presented* to the proper Court. The placing a petition on the table when the officer is not present is not a presentation to him. TAJ ULDEEN KHAN *v.* GHAFOOR-UL-NISSA . . . . . **3 N. W., 341**

The presentation of a plaint at the private residence of the Munsif was held not a sufficient institution of the suit. JAI KUAR *v.* HEERALAL **[7 N. W., 5**

5. ——————— *Presentation of plaint when proper Court was closed.*—Where a plaintiff presented a plaint to the District Court, the Munsif's Court, in which he ought to have presented it, being then temporarily closed, it was held that the date on which the plaint was presented to the District Judge should be considered as the date of presentation to the proper Court. IN THE MATTER OF THE PETITION OF GANESH SADASHIV . . **5 Bom., A. C., 117**

6. ——————— *Plaint presented during vacation to wrong officer.*—Where a plaint was presented to a Kurkun left in charge of a Court during vacation, and the cause of action on which the suit was brought became barred before the vacation ended, it was held that, as the Judge was the proper person to receive plaints, the presentation to the Kurkun was invalid, and did not prevent the period of limitation from running. NANDVALLABH *v.* ALIBHAI ISYAGANI . . . . . **6 Bom., A. C., 254**

7. ——————— *Presentation of plaint when Court was closed.*—Where a plaintiff presented a plaint to the District Court, the Subordinate Judge's Court in which he ought to have presented it being then temporarily closed, it was held that the District Court could not be considered a Court of first instance competent to receive the plaint. *In re Sadashiv, 5 Bom., A. C., 117,* overruled. *Motilal Ramdas* v. *Jamnadas, 2 Bom., 42,* followed. RAMAYA ELAPA *v.* MUHAMADBHAI . . . . . **10 Bom., 495**

8. ——————— *Presentation of plaint.—Computation of time.*—The plaintiff's suit was barred by the Limitation Act on the 11th of May 1870. His plaint was presented in the Court of the District Munsif's Court of Cudderpah on the 21st of May. He had presented his plaint on the 5th May in the Court of another District Munsif who had no jurisdiction, and it was returned by the latter District Munsif on the 7th May, in order that it might be presented to the Court having jurisdiction to determine the suit within one month from the date on which it was returned. *Held* that the plaintiff's suit was barred by the provisions of the Limitation Act (XIV of 1859). CHEIGU NANGIAH GAURI NANGIAH *v.* PIDATALA VENCATUPPAH . . . . . **5 Mad., 407**

**LIMITATION ACT, 1877, s. 4**—*continued.*

9. ——————— *Presentation of plaint.—Suit against minor.—Appointment of guardian ad litem.—Suit when instituted.*—A suit to enforce a right of pre-emption in respect of a share of an undivided village was instituted against the vendor and the purchaser, the latter being a minor, on the 1st June 1880. The instrument of sale was registered on the 9th June 1879. On the 14th June 1880, the Court in which such suit was instituted made an order appointing a guardian for such suit for the minor purchaser. *Held,* having regard to the provisions of section 4 of Act XV of 1877, and *Ram Lal* v. *Harrison, I. L. R., 2 All., 832;* and *Skinner* v. *Orde, I. L. R., 2 All., 241: L. R., 6 I A., 126,* that, for the purposes of limitation, such suit was instituted, as regards the minor purchaser, on the 1st June 1880, when the plaint was first presented, and not on the 14th June 1880, when the order appointing a guardian for such suit for him was made, and such suit was therefore within time KHEM KARAN *v.* HAR DAYAL . . . . **I. L. R., 4 All., 37**

10. ——————— *Presentation of plaint.—Plaint not accepted on day it is presented.*—A plaintiff was held to be technically right in stating that the fact of his plaint not having been accepted on the day on which it was actually presented, ought not to deprive him of his right of suit. YOUNG *v.* MACCORKINDALE . . . . . **19 W. R., 159**

11. ——————— *Presentation of plaint insufficiently stamped.—Order for registration of plaint made after expiration of time.*—Where a plaint, insufficiently stamped, was duly presented to a Court before the expiration of the time allowed by the Limitation Act, and was retained by the Court, the plaintiff being ordered within a limited time to supply the requisite additional stamped paper, which was done,—*Held* to be in time, although the formal order for registration of the plaint was not made until the period of limitation applicable to the case had expired. HIDAYUT ALI *v.* MABRAJ BEGUM **[3 N. W., 202**

IRTAZA HOSSEIN *v.* HURRY PERSHAD SINGH **[7 W. R., 241**

12. ——————— *Presentation of plaint.—Return of plaint for amendment.*—A plaint was presented to the Court on the day previous to the expiration of the time limited for suing, but it was returned to the plaintiff for the purpose of being amended by the insertion of the particulars required by Act VIII of 1859, section 26; and on the second day after (the intermediate day being Sunday), it was again presented, amended as required, and received. *Held* that the suit was commenced, for the purpose of saving the Statute of Limitations, when the plaint was first presented to the Court, and that it was therefore within time, notwithstanding the day when it was presented after amendment was beyond the

period of limitation. SHAM CHAND KOONDOO *v.* KALLY KANTH ROY . Marsh., 336: 2 Hay, 314

13. ——————— *Presentation of plaint.—Computation of time from which it runs.*—Where the plaintiff within three years from the time the cause of action arose presented his plaint, which the Court returned to him for amendment but without specifying any time for such amendment, and the plaint was again presented and filed some days beyond the three years, and the defendants pleaded that the suit was barred,—*Held* that the date of commencing the action was that of the original presentation of the plaint. ISMAIL SAHEB *v.* ARUMUGA CHETTI [1 Mad., 427

GREESH CHUNDER SINGH *v.* PRAN KISHEN BHUTTACHARJEE . . 7 W. R., 157

MENGUR MUNDUR *v.* HUREE MOHUN THAKOOR [23 W. R., 447

RAM COOMAR SHAHA *v.* DWARKANATH HAZRA [5 W. R., 207

HUSRUTOOLLAH *v.* ABOO MAHOMED ABDOOL KADER . . . . 6 W. R., 39

14. ——————— *Presentation of plaint.—Institution of suit.—Return for amendment.*—Under the provisions of Act IX of 1871, a suit is instituted when a plaint is presented to a proper officer. The plaintiff, the limitation of whose suit expired on 5th October, presented his plaint to the Subordinate Judge on 20th September, improperly stamped, and it was returned to him with an order to make the deficiency good, without any time being specified within which the order was to be carried out. A vacation supervened. The deficiency was supplied, and the plaint accepted on 4th November, or eleven days after the Court opened. The defendant pleaded limitation. *Held* that the date of presentation being taken as the date of institution for the purpose of calculating limitation, the suit was instituted within time. BEGEE BEGUM *v.* YUSUF ALI . 6 N. W., 139

15. ——————— *Date from which appeal considered as instituted.—Memorandum of appeal returned for correction.*—Where an appellant presented an appeal within the period of limitation prescribed therefor, and the Appellate Court returned the memorandum of appeal for correction without specifying a time for such correction, the appeal again presented some days after the period of limitation was presented within time, the date of its presentation being the date it was first presented. JAGAN NATH *v.* LALMAN [I. L. R., 1 All., 260

16. ——————— *Civil Procedure Code, 1877, s. 54 (b).—Appeal when presented.—Memorandum of appeal insufficiently stamped.—Limitation.*—For the purposes of limitation, an appeal is preferred when the memorandum of appeal is presented to the proper officer, and not when, where the memorandum of appeal is insufficiently stamped and is returned in order that the deficiency may be supplied, it is again presented. When an Appellate Court returns an insufficiently-stamped memorandum of appeal, in order that it may be sufficiently stamped, it should fix a time within which the deficiency is to be supplied. SHEO PARTAB NARAIN SINGH *v.* SHEO GHOLAM SINGH . . I. L. R., 2 All., 875

17. ——————— *Amendment of decree, Application for.—Civil Procedure Code, s. 206.*—Under a proper interpretation of the preamble and section 4 of the Limitation Act (XV of 1877), the rule of limitation is confined to the litigants, and is inapplicable to acts which the Court may or has to perform *suo motu*. Section 206 of the Civil Procedure Code empowers a Court of its own motion to amend its decree, and the mere fact that one of the parties has made an application asking the Court to exercise that power will not render the action of the Court subject to the rule of limitation. *Roberts* v. *Harrison, I. L. R., 7 Calc., 333; Vithal Janardun* v. *Rakmi, I. L. R., 6 Bom., 586;* and *Kylasa Goundan* v. *Ramasami Ayyar, I. L. R., 4 Mad., 172,* referred to. DHAN SINGH *v.* BASANT SINGH [I. L. R., 8 All., 519

18. ——————— *Amendment of plaint.—Civil Procedure Code, 1877, s. 53.*—The plaint in a suit for money charged upon immoveable property, which described such property as "the defendant's one biswa five biswansi share within the jurisdiction of the Court," was presented on the 21st November 1878 within the period of limitation prescribed for such a suit by Act XV of 1877. It was subsequently returned for amendment, and, having been amended by the insertion of the words "in mouza S., pergunnah S.," after the word "share," was presented again on the 8th January 1879 after such period. *Held* that the date of the amendment of the plaint did not affect the question of limitation for the institution of the suit, and the return of the plaint for amendment and its subsequent presentation and acceptance by the Court did not constitute a fresh institution of the suit. RAM LAL *v.* HARRISON [I. L. R., 2 All., 832

19. ——————— *Application, Return of, for amendment.*—Where an application is returned for amendment, the period of limitation counts from the first presentation. CHOWDHRY PURLADH MAHAPATTUR *v.* CHOWDHRY JONARDUN MOHAPATTUR [6 W. R., Mis., 15

*Contra,* GOUR MOHUN SURMAH *v.* JUGGERNATH ACHARJEE . . . 14 W. R., 446

20. ——————— *Pauper suit.—Civil Procedure Code, s. 308.—Calculation of period of limitation.*—Under section 308 of Act VIII of 1859, and the Limitation Act, 1859, in computing the period of limitation in a pauper suit, the commencement of the suit must be reckoned from the day when the application to sue *in formâ pauperis* was filed, and not from the day the application was admitted. GOLUCKNATH DUTT *v.* SEETARAM GOWER [W. R., F. B., 53: 1 Ind. Jur., O. S., 66

SEETARAM GOWER *v.* GOLUCKNATH DUTT [Marsh., 174: 1 Hay, 378

LIMITATION ACT, 1877, s. 4—*continued.*

21. ——————— *Suit in formâ pauperis.—Payment of Court fees by petitioner.—Civil Procedure Code, 1859, ss. 308-310.—Date of institution of suit.*—Where a person, being at the time a pauper, petitions, under the provisions of Act VIII of 1859, for leave to sue as a pauper, but subsequently, pending an enquiry into his pauperism, obtains funds which enable him to pay the Court fees, and his petition is allowed upon such payment to be numbered and registered as a plaint, his suit shall be deemed to have been instituted from the date he filed his pauper petition, and limitation runs against him only up to that time. SKINNER *v.* ORDE
[I. L. R., 2 All., 241
L. R., 6 I. A., 126

Reversing the decision of the High Court
[I. L. R., 1 All., 230

22. ——————— *Explanation.—Petition in suit in formâ pauperis.—Civil Procedure Code, 1859, s. 308.—A.* put in a petition to sue *in formâ pauperis* for possession of certain foreclosed property within the time specified by the Limitation Act, but on her failing to appear on two occasions when called upon to give evidence of her pauperism, the case was struck off so far as the application to sue *in formâ pauperis* was concerned. At the instance of *A.* the case, however, was again reopened, and a date fixed for her appearance. Two days prior to this date, but at a time beyond the limit fixed by the Limitation Act, *A.* put in a petition asking that the petition which she then made to have her suit proceed as an ordinary suit might be joined with her application to sue *in formâ pauperis*, and the suit be duly tried in the ordinary way. She also paid in the regular amount of stamp duty for an ordinary suit. On the point of limitation,—*Held* that the plaint must be considered as filed, not on the day of filing the application to sue *in formâ pauperis*, but on the day on which the stamp duty was paid, and application made to have the suit tried in the ordinary way. The explanation to section 4 of the Limitation Act only applies in cases where, under section 308 of the Civil Procedure Code, the application for leave to sue *in formâ pauperis* is granted, and the application numbered and registered as a suit. CHUNDER MOHUN ROY *v.* BHUBON MOHINI DABEA
[I. L. R., 2 Calc., 389

23. ——————— *Application to sue in formâ pauperis.—Renewal of application.*—An application to sue as a pauper having been refused, on the ground that the suit was barred by limitation, the High Court on revision permitted the applicant to renew his application to the Court below. The Judge verbally rejected this application, saying he would deliver a written judgment. Before the written judgment was delivered the applicant offered to pay the usual Court fees, and asked that the petition might be taken as a plaint filed on the date of the first application: this was mentioned and refused in the written judgment. *Quæry,*—Whether the ruling in *Skinner* v. *Orde, I. L. R., 2 All., 241,* could be held to apply. RAM SAHAI SING *v.* MANIRAM
[I. L. R., 5 Calc., 807: 6 C. L. R., 223

LIMITATION ACT, 1877, s. 4—*continued.*

24. ——————— *Act XIV of 1859, s. 1.—Claim against company being wound up.—Commencement of suit.*—Where *A.* applied to the Court to realise a claim against a company which was being wound up by the Court,—*Held* that he was prosecuting a suit in Court within the meaning of section 1 of Act XIV of 1859. He commenced his suit when he first sent in his claim to the official liquidator. IN THE MATTER OF ACT XIX OF 1857 AND THE GANGES STEAM NAVIGATION COMPANY. ROBERTSON'S CASE . 2 Ind. Jur., N. S., 180

25. ——————— *Appeal by prisoner in jail.—Presentation of petition to officer in charge of jail.*—In the case of appeals by prisoners in jail, presentation of the petition of appeal to the officer in charge of the jail is, for the purpose of the Limitation Act, equivalent to presentation to the Court. QUEEN-EMPRESS *v.* LINGAYA
[I. L. R., 9 Mad., 258

26. ——————— *Applications.—Rules of Court.—Applications of urgent nature.*—The rules of the Court, prescribing certain hours for the receipt of petitions and hearing of motions, cannot operate to alter the period of limitation prescribed by law, so as to exclude urgent applications made at any time in the day. IN THE MATTER OF DESPUTTY SINGH *v.* DOOLAR ROY . . . . 1 C. L. R., 291

27. ——————— *Filing appeal after prescribed time.—Removal from file.*—When a petition of appeal has been registered after lapse of the time allowed by law, the Judge has power, on discovery thereof, to reject or to remove it from his file. JAFER HOSSEIN *v.* MAHOMED AMIR
[4 B. L. R., Ap., 103: 13 W. R., 351

——————— s. 5 (1871, s. 5).

*See* ART. 165 (1871, ART. 158).
[I. L. R., 2 Bom., 673

*See* APPEAL IN CRIMINAL CASES—ACQUITTALS, APPEALS FROM—
[I. L. R., 2 Calc., 436

*See* APPEAL TO PRIVY COUNCIL—PRACTICE AND PROCEDURE—TIME FOR APPEALING.
[I. L. R., 2 Calc., 128

*See* COURT FEES ACT, 1870, SCH. I, ARTS. 4 AND 5 . I. L. R., 9 Mad., 134

1. ——————— *Exception to section.—Special law.*—The exceptions contained in section 5 of Act IX of 1871 apply only to cases dealt with under the General Act of Limitation. TRIR SING *v.* VENKATA RAMIER . . I. L. R., 3 Mad., 92

2. ——————— *Time during which Court is closed.*—The time that the Courts are closed must be deducted in computing the period of limitation. MANEERUN *v.* LUTEEFUN . . 3 W. R., 46

*Contra,* RAMASAMY CHETTY *v.* VENKATACHETTAPATY CHETTY . . . 2 Mad., 468

3. ——————— *Time expiring when Court is closed.*—When the time for doing an act expires

**LIMITATION ACT, 1877, s. 5**—*continued.*

whilst the Court is closed, the act, if done on the day on which the Court is next open, will be held to be done within time. MUCHUL KOOER *v.* LALJEE [2 N. W., 112

AJMUDDIN *v.* MATHURADAS GORADHAN DAS [11 Bom., 206

NARAYAN MANDAL *v.* BENI MADHAB SIRCAR [4 B. L. R., F. B., 32: 12 W. R., F. B., 21

4. ——— *Appeal.—Holiday, Time expiring on.*—When the last day for presenting an appeal falls upon a Sunday or close holiday, an additional day is to be allowed for the presentation of the memorandum of appeal. EX PARTE KRISHNA PADHE [6 Bom., A. C., 50

MOSURUF ALI CHOWDHRY *v.* JANOKENATH ODHICAREE . . W. R., 1864, Mis., 40

BISHEN PERKASH NARAIN SINGH *v.* BABOOA MISSER . . . . 8 W. R., 73

This section overrules the following cases, decided under the Limitation Act of 1859:—

KHODIE LAL *v.* BISWASU KUNWAR [4 B. L. R., A. C., 131: 13 W. R., 122

RAJKRISTO ROY *v.* DINOBUNDOO SURMA [B. L. R., Sup. Vol., 360 S. C. 3 W. R., S. C. C. Ref., 5

DEWAN ALI *v.* MUNSOOR ALI . 11 W. R., 259

KUDOMESSUREE DOSSEE *v.* EMAM ALI [20 W. R., 167

COLLIS *v.* TARINEE CHURN SINGH [3 W. R., 210

HOLEE RAM DOSS *v.* MIREE RAM GOGOOEE [6 W. R., 39

5. ——— *Suit on promissory note on demand.—Closing of Court.*—A suit on a promissory note payable on demand, dated the 14th November 1867, was filed on 14th November 1870, that being the first day on which the Court was open after the Durga Puja holidays: the 13th November was a Sunday. *Held,* the suit was not barred. ABDUL ALI *v.* TARACHAND GHOSE [6 B. L. R., 292

S. C. on appeal . TARACHAND GHOSE *v.* ABDUL ALI . 8 B. L. R., 24: 16 W. R., O. C., 1

MUHTAB *v.* RAM DYAL . . 3 Agra, 319

6. ——— cl. (a).—*Time expiring when Court is closed.*—Where a suit was filed in the Munsif's Court on the day on which the Court reopened after the vacation, but the Munsif found he had no jurisdiction, and on the same day the suit was filed in the Small Cause Court,—*Held,* the plaintiff could not claim the benefit of section 5, clause (*a*), as to the time during which the Munsif's Court was closed, because the suit was not instituted in the Small Cause Court on the day on which that Court reopened. ABHOYA CHURN CHUCKERBUTTY *v.* GOUR MOHUN DUTT . . . 24 W. R., 26

**LIMITATION ACT, 1877, s. 5**—*continued.*

7. ——— *Holiday.—Act XI of 1865, s. 21.*—By section 21, Act XI of 1865, notice of application for a new trial must be filed within seven days from the date of the decision. When the decree was made on 6th November, and the Court was closed on 12th, 13th, 14th, and 15th,—*Held* an application filed on the 16th was in time. GIRIJA BHUSAN HOLDAR *v.* AKHAY NIKARI [5 B. L. R., Ap., 57, note: 13 W. R., 105

8. ——— *Time for institution of suit expiring when Court is closed.—Held* that where the period of limitation prescribed for a suit expired when the Court was closed for a vacation, and the Court, instead of reopening after the vacation on the day that it should have reopened, reopened on a later day, and the suit was instituted when it did reopen, it was instituted within time. BISHAN CHAND *v.* AHMAD KHAN . . . I. L. R., 1 All., 263

9. ——— *Adjournment of Court with office opened during adjournment for reception of plaints, &c.*—Where a District Court was adjourned for two months, but the notification stated that the Court would be open twice a week for one hour for the reception of plaints, petitions, and other papers,—*Held, per curiam* (INNES, *J.,* dissenting), that the Court was not closed till the last day of the adjournment within the meaning of section 5 of the Limitation Act, 1877, so as to allow an appellant to present his appeal on the day the Court reopened after the adjournment, the appeal time having expired during the adjournment. NACHIYAPPA MUDALI *v.* AYYASAMI AYYAR . I. L. R., 5 Mad., 189

10. ——— *Time for presenting appeal expiring during the vacation.*—Where the period of limitation for the filing of an appeal has expired during vacation, a party to a suit has a right, under the provisions of the Limitation Act (XV of 1877), to have his appeal admitted on the day the Court reopens, and the Prothonotary of the High Court has power to receive and file a memorandum of appeal on that day. KING *v.* KING [I. L. R., 6 Bom., 487

11. ——— *Computation of period of limitation.—Holiday.*—On the 13th April 1883 (corresponding with the 1st Bysack 1290) the plaintiff instituted a suit to recover money due on a simple unregistered bond, dated 8th Bysack 1286, and repayable on the 30th Cheyt 1286 (corresponding with the 11th April 1880). The 12th April 1883 (30th Cheyt 1290) was a holiday. *Held* that limitation began to run on the 12th April 1880, and that the suit was therefore barred. DEB NARAIN SINGH *v.* ISHAN CHUNDER MALO . . 13 C. L. R., 153

12. ——— *Suit for an account from agent.—Courts being closed.*—Although a suit to recover moneys or obtain papers or accounts from an agent must, under section 30 of Bengal Act VIII of 1869, be instituted within one year from the determination of the agency, yet, if on the last day of such year the Courts be closed, the suit will, under sec-

**LIMITATION ACT, 1877, s. 5**—*continued.*

tion 5 of Act XV of 1877, not be barred if filed on the first day of the reopening of the Court. GOLAP CHAND NOWLUCKHA *v.* KRISHTO CHUNDER DASS BISWAS . . . . **I. L. R., 5 Calc., 314**

**13.** ——————— *Time for presenting plaint.—Beng. Act VIII of 1869, s. 31.*—The provisions of section 5 of the Limitation Act (XV of 1877) apply equally to suits under the Bengal Rent Act (Bengal Act VIII of 1869). In a suit for rent, where it appeared that a deposit had been made in Court under the provisions of the Bengal Rent Act (Bengal Act VIII of 1869), and that the six months allowed by section 31 of that Act for the purpose of instituting a suit had expired on a day when the Court was closed for an authorised holiday, but that the plaint had been filed on the first day the Court reopened,—*Held* that the provisions of section 5 of the Limitation Act (XV of 1877) applied to such cases, and that, consequently, the suit was not barred. *Golap Chand Nowluckha* v. *Krishto Chunder Das Biswas, I. L. R., 5 Calc., 314;* and *Hossein Ally* v. *Donzelle, I. L. R., 5 Calc., 906,* followed. *Purran Chunder Ghose* v. *Mutty Lall Ghose Johiri, I. L. R., 4 Calc., 50,* dissented from. KHOSHELAL MAHTON *v.* GUNESH DUTT *alias* NANHOO SINGH **[I. L. R., 7 Calc., 690**

**14.** ——————— *Suit to compel registration.—Registration Act, III of 1877, s. 77.*—The provisions of section 5 of Act XV of 1877 apply to suits instituted under the provisions of section 77 of the Registration Act (III of 1877). NIJABUTOOLLA *v.* WAZIR ALI **[I. L. R., 8 Calc., 910: 10 C. L. R., 333**

**15.** ——————— *Civil Procedure Code, 1877, s. 561.—Time for filing objection.—Holiday.*—Where the time for filing objections under section 561 of the Civil Procedure Code expired on a day when the Court was closed, and objections were filed on the day the Court reopened,—*Held* that such objections were filed within time. BAGHELIN *v.* MATHURA PRASAD . . . . **I. L. R., 4 All., 430**

**16.** ——————— *Civil Procedure Code, s. 561, Objection under.*—Section 5 of Act XV of 1877 does not apply to an objection under section 561 of the Procedure Code. KALLY PROSUNNO BISWAS *v.* MUNGALA DASSEE . . **I. L. R., 9 Calc., 631**

**17.** ——————— *Objections to decree.—Civil Procedure Code, 1877, s. 561.—Extension of time.*—The seven days within which a notice of objections to a decree by a respondent under section 561 of the Code must be given, is not a period to which the provisions of paragraph 2 of section 5 of the Limitation Act can be extended, and the Court has no discretion to extend the period. DEGAMBER MOZUMDAR *v.* KALLYNATH ROY **[I. L. R., 7 Calc., 654: 9 C. L. R., 265**

**18.** ——————— *Objections taken under s. 348, Civil Procedure Code, 1859.—Withdrawal of appeal.—Ground for admitting appeal after time*—The circumstance that a respondent who has taken, or intended to take, objections, under section 348 of the Code of Civil Procedure, to the decree of the Court of first instance, at the hearing of an appeal already preferred by his opponent has been prevented by the withdrawal of the appeal from having his objections heard, does not constitute a sufficient cause for admitting a cross-appeal by such respondent after the prescribed period, Act IX of 1871, section 5. The High Court may consider and determine upon the sufficiency of the reasons which a Judge has given for admitting an appeal after the lapse of the period limited for that purpose by law. *Mowri Bibee* v. *Soorendra Nath Roy, 2 B. L. R., A. C., 184: 10 W. R., 178,* followed. SURBHAI DAYALJI *v.* RAGHUNATHJI VASANJI . . . **10 Bom., 397**

**19.** ——————— *Admission of, after limited period.—Grounds for admission after time.—Sufficient cause for delay.—Act VIII of 1859, s. 333.*—As to what will be considered sufficient cause for delay in filing appeal and be ground for admitting a petition of appeal after the time limited by Act VIII of 1859, section 333. SECRETARY OF STATE *v.* MUTU SAWMY **[4 B. L. R., Ap., 84: 13 W. R., 245**

**20.** ——————— *Calculation of period allowed for.—Reasonable ground for enlarging time.—Review.*—The plaintiff, against whom a decree had been given, did not appeal within the twenty days allowed for that purpose; but, after the expiration of more than a month, he made an application for a review of judgment, which was refused after nine months. Nineteen days later he applied to have the time for filing his appeal enlarged. *Held* that the application was not made in time. Sufficient cause was not shown for not having presented the appeal within the limited period. In calculating the number of days limited for appealing, the period occupied by the Court in disposing of an application for review presented during the time limited for appealing, must not be reckoned. NOBO KISSEN SINGH *v.* KAMINEE DASSEE . . . **B. L. R., Sup. Vol., 349 [2 W. R., Mis., 35: Bourke, A. O. C., 38**

**21.** ——————— *Appeal preferred after time, Admission of.—Ground for delay.*—In a case decided by a Deputy Collector, an appeal was preferred to the Collector, who rejected it, holding that he had no jurisdiction. An appeal was then preferred to the Judge, who also rejected it, on the ground of want of jurisdiction, and referred the parties to the Collector. The Collector accordingly tried the case, but his proceedings were quashed by the High Court as being without jurisdiction. The parties then applied to the Judge for a review of his order, which he refused to grant, suggesting an appeal. They accordingly filed an appeal, and the Judge reversed the order of the Deputy Collector. *Held* that the Judge, not having admitted the review as he might have done, was at liberty to treat the appeal as one filed after time on sufficient reasons assigned for the delay. TROYLUCKHNATH CHUCKERBUTTY *v.* JHABBOO SHAIKH **[10 W. R., 334**

**LIMITATION ACT, 1877, s. 5**—*continued.*

22. ——————— *Delay in appealing.—Application for review.*—An application for review, if made within reasonable time and with due diligence, is a sufficient cause for delay in preferring an appeal, if the appeal is preferred as speedily as may be after the other proceedings. KULLEE SINGH *v.* JEWAN SINGH [22 W. R., 79

23. ——————— *Appeal admitted out of time.—Review pending.—Time excluded.—Review when excuse for delay.*—In calculating the period allowed by the Limitation Act, 1877, for presenting an appeal, the time during which an application for review of judgment is pending cannot be excluded as a matter of right. But, if an application for review has been presented with due diligence, and admitted, and there was a reasonable prospect that the petitioner would obtain by the review all he could obtain by appeal, the Court would be justified in admitting an appeal presented out of time. VASUDEVA *v.* CHUNIASAMI . . . I. L. R., 7 Mad., 584

24. ——————— *Time for preferring.—Pendency of application for review.*—In computing the period within which an appeal may be preferred, the time during which an application for review was pending is to be excluded. IN THE MATTER OF THE PETITION OF BROJENDRO COOMAR ROY [B. L. R., Sup. Vol., 728: 7 W. R., 529

POREEH NATH ROY *v.* GOPAL KRISTO DEB [15 W. R., 61

25. ——————— *Date from which time for appeal runs where an application for review is admitted.*—Whether a review order is rightly made upon legal grounds or not, when once made it has the effect of reopening the hearing and of causing the judgment passed upon such hearing to be the final judgment as regards the parties to that review; consequently any such parties' right of appeal against the decretal order runs from the time of the final order on review, even if the Appellate Court should put aside the review matter. ROOP KALEE KOOER *v.* DOOLAR PANDEY . . . 20 W. R., 101

26. ——————— *Delay in filing.—Grounds for delay.*—Delay in preferring an appeal should be explained. Inasmuch as a new statement of the law by the High Court is not a sufficient excuse for delay in applying for a review of judgment, it is still less an excuse for delay in appealing against a judgment. MOWRI BEWA *v.* SOORENDRANATH ROY [2 B. L. R., A. C., 184: 10 W. R., 178

AMBA NASHYA *v.* GAJAN SHUTAR [2 B. L. R., Ap., 35: 11 W. R., 130

27. ——————— *Time for appealing.—Alteration in law.*—An appeal will not be allowed after the time for appealing has expired, merely because a judgment altering the view of the law which prevailed at the time of the decision of the original suit has subsequently been given by the High Court. MAKHUN NAIKIN *v.* MANCHAND LADHABHAI [5 Bom., A. C., 107

**LIMITATION ACT, 1877, s. 5**—*continued.*

28. ——————— *Sufficient cause for admission of appeal after time.—Appellate Court.*—A certain suit was dismissed on the 26th July 1875 on which day the plaintiff applied for a copy of the Court's decree. She obtained the copy on the 31st July, and on the 31st August, or one day beyond the period allowed by law, she presented an appeal to the Appellate Court. She did not assign in her petition any cause for not presenting it within such period, but alleged verbally that she had miscalculated the period. The Appellate Court recorded that it should excuse the delay, and admitted the appeal. *Held* that there was, under the circumstances, no sufficient cause for the delay. An Appellate Court should not admit an appeal after the period of limitation prescribed therefor without recording its reasons for being satisfied that there was sufficient cause for not presenting it within such period. ZAIBULNISSA BIBI *v.* KULSUM BIBI . . . . I. L. R., 1 All., 250

29. ——————— *Suits under Act X of 1859.—Civil Procedure Code, 1859, s. 333.—Act X of 1859, s. 161.*—Although in computing the period of limitation in suits under Act X of 1859 no deduction was allowed as in section 14 of Act XIV of 1859, yet section 161 of Act X of 1859, read together with section 333 of Act VIII of 1859, gave the Court discretion to allow an appeal to be presented after time, on the ground that its pendency in a Court that had no jurisdiction was "sufficient cause for delay." MODHOOSOODUN MOJOOMDAR *v.* BROJONATH KOOND CHOWDHRY . . . 5 W. R., Act X, 44

But *see* KALEE KISHORE PAUL *v.* MONEE RAM SINGH . . . 5 W. R., Act X, 46

30. ——————— *Admission of appeal after time.—Discretion of Judge.*—It is in the discretion of the Judge to consider whether sufficient cause has been shown for the non-presentation of an appeal in proper time, owing to delay on the part of the Collector, to whom the appeal was wrongly preferred in the first instance, and the High Court has no authority to interfere with such exercise of discretion by the Judge. RAJCOOMAR ROY *v.* MAHOMED WAIS [7 W. R., 337

31. ——————— *Power of Division Court to set aside order of single Judge admitting appeal after time.—Held* that the order admitting an appeal after time, made *ex parte* by a single Judge of the High Court sitting to receive applications for the admission of appeals, under a rule of the Court made in pursuance of 24 and 25 Victoria, Cap. 104, section 13, and the Letters Patent of the Court, section 27, was liable to be impugned and set aside at the hearing by the Division Court before which it was brought for hearing, on the ground that the reasons assigned for admitting it were erroneous or inadequate. DUBHY SAHAI *v.* GANESHI LAL . . I. L. R., 1 All., 34

32. ——————— *Appeal filed after time.—Order under cl. b, s. 5, of the Limitation Act (IX of 1871).*—An order made *ex parte* under clause (*b*), section 5, of the Limitation Act of 1871, permitting an appeal to be registered although filed beyond time,

**LIMITATION ACT, 1877, s. 5**—*continued.*

may, on proper cause being shown, be set aside by the Court which made it; but such an order made by a District Judge cannot be afterwards cancelled by a Subordinate Judge upon the appeal coming on for hearing before him. JHOTEE SAHOO *v.* OMESH CHUNDER SIRCAR . . **I. L. R., 5 Calc., 1**

**33.** ——————— *Admission of appeal out of time.—Ex parte order set aside at hearing.*—An order made *ex parte*, under section 5 of the Limitation Act, 1877, admitting an appeal after the period prescribed therefor, may be set aside on proper cause being shown by the Court which made it. VENKATRAYUDU *v.* NAGADU . **I. L. R., 9 Mad., 450**

*See* MOSHAULLAH *v.* AHMEDULLAH **[I. L. R. 13 Calc., 78**

**34.** ——————— **and s. 14.**—*Ground for admission of appeal after time.*—The circumstances contemplated in section 14 of the Limitation Act, 1877, will ordinarily constitute a sufficient cause in the sense of section 5 for not presenting an appeal within the period of limitation. BALVANT SINGH *v.* GUMANI RAM . . . **I. L. R., 5 All., 591**

**35.** ——————— *Review.—Application for review.—Sufficient cause for delay.—Pendency of second appeal.—Ignorance of effect of judgment.*—*G.* obtained a decree against *M.* in the Court of the Subordinate Judge of Ahmedabad for the refund of a certain sum of money alleged to have been illegally levied by *B.* as inamdar for local fund cess due for certain years. In appeal, the District Court on the 21st March 1882 varied the decree, and reduced the amount. On second appeal the High Court, on 23rd June 1882, dismissed the appeal, on the ground that the lower Courts had no jurisdiction, the suit being a Small Cause Court suit. The decree of the District Court consequently remained in force. In July 1882 *G.* brought a second suit against *M.* in the Small Cause Court at Ahmedabad for moneys illegally levied by *M.* in subsequent years. The Judge of that Court held that the decree in the former suit passed on 21st March 1881 estopped *M.* from disputing *G.'s* claim, and that the matter was *res judicata*. *M.* then procured the proceedings in the Small Cause Court to be stayed, and on the 18th November 1882 applied to the District Court for a review of its decree of 21st March 1881. The District Judge granted the review on the ground that the time lost by *M.* in the prosecution of the second appeal should be excluded from computation, and that the subsequent delay was justified by the fact that *M.* was not aware of the effect of the decision in the first suit until informed of it by the Judge of the Small Cause Court at the hearing of the second suit. On appeal to the High Court,—*Held*, reversing the order of the District Judge, that the circumstances did not justify the admission of *M.'s* application for review after the expiration of the ninety days allowed by the Limitation Act. The pendency of an appeal is not a "sufficient cause" for not presenting the application earlier within the meaning of section 5 of the Limitation Act, XV of 1877. GULAM HUSEN MAHAMED *v.* MUSA MIYA HAMAD ALI **[I. L. R., 8 Bom., 260**

**36.** ——————— *Ground for non-prosecution of appeal.*—The fact that the plaintiff's attorney on being served with notice of appeal failed to notice that a party who had been a defendant in the Court below had not been made a respondent in the appeal, coupled with the fact that the application made by the plaintiff to make such defendant a party respondent after the period of limitation had expired was not made at the earliest opportunity possible, is not a sufficient ground under section 5 of the Limitation Act for non-prosecution of the appeal within the period allowed. CORPORATION OF THE TOWN OF CALCUTTA *v.* ANDERSON . **I. L. R., 10 Calc., 445**

**37.** ——————— *Mistake of counsel.—Delay.—"Sufficient cause."*—In a suit between *A.* and *B.*, heard on the 29th January 1883, a certain conveyance was filed with the plaint, but up to the hearing this conveyance had been protected from discovery. *B.'s* counsel had, however, had a copy thereof delivered to him at the time *B.'s* written statement was being drawn, and a copy briefed to him at the hearing. At the hearing *A.'s* counsel stated that the effect of the conveyance was to vest the entirety of a certain property in *A.*; this view was accepted by *B.'s* counsel, who did not read the conveyance. The only issue in the case was "who was in possession of the property," and the Court decided this issue on the 5th February in favour of the plaintiff. On the 26th February *B.* brought a suit against *A.* to set aside this conveyance on the ground of fraud. And in certain proceedings in this case taken on the 31st March, *B.'s* counsel discovered, as he alleged for the first time, that, under the conveyance, a moiety of a seven twenty-fourth share remained in *B.* On that day instructions were given to *B.'s* counsel to draw up a petition of review of the judgment of the 5th February. This petition, owing to the Easter vacation, was not, and could not have been, presented till the 9th April. In deciding whether *B.* had shown "sufficient cause" within the meaning of section 5 of the Limitation Act, for not making the application within the time allowed by law, the Court, following the principles laid down by *Bowen, L. J.* in *In re Manchester Economic Building Society, L. R., 24 Ch. D., 488*, in its discretion, held that "sufficient cause" had been shown by *B.* *Anderson* v. *Corporation of the Town of Calcutta, I. L. R., 10 Calc., 445*, distinguished. IN THE MATTER OF THE PETITION OF SOLOMON. GOPAUL CHUNDER LAHIRY *v.* SOLOMON . . . **I. L. R., 11 Calc., 787**

In the same case on appeal,—*Held*, on the facts, that there was no "sufficient cause" for not making an application for review within the time limited by section 5 of the Limitation Act, 1877. GOPAL CHUNDRA LAHIRI *v.* SOLOMON **[I. L. R., 13 Calc., 62**

**38.** ——————— *Discretion of Court to admit appeal after time.*—Exercise by Court of the discretion given to it by section 5 of the Limitation

**LIMITATION ACT, 1877, s. 5—*continued.***

Act, 1877, by making person a respondent when the time for appealing against him had expired. MANICKYA MOYEE v. BORODA PROSAD MOOKERJEE [I. L. R., 9 Calc., 355 : 11 C. L. R., 430

39. ——————— *Appeal in pauper suit.—Application for review.*—The language of the Limitation Act precludes any other construction than that while a pauper may apply for a review of judgment with the same indulgence as to delay in making the application as a person who is not a pauper, yet, in making his application for leave to appeal, similar indulgence is not extended to him. LAKSHMI v. ANANTA SHANBAGA . I. L. R., 2 Mad., 230

40. ——————— *Sufficient cause.—Poverty.—Admission of appeal after time.*—Poverty is not "sufficient cause," within the meaning of section 5 of the Limitation Act, Act XV of 1877, for admitting an appeal after the ordinary period of limitation prescribed therefor has expired. MOSHAULLAH v. AHMEDULLAH . I. L. R., 13 Calc., 78

41. ——————— *Discretion of Court.—Appeal out of time, Admission of.*—Section 5 of the Limitation Act gives a discretion to a Court to admit an appeal filed out of time. *A.* valued his suit at ₹18,000, which was reduced to less than ₹5,000 by the Court of first instance at Rajshahye. A decree, dated the 20th December 1883, was given against the defendant, who applied for copies on the 3rd of February, and the decree was ready on the 7th. The defendant was apparently under the impression that the appeal would lie to the High Court; but on the 16th of March a letter was despatched by his Calcutta agent informing him that he was mistaken and that the appeal lay to the District Judge. This letter reached Rajshahye on the 17th, and the appeal was filed on the 23rd of March. *Held* that, under the circumstances, the Court might admit the appeal in the exercise of its discretion under section 5 of the Limitation Act. HURO CHUNDER ROY v. SURNAMOYI . . . . I. L. R., 13 Calc., 266

**——— s. 6 (1871, s. 6).**

*See* s. 14 . . I. L. R., 8 Bom., 529

1. ——————— *Act IX of 1871, s. 6.—Rules for computing limitation.*—Though by section 6 of the Limitation Act, 1877, nothing in that Act affects the period of limitation prescribed by any special or local law for any suit, appeal, or application, still the rules prescribed by that Act for computing the period of limitation are applicable to such suit, appeal, or application. Section 6 of Act IX of 1871 contrasted with section 6 of Act XV of 1877. BEHARI LALL MOOKERJEE v. MUNGOLANATH MOOKERJEE . I. L. R., 5 Calc., 110 : 4 C. L. R., 371

2. ——————— *Act IX of 1871, s. 6.*—Section 6 of Act IX of 1871 and section 6 of Act XV of 1877 compared. GOLAP CHAND NOWLUCKHA v. KRISHTO CHUNDER DASS BISWAS [I. L. R., 5 Calc., 314

**LIMITATION ACT, 1877, s. 6—*continued.***

3. ——————— *Special law of limitation.*—In the absence of a special provision applicable to special laws, the general rule that when limitation once begins to run it continues to run, and its operation is not liable to be suspended either on Sundays, holidays, or during the recess of Courts, is applicable. THIR SING v. VENKATA RAMIER [I. L. R., 3 Mad., 92

4. ——————— *Special law of limitation.—Mad. Reg. IV of 1816, s. 5.—Village Munsif.—Civil jurisdiction.—Limitation of suits.*—Section 5 of Regulation IV of 1816, which prohibits Village Munsifs from trying any suit cognisable by them, unles (*inter alia*) the cause of action has arisen within twelve years previous to the institution of such suit, does not exclude such suits from the operation of the Limitation Act, 1877. ERAJABI v. MAYAN . . . . I. L. R., 9 Mad., 118

**——— s. 7 (1871, s. 7; 1859, ss. 11, 12).**

*See* LIMITATION ACT, 1877. [I. L. R., 10 Calc., 748

1. ——————— *Disqualification to sue.*—No other cause of disqualification than those mentioned in the Limitation Act is admissible to save limitation. RAM KISHORE ACHARJE CHOWDHRY v. LUKHEE DEBEE CHOWDHRAIN . W. R., 1864, 290

2. ——————— *Voluntary absence after attaining majority.*—The plaintiff's voluntary absence abroad after attaining majority does not bar the operation of Act XIV of 1859. VENKATA SUBHA PATTAR v. GIRI AMMAL . 2 Mad., 113

3. ——————— *Ignorance of accrual of cause of action by absence from country.*—Ignorance of the cause of action having accrued when owing to any other cause than the fraud of the defendant,—*e.g.*, absence from the country,—does not give the plaintiff a longer time for suing. REAZ ALI KHAN v. GOVERNMENT OF INDIA . . 19 W. R., 269

4. ——————— *Absence by reason of transportation.*—During the plaintiff's absence by reason of transportation, the defendant took possession of land which previously belonged to him as a tenant, and the landlord allowed the defendant to hold as his tenant. He held possession for more than twelve years. In a suit by the plaintiff on his return to turn the defendant out of possession, in which the landlord was made a defendant,—*Held* that the suit was barred, there being no exception in the Limitation Act with regard to plaintiffs who are beyond the sea in consequence of transportation. DOMUN v. SUDUNKOOLAH [1 B. L. R., S. N., 25 : 10 W. R., 253

5. ——————— *Adopted son.—Disability.*—An adopted son after he attains majority is under no legal "disability" within the meaning of section 11, Act XIV of 1859, although his title as adopted son may be disputed and has not been finally established. MUDDUN MOHUN TEWAREE v. NAND KISHORE DOSS [5 W. R., 295

**LIMITATION ACT, 1877, s. 7**—*continued.*

He must bring his suit to set aside illegal acts of his adopting mother within three years of his attaining majority. KISHEN MOHUN KHOOND *v.* MUDDUN MOHUN TEWAREE . . . 5 W. R., 32

6. ——— *Minors.—Law of the party.*—The term "minors" used in section 12 of Act XIV of 1859 must be construed according to the law of the party in the case. HARI MAHADAJI JOSHI *v.* VASUDEV MORESHVAR JOSHI [2 Bom., 344: 2nd Ed., 325

7. ——— *Age of majority.—Minor.*—For the purposes of the Limitation Act, IX of 1871, no person, whatever his domicile may be, is protected from the operation of the Act beyond the age of 18, and the three years of grace given by that Act. RAINEY *v.* NOBO COOMAR MOOKERJEE [5 C. L. R., 543

8. ——— *Object of section.*—The object of the section of the Limitation Act relating to disabilities is not to place minors under a special disability as compared with majors, but to make a special concession in their favour. BISSUMBHUR SIRCAR *v.* SOORODHUNY DOSSEE . . . 3 W. R., 21

KALEE DOSS CHATTERJEE *v.* BEHAREE LOLL MOOKERJEE . . . . . 2 W. R., 305

HURRIS CHUNDER NAG *v.* ABBAS ALI [5 W. R., 204

9. ——— *Construction of section.*—The section merely means that no limitation will apply to a case in which the person suing was disqualified at the time when the cause of action arose, provided the suit is brought within three years of the time of the disqualification ceasing. GUZ BEHARY SINGH *v.* WASHUN . . W. R., 1864, 302

10. ——— *Minority.—Effect of section.*—The effect of it is to provide a distinct period of limitation applicable to every case in which but for legal disability the suit would be barred: in other words, to add three years from the time the disability ceases to the period of limitation made applicable by the Act to the particular case. RAMANUJA CHARIYAR *v.* VENKATA VARADH AIYANGAR [4 Mad., 54

11. ——— *Disability of minority.*—In computing the period of limitation under section 11, the period of the plaintiff's legal disability by reason of minority cannot be deducted. VIRA PILLAI *v.* MURUGA MUTTAYAN . . . 2 Mad., 340

12. ——— *Suit by mother and guardian of minor.*—A mother and guardian of a minor is entitled to a deduction from the computation of limitation of the period of the minor's legal disability. RAM CHUNDRA ROY *v.* UMBICA DOSSIA [7 W. R., 161

13. ——— *Suit by minor through guardian.*—In a suit by a minor through her guardian for the recovery of property sold more than three years before the plaint was filed, plaintiff was

**LIMITATION ACT, 1877, s. 7**—*continued.*

held to be entitled to rely on the provisions of section 11 of Act XIV of 1859, and to be therefore not barred by limitation. RAM GHOSE *v.* GREEDHUR GHOSE [14 W. R., 429

14. ——— *Effect of guardianship on minor's disability.*—The fact that a minor is for a time represented by a guardian does not remove the disability of the minor. ANANTHARAMA AYYAN *v.* KARUPPANAN KALINGARAYEN [I. L. R., 4 Mad., 119

15. ——— *Minor's right to sue.—Disability.*—A suit by a guardian on behalf of a minor is that of the minor, and is governed by the law of limitation applicable to the minor. KHODABUX *v.* BUDREE NARAIN SINGH [I. L. R., 7 Calc., 137: 8 C. L. R., 306

SUFFUROONISA BIBEE *v.* NOORUL HOSSEIN [17 W. R., 419

16. ——— *Minor's right to sue.—Application by guardian for minor.*—Where a minor had been dispossessed of his share in certain property, which had been sold in execution of a decree, and where an application under section 268 of Act VIII of 1859 to obtain possession of the share was made by the then guardian of the minor and disallowed, and subsequently, but beyond the period of one year from the date of the application, a suit was brought to obtain possession by another guardian of the infant, who had been duly appointed,—*Held* that such suit was not barred by limitation, the right to sue being that of the minor, and that it might be exercised by any one duly appointed on his behalf during his minority, or by the infant himself, within the time limited by section 7 of Act XV of 1877, after attaining his majority. KHODABUX *v.* BUDREE NARAIN SINGH . I. L. R., 7 Calc., 137: 8 C. L. R., 306

17. ——— *Suits under the Rent Act.*—The provisions of the section were formerly held to be not applicable to suits under the Rent Act. DINONATH PANDAY *v.* ROGHOONATH PANDAY [5 W. R., Act X, 41

LUCHMUN SINGH *v.* MIRIAM. LUCHMUN SINGH *v.* KAZIM ALI KHAN . . 5 W. R., 219

POORUN SINGH *v.* KASEEENATH SINGH [6 W. R., 20

SEEE PERSHAD *v.* RAJGOOROO TRUEUMBUKHNATH DEO . . . . 10 W. R., 44

But there is now no distinction in that respect between rent suits and other suits.

18. ——— *Act XIV of 1859, ss. 11 and 12.—Civil Procedure Code, 1859, s. 246.—Disability of minority.*—It was held that the limitation of one year, provided by section 246 of Act VIII of 1859, was subject, in the case of a minor, to be modified by sections 11 and 12 of Act XIV of 1859. *Mahomed Bahadur Khan* v. *Collector of Bareilly, 13 B. L. R., 292,* distinguished, on the ground that it

LIMITATION ACT, 1877, s. 7—*continued.*

was decided on an Act of a very special nature. PHOOLBAS KOONWUR *v.* LALLA JOGESHUR SAHOY [I. L. R., 1 Calc., 226: 25 W. R., 285 L. R., 3 I. A., 7

HURO SOONDUREE CHOWDHRAIN *v.* ANUNDNATH ROY CHOWDHRY . . . 3 W. R., 8

And the Act of 1877 now expressly applies to such cases, as also to cases of execution of decrees to which it was held the provisions of the Act of 1859 did not apply.

*See* ROTTY RUMUN OOPADHYA *v.* CHUNDEE BINODE OOPADHYA . 5 W. R., Mis., 10

CHUNDER COOMAR ROY *v.* SHURUT SOONDUREE DEBIA . . . . 6 W. R., Mis., 37

TARUCKNATH MOOKERJEE *v.* POORNOCHUNDER CHATTERJEE . . . 8 W. R., 137

MUTHOORA DOSS *v.* SHUMBHOO DUTT [20 W. R., 53

19. ——————— *Minority.—Minor inheriting decree.*—Where a decree-holder is under no legal disability to execute his decree, his son only succeeds to his right and is bound to execute his decree within the time which remained to the original decree-holder. ANNUNDIKOOMAR *v.* THAKOOR PANDAY [1 Ind. Jur., N. S., 31 4 W. R., Mis., 21

20. ——————— *Suit by guardian of minor.—Application by minor for execution of decree.*—The guardian and administratrix of her minor sons obtained a money-decree against the defendants in August 1874, and on the 22nd February 1875 applied for its execution. The application was struck off on the 30th July 1875, as no property belonging to the defendants could be found. On the 16th of June 1881 the guardian died, and one of the sons, on the 20th of October 1882, soon after attaining his majority, made a fresh application for execution of the decree. *Held* that the fresh application was not time-barred, the time from which the period of limitation began to run against the applicant being the date on which he attained majority. *Khodabux* v. *Budree Narain Singh, I. L. R., 7 Calc., 137,* followed. JAGJIVAN AMIRCHAND *v.* HASAN ABRAHAM [I. L. R., 7 Bom., 179

21. ——————— *Execution of decree.—Minor plaintiff.—Application for execution by guardian.*—A plaintiff, who has obtained a decree during his minority, has the option either of applying through his guardian to execute the decree during his minority or to wait until the expiration of his minority before executing his decree. The application of the guardian is the application of the infant. The minor is under disability during the whole period of his minority. His disability does not cease because he, through his guardian, makes two or more applications for execution, however long the interval between them, provided they are all made during his minority. MON MOHUN BUKSEE *v.* GUNGA SOONDERY DABEE [I. L. R., 9 Calc., 181: 11 C. L. R., 34

LIMITATION ACT, 1877, s. 7—*continued.*

22. ——————— *Period of successive minorities.*—In a suit instituted before Act XIV of 1859 came into operation, the periods of successive minorities might be deducted in reckoning the term of limitation. AMIRTOLAL BOSE *v.* RAJONEEKANT MITTER . . 15 B. L. R., 10: 23 W. R., 214 [L. R., 2 I. A., 113

23. ——————— *Act XIV of 1859, ss. 11 and 12.—Right of minor to sue by guardian.*—The benefit of sections 11 and 12 of Act XIV of 1859 is not limited to the period when the disability of minority has ceased, but applies also to the period during which the disability continues; and therefore, during the latter period, it is open to the minor to sue by his guardian. PHOOLBAS KOONWUR *v.* LALLA JOGESHUR SAHOY [I. L. R., 1 Calc., 226: 25 W. R., 285 L. R., 3 I. A., 7

S. C. in lower Court, SADABURT PERSHAD SAHOO *v.* LATF ALI KHAN. PHOOLBAS KOOER *v.* LALL JUGESSUR SAHI. BIKRAMJIT LALL *v.* PHOOLBAS KOOER. RAM DHYAN KOONWARI *v.* PHOOLBAS KOOER . . 14 W. R., 339

*See* RAM AUTAR *v.* DHUNEE RAM [1 N. W., Ed. 1873, 122

and BAROO MULL *v.* CHUJJOO MULL [4 N. W., 125

24. ——————— *"Representative."—Purchaser from minor.—Quære,*—Can the term "representative" in section 11, Act XIV of 1859, be extended so as to include any purchaser from the minor suing in his lifetime? Whatever may have been the effect of section 11 of Act XIV of 1859, as to extending the privilege given to a minor to his representatives, section 7, the corresponding section of Act IX of 1871, limits the privileges to the minor himself and his representative after his death; and therefore a purchaser from a minor cannot claim the benefit of that section. MAHOMED ABSAD CHOWDHRY *v.* YAKOOB ALLY . . 15 B. L. R., 357: 24 W. R., 181

25. ——————— *Suit by minor on attaining majority.*—Suit to recover money advanced on a bond granted by the plaintiffs' father, on the allegation that the money advanced was the plaintiffs', who were minors at the time. In the absence of proof of knowledge on the part of the defendant of the benami character of the father's position, it was held that, whether the money of the loan really belonged to the plaintiffs or not, they could only sue as the representatives of their father, and that section 11 prevented them from deriving any advantage from their minority in computing the period of limitation. NOSHEERAM ROY *v.* SHUSHEE BHOOSHUN ROY [5 W. R., 169

MUKOOTNATH *v.* JUGWUNT LALL [3 Agra, 389

TARUCK CHUNDER SEN *v.* DOORGA CHURN SEN [20 W. R., 2

26. ——————— *Minority.—Disability.—Guardian.*—Where the father of a minor lent on

**LIMITATION ACT, 1877, s. 7—*continued.***

account a sum of money to the defendant, and died without having received back the money, and the account was continued with the defendant by the mother and guardian of the minor, and the balance was struck during the minority of the infant, it was held that the cause of action arose at the time such balance was struck; and that, as the cause of action accrued to the minor during his disability, his representatives could sue to recover the balance at any time during the time of disability, and that a claim by the minor on attaining his majority, or, if he should die, by his representative, would not be barred if preferred within three years from the cessation of the disability. Further, the extension of the period of limitation conceded to a minor on account of legal disability is not affected by the fact that during his minority he is represented by a guardian. MAHIPATRAV CHANDRARAV *v.* NENSUK ANANDRAV SHET MARVADI

[4 Bom., A. C., 199

27. ——————— *Suspension of right of suit for disability.*—Limitation begins to run against a mother on her succeeding to a family estate as the heir of her son and under no disability, and cannot be stopped by any subsequent disability under section 11. A dispossession by a stranger to a family of a portion of the family estate is only one cause of action to the family arising on the date of dispossession; and though, in consequence of the minority of a certain member of the family living at the time the period of limitation may under the law be enlarged, still no new cause of action accrues to a subsequently born son at the date of his birth, so as to enable him to postpone again the period of limitation which has begun to run against the family. GOBIND COOMAR CHOWDHRY *v.* HURO CHUNDER CHOWDHRY

[7 W. R., 134

28. ——————— *Disability of heir.—Cause of action.*—Under section 11, Act XIV of 1859, the subsequent disability of an heir will not save a suit instituted after a lapse of twelve years from the date of cause of action when such cause of action arose during the lifetime of the ancestor. MOHABAT ALI *v.* ALI MAHOMED KULAL

[3 B. L. R., Ap., 80 : 12 W. R., 1

29. ——————— *Minority, Omission to sue within three years after.*—The mere fact of a plaintiff not suing within three years of his attaining majority will not, in cases where Act XIV of 1859 allows a general limitation of twelve years, bar his suit if brought within twelve years of the time when the cause of action accrued. RADHAMOHUN GOWER *v.* MOHESH CHUNDER KOTWAL . 7 W. R., 3

30. ——————— *Disability of heir.—Cause of action.*—*T.*, *R.*, and *N.*, three of the heirs of one *H.*, sued the defendant in 1865 for possession of certain property left by *H.* The defence was that the defendant had purchased the property from *H.* in 1851, and had ever since been in possession. The lower Court found that the suit was barred as regarded some of the plaintiffs, but that the other two plaintiffs, *R.* and *N.*, had not, at the time the suit was brought, exceeded their majority by three years, the time allowed them by section 11, Act XIV of 1859. *Held* that, whether limitation would bar *R.* and *N.* depended not on the question whether three years from their majority had elapsed or not before the institution of the suit, but whether twelve years having elapsed from the cause of action in 1857, limitation operated as a bar. If *H.* had, at the time of his death, been out of possession for twelve years, then *R.* and *N.* would not be entitled to the extra three years after attaining their majority; but if he had died within twelve years, then the limitation should be calculated from the date of the cause of action to the date of his death, and then three years be allowed to *R.* and *N.* after they came of age. NUR MOHAMMED *v.* THAKOOR BIBI

[1 B. L. R., S. N., 18

31. ——————— *Disability of heir.—Cause of action.*—*A.* sued to set aside a deed of sale of certain immoveable property, which she claimed as the property of her husband. The deed of sale had been executed by her husband's mother during her husband's minority. Her husband attained his majority more than twelve years after the deed of sale, and died about a year afterwards, leaving her, *A.*, a minor. *A.* alleged that she had attained her majority within three years of this suit. *Held*, the suit was barred under section 11, Act XIV of 1859. The husband could have sued after attaining his majority, and the subsequent disqualification of the plaintiff *A.* could not extend the time. ABHAYA DURGA *v.* HARI KRISHNA GOPE

[1 B. L. R., S. N., 21 : 10 W. R., 285

32. ——————— *Suit to set aside alienation of ancestral property.*—A suit to set aside alienation of ancestral property, where a period of twelve years from the date of such alienation had elapsed during plaintiff's minority, may be brought within three years (not twelve) from the time of his attaining majority. CHOWDHRY ZUHOORUL HUQ *v.* BAGOO JAN . . . . 11 W. R., 532

Affirmed on review, BAGOO JAN *v.* CHOWDHRY ZUHOORUL HUQ . . . 13 W. R., 69

33. ——————— and art. 129.—*Cause of action.—Minority.*—In a suit by the reversionary heirs of one *S.* to set aside an adoption alleged to have been made with the permission of *S.*, the plaintiffs alleged that *S.* died in 1844; that the adoption took place in 1845; and that they attained their majority respectively on the 25th September 1871, and the 20th December 1872. The suit was instituted on 16th June 1873. *Held* that the adoption having taken place after the death of *S.*, the cause of action arose at the date of the adoption, as provided by art. 129, schedule II, Act IX of 1871; and that the plaintiffs, not having been in existence when the cause of action arose, were not entitled to the benefit of section 7, Act IX of 1871, so as to enable them to sue within three years of attaining their majority. SIDDHESSUR DUTT *v.* SHAM CHAND NUNDUN

[15 B. L. R., 9, note : 23 W. R., 285

*See* MRINMOYEE DABEA *v.* BHOOBUNMOYEE DABEA . . 15 B. L. R., 1 : 23 W. R., 42

LIMITATION ACT, 1877, s. 7—*continued.*

34. ——————— and art. 44.—*Minority. Disability of.—Alienation by guardian of property of minor.—Cause of action.*—*K. R.* died in 1844, leaving a widow, *O. T.*, and a minor son, *G. D.* In 1847 *O. T.* executed in favour of the defendant a mirasi ijara of certain property, but it did not appear whether she so acted as guardian or mother of *G. D.* *G. D.* died in 1855 before attaining majority, and, under an anumati patro executed by *K. R.* before his death, the plaintiff was adopted in 1858. *O. T.* died in 1861. In a suit brought by the plaintiff in 1873 to set aside the alienation by *O. T.* in 1847,—*Held* that, if the alienation was made by *O. T.* as guardian of *G. D.*, the suit was not barred, it having been brought within three years after the plaintiff attained his majority; if made by her as a Hindu widow, the suit was still not barred, the cause of action not arising until her death, when the plaintiff was a minor. PROSONNA NATH ROY CHOWDRY *v.* AFZOLONNESSA BEGUM

[I. L. R., 4 Calc., 523 : 3 C. L. R., 391

35. ——————— *Minority.—Right to sue, —Personal exemption.—Assignment by minor.*—Under section 7 of the Limitation Act, a minor has, in respect of a cause of action accruing during his minority, a right to sue at any time within three years of attaining his majority; but if during his minority, or if after attaining his majority and within three years thereof, such person assigns all his rights and interests to a third party, who is *sui juris*, the latter cannot claim the exemptions accorded to the minor by section 7 of the Limitation Act, but is subject to the ordinary law of limitation governing suits in which relief of the same nature is claimed. RUDRA KANT SURMA SIRCAR *v.* NOBOKISHORE SURMA BISWAS. SAMOD ALI *v.* MAHOMED KASSIM

[I. L. R., 9 Calc., 663 : 12 C. L. R., 269

36. ——————— *Disability of minority.—Suit by representative of minor in interest.*—Where a person whose right to sue is limited (say) to twelve years, labours under a disability such as is specified in Act IX of 1871, section 7, and the disability continues up to his death, which occurs within those twelve years, leaving some (say eight) years to run, his representative in interest has only the remainder of the period of limitation (*i.e.*, eight years in the case supposed) within which to bring his suit. The fact of the representative being himself a minor does not give him any more time, as he can sue through his guardian or next friend. SOOKH MOYEE CHOWDHRAIN *v.* RAGHUBENDRO NARAIN CHOWDHRY

[24 W. R., 7

This section does not apply to suits for pre-emption. Under the Acts of 1859 and 1871 the case of MURTAZA *v.* LALLA NURSING SUHAE . 7 W. R., 86 decided that ss. 11 and 12 of the Act of 1859 did not apply to pre-emption suits; and the cases of JUNGOO LALL *v.* LALA ALUM CHAND

[7 W. R., 279

and RAJA RAM *v.* BANSI . I. L. R., 1 All., 207

LIMITATION ACT, 1877, s. 7—*continued.*

the former under the Act of 1859 and the latter under the Act of 1871, decided that the sections relating to the disability of minority in those Acts did apply to such suits.

——————— s. 8 (1871, s. 8).

1. ——————— *Joint Hindu family.—Debt due to family.—Joint creditors.*—The manager of a joint Hindu family, of which *S.* was a minor member, lent money on behalf of the family to *K.* The time limited by law for a suit for such money was three years from the date of the loan. During that period there were several members of the family who were *sui juris*. After attaining his age of majority *S.* sued *K.* for such money, and as the period limited by law for such suit had expired, relied on the saving provisions of section 8 of the Limitation Act, 1877. *Held* that, although during such period *S.* was one of several joint creditors who was under a disability, yet as more than one member of the family could have given a discharge to *K.* without *S.'s* concurrence, the provisions of section 8 of the Limitation Act were not applicable, and his suit was therefore barred by limitation. SURJU PRASAD SINGH *v.* KHWAHISH ALI . I. L. R., 4 All., 512

2. ——————— *Cause of action, Accrual of, during minority.—Minor's right to sue after attaining majority.*—The plaintiff having attained majority on the 11th March 1882, sued the defendant, within three years from that date, upon a bond obtained in 1872 by his mother and guardian in the plaintiff's name alone. The defendant contended that the plaintiff's brother, who was capable of giving a valid discharge to his debtors, having failed to sue within proper time, the suit was barred. On reference to the High Court,—*Held* that the suit was not barred. The plaintiff's brother not being a party to the bond, section 8 of the Limitation Act, XV of 1877, would not apply. The bond was passed to the plaintiff alone, and the right of action accrued to him on the 8th July 1878. Being then a minor, time did not begin to run until he attained his majority. YESKNATH RAMCHANDRA *v.* WAMAN BRAHMADEV

[I. L. R., 10 Bom., 241

——————— s. 9. (1871, s. 9).

*See* s. 13 . I. L. R., 6 Bom., 103
[I. L. R., 4 All., 530
I. L. R., 8 Bom., 561

——————— s. 10 (1871, s. 10; 1859, s. 2).

*See* ART. 120 . I. L. R., 10 Bom., 242

1. ——————— *Trustee.—Benamidar.*—A benami transaction does not create the relation of trustee and *cestui que* trust. A benamidar is not a trustee within the meaning of section 2, Act XIV of 1859. UMA SUNDARI DASI *v.* DWARKANATH ROY

[2 B. L. R., A. C., 284 : 11 W. R., 72

2. ——————— *Trustee.—Mortgagee in possession.*—A mortgagee in possession after the mortgage has been satisfied is not a trustee for the mort-

gagor within the meaning of section 2 of Act XIV of 1859. LALL DOSS *v.* JAMAL ALI
[B. L. R., Sup. Vol., 901: 9 W. R., 187

3. ——————— *Trust.—Master and servant.*—*A.* advanced certain sums of money on different occasions to his servant, *B.*, for the purpose of erecting buildings, &c., for *A.* In a suit by *A.* for recovery of the balance, *B.* raised the defence that the suit was barred so far as it related to sums advanced more than three years before the suit. *Held* that the matter was of the nature of a trust, and limitation would not apply. NARAYAN DAS *v.* MAHARAJA OF BURDWAN . 1 B. L. R., S. N., 11: 10 W. R., 174

4. ——————— *Trustee.—Mahomedan lady's estate.*—In a suit by the purchaser of a Mahomedan lady's share in her father's property against her brother, it was held that, as the property while in the hands of the brother was in the hands of a trustee, and not in adverse possession, limitation could not apply. BACHARAM CHOWDRY *v.* MAHTAB BEEBEE
[W. R., 1864, 377

5. ——————— *Trustee.—Depository.—Immoveable property made over to defendant to sell and pay to plaintiff.—Limitation Act, 1859, cl. 15, s. 1.*—Where immoveable property was given into the possession of the defendant, under an order of a revenue officer, which directed the defendant to sell the crops and, after payment of Government dues, to account for the profits to the plaintiff on his claiming it, it was held that the defendant was not a depository, but a trustee of the property. VITAL VISHWANATH PRABHU *v.* RAM CHANDRA SADASHIV KIRKIRE . . . 7 Bom., A. C., 149

6. ——————— *Trustee.—Possession of property not for person's own use.*—Where property is vested in a person partly for charitable purposes and partly for the benefit of others, and he is bound to use it for such purposes and not for his own advantage, he is a trustee within the meaning of Act XIV of 1859, section 2. ALLEH AHMED *v.* NUSEEBUN . . . . . 21 W. R., 415

7. ——————— *Trustee.—Idol.*—In a suit by the representatives of a shebait to recover possession of property of an idol from the assignees of a purchaser, on the ground that the purchaser was a mere trustee for the idol, and the defendants had notice of this or might have known it by reasonable enquiry,—*Held* that the suit was not one which came within section 2, Act XIV of 1859, as a suit brought against a trustee. BRAJA SUNDARI DEBI *v.* LUCHMI KUNWARI . . . 2 B. L. R., A. C., 155

S. C. on appeal to the Privy Council, BROJOSOONDERY DEBIA *v.* LUCHMEE KOONWAREE
[15 B. L. R., 176 note

8. ——————— *Persons holding endowed property in trust.*—No limitation applies in the case of persons holding endowed property in trust and under accountability, but no indulgence should be shown to a plaintiff who brings forward claims so stale and antiquated that difficulty arises in finding any reliable evidence whereby to decide on their validity and extent. BUZL ROHIM *v.* LUTAFUT HOSSEIN. KHODEJOONISSA BIBEE *v.* LUTAFUT HOSSEIN . . . . W. R., 1864, 171

9. ——————— *Suit to establish right to beneficial interest in proceeds of debutter land.*—A suit to establish a right to a beneficial interest in the surplus proceeds of debutter land after providing for the worship of the idol, where the parties were shebaits, was held to be not a suit between co-trustees to the share claimed, but one to which the Law of Limitation would apply. MOHAMAYA DOSSEE *v.* BINDOO BASHINEE DOSSEE . . . . 19 W. R., 35

10. ——————— *Specific trust—Suit to remove trustee.*—In a suit brought for the purpose of removing the trustees or managers of certain property which was made debutter for the benefit of an idol, and of establishing the plaintiff's claim to be appointed trustee or manager, it was objected that the suit was barred by limitation. *Held* that the suit was one for the purpose of following the property in the hands of trustees within the meaning of section 10 of the Limitation Act, XV of 1877, and therefore limitation did not run. SREENATH BOSE *v.* RADHA NATH BOSE
[12 C. L. R., 370

11. ——————— *Suit for possession against agent in charge of endowed property.*—A suit for possession against an agent or deputy in charge of endowed property was not barred by limitation according to section 2, Act XIV of 1859. GHOLAM NUJJUFF *v.* TOOSSOODDUCK HOSSEIN
[1 W. R., 126

12. ——————— *Trustee.—Constructive trust.—Court of Wards taking possession of estate under order of Government.—Mad. Reg. V of 1804.—Mad. Reg. VII of 1808.*—The Government, by directing the Court of Wards to take charge of an estate during the minority of the next claimants, does not constitute itself a trustee for the rightful owner. The wrongful invasion or continuance in possession of a stranger, whether with or without knowledge of the infirmity of his title, will not make the wrong-doer a constructive trustee unless he has been admitted into possession by a trustee. PALKONDA ZAMINDAR (ZEMINDAR OF PALKONDA) *v.* SECRETARY OF STATE FOR INDIA . I. L. R., 5 Mad., 91

13. ——————— *Co-sharers.—Trustees.*—The non-receipt of a share of the profits of an estate is no cause of action between shareholders from which limitation runs. SHIBO SUNDARI DASI *v.* KALI CHURAN RAI . . . W. R., 1864, 296

14. ——————— *Trustee.—Express trustee.—Absent co-sharer.*—Section 10 of the Limitation Act, 1877, has reference to express trustees, and in order to make a person an express trustee within the meaning of that section, it must appear either from express words or clearly from the facts that the rightful owner has entrusted the property to the person alleged to be a trustee for the discharge of a particular obligation. In 1813. *S.*, being unable to

**LIMITATION ACT, 1877, s. 10**—*continued.*

pay the Government revenue due on his land, abandoned his village. In 1833, *H.*, who had paid the revenue due by *S.* and had taken, or obtained from the Government, possession of *S.'s* land, attested a village paper in which it was stated that, if *S.* returned and reimbursed him, he should be entitled to his land. Sixty years after *S.* abandoned his village, *B.*, as the representative of *S.*, sued the representative of *H.* for such land, alleging that it had vested in *H.* in trust to surrender it to *S.* or his heirs on demand. As evidence of such trust, *B.* relied on the village paper mentioned above, and on the village administration paper of 1862, in which it was stated that absent co-sharers might recover their shares on payment of the arrears of Government revenue due by them. *Held* that such documents did not prove any express trust, within the meaning of section 10 of the Limitation Act, 1877, and the suit was therefore barred by limitation. BARKAT *v.* DAULAT [I. L. R., 4 All., 187

15. ——————— *Trust.—Absconding co-sharer.—Purchaser from remaining co-sharer, Right of.*—Where a clause of the wajib-ul-urz of a village stated in general terms that absconders from such village should receive back their property on their return, and certain persons who absconded from the village before the wajib-ul-urz was framed sued to enforce such clause against the purchaser of their property from the co-sharer who had taken possession of it on their absconding, and who was no party to the wajib-ul-urz, alleging that their property had vested in such co-sharer in trust for them,—*Held* that, assuming the trust to be established, as the purchaser had purchased in good faith for value and without notice of the trust, and was not the representative of such co-sharer within the meaning of section 10 of Act IX of 1871, and had been more than twelve years in possession, the suit was barred by limitation. PIAREY LAL *v.* SALIGA [I. L. R., 2 All., 394

KAMAL SINGH *v.* BATUM FATIMA [I. L. R., 2 All., 460

16. ——————— *Trustee.—Executor.*—An executor, who by the will is made an express trustee for certain purposes, is, as to the undisposed of residue, a trustee within the scope of section 2 of Act XIV of 1859, for the heir or heirs of the testator. LALLUBHAI BAPUBHAI *v.* MANKUVARBAI [I. L. R., 2 Bom., 388

17. ——————— *Suit by representatives of testator against defaulting executor.*—Where no steps had been taken against the assets of a defaulting executor who died in 1836,—*Held* that the claim of the representatives of the testator was barred by limitation, the Court declining to express an opinion as to whether, in another form of suit, the claimants might not follow their testator's assets under section 2. IN RE PALMER'S ESTATE . . Cor., 68

18. ——————— *Specific property.—Executors.—Trustees.—Suit for account.*—The firm of *C., T., & Co.* acted as agents for the trustees of *G. D.* It appeared, from entries in their books, headed "Account of the Trustees for *G. D.*," that the firm had in their hands R12,453 to the credit of the trustees in 1848, at which time the firm stopped payment. *D. T.*, a member of the firm of *C., T. & Co.*, and *W. S.*, were the trustees. In the earlier accounts the names of *D. T.* and *W. S.* both appeared; in the later ones,—namely, from 1842 until they were closed in 1848,—at the head of the account there was a memorandum written in small letters, "*D. T.*, trustee," but it did not appear that *W. S.* had ever renounced the trust, or conveyed the trust estate to *D. T.* In 1846 *D. T.* died, leaving *G.* and *T.*, the surviving partners of the firm, the executors of his will. *W. S.* survived *D. T.* In 1867, the representative of *G. D.* brought a suit for an account against *G.* and *T.*, as the executors of *D. T.* *Held*, upon the facts, that there was no proof that any specific property, the subject of the trust, had come to the hands of *G.* and *T.* as executors of *D. T.*, and any other claim was barred by section 2, Act XIV of 1859. MICHAEL *v.* GORDON [2 Ind. Jur., N. S., 271

19. ——————— *Trust.—Charge of debts by testator.*—A charge of debts generally by a testator upon his property, or any part of it, will not affect limitation, because it does not at all vary the legal liabilities of the parties, or make any difference with respect to the effect and operation of the statute itself. The executors take the estate subject to the claims of the creditors, and are in point of law trustees for the creditors, and such a charge adds nothing to their legal liabilities. But the case is different when particular property is given upon trust to pay a particular debt or debts. In such a case the trustee has a new duty—not the ordinary duty of an executor to pay debts generally out of property generally, but a duty to apply a particular property to secure a particular debt; and there is a trust within the meaning of section 10 of the Limitation Act. ANUND MOYE DABI *v.* GRISH CHUNDER MYTI [I. L. R., 7 Calc., 772 : 9 C. L. R., 327

20. ——————— *Suit to recover property subject to a trust not carried out.*—Section 2 of Act XIV of 1859 is applicable to a suit for the recovery of property the possession of which had been transferred upon trust, and in respect of which there had been a disaffirmance of the trust, and a refusal to fulfil the conditions of the trust. SOOMBUN RAI *v.* MAHESH DUTT . . . . 4 N. W., 33

21. ——————— *Trustee.—Claim against rival trustee.*—A claim to vindicate the personal right of a trustee to the possession of immoveable property against another person claiming such right in the same character is not governed by section 10 of the Limitation Act, 1877. KARIMSHAH *v.* NATTAN BIVI . . . . I. L. R., 7 Mad., 417

22. ——————— *Express trust.—Suit against trustees to charge property with trust.*—A suit against trustees for the purpose of charging certain property with the trusts declared by the author of the trust in respect of that property and for

an account, is a suit to follow property, and, as such, is not barred by any lapse of time. HURRO COOMAREE DOSSEE *v.* TARINI CHURN BYSACK

[I. L. R., 8 Calc., 766

23. ——————— *Trust for specific purpose. Implied trusts.—Adverse possession.*—The words of section 10 of the Limitation Act of 1871 mean that when a trust has been created expressly for some specific purpose or object, and property has become vested in a trustee upon such trust (either from such person having been originally named as trustee, or having become so subsequently by operation of law), the person or persons who for the time being may be beneficially interested in that trust may bring a suit against such trustee to enforce that trust at any distance of time without being barred by the law of limitation. The language of the section is specially framed so as to exclude implied trusts, or such trusts as the law would infer merely from the existence of particular facts or fiduciary relations. KHERODEMONEY DOSSEE *v.* DOORGAMONEY DOSSEE

[I. L. R., 4 Calc., 455 : 3 C. L. R., 315

S. C. in lower Court . . 2 C. L. R., 112

24. ——————— and arts. 118, 133, 134. —"*Trust for a specific purpose.*"—*Per* GARTH, *C. J.*—The words "in trust for a specific purpose" are intended to apply to trusts created for some defined or particular purpose or object, as distinguished from trusts of a general nature such as the law impresses upon executors and others who hold recognised fiduciary positions. *Per* WHITE, *J.*—The words "in trust for a specific purpose" are used in a restrictive sense, and limit the character and nature of the trust attaching to the property which is sought to be followed. The phrase is a compendious form of expression for trusts of the nature and character mentioned in articles 133 and 134 of the Limitation Act,—namely, such as attach to property conveyed in trust, deposited, pawned, or mortgaged. GREENDER CHUNDER GHOSE *v.* MACKINTOSH

[I. L. R., 4 Calc., 897 : 4 C. L. R., 193

25. ——————— *Trustee and cestui que trust.—Will.—Void gift.—Residue.—Gift of interest.—Share of rents and profits.—Corpus of estate.*—*A.* by his last will and testament gave his property to trustees, partly in trust for religious and other purposes, and partly to pay thereout to certain persons and their heirs for ever certain annuities, being fixed portions of the net profits of a certain estate called the Hurro estate which amounted to R3,150. *A.* died in November 1863. On the 11th of August 1879, the heir of one of the annuitants instituted a suit claiming a share under the will, and asking for a partition of that share. The plaintiff alleged, besides, that certain of the trusts and provisions in the will were invalid in law; that, consequently, a large portion of the testator's property remained undisposed of at his death, and she claimed a share of this residue as one of the heirs of the testator. *Held* that, under the circumstances, the gift of the share of the rents and profits amounted to a gift of a share in the *corpus* of the estate; and



that, in respect of that portion of the plaintiff's claim, the suit was not barred by limitation. *Kherodemoney Dossee* v. *Doorgamoney Dossee, I. L. R., 4 Calc., 455; Greender Chunder Ghose* v. *Mackintosh, I. L. R., 4 Calc., 897; Anund Moye Dabi* v. *Grish Chunder Myti, I. L. R., 7 Calc., 772; Mannox* v. *Greener, L. R., 14 Eq., 456;* and *Sookmoy Chunder Dass* v. *Monohari Dossee, I. L. R., 7 Calc., 269,* cited. Where an estate is given by will to trustees for religious and other purposes, some of which are invalid or fail, the heirs of the testator may be barred by limitation from recovering the portion undisposed of, though they might still bring a suit against the trustees to compel them to properly administer the trusts which had not failed. HEMANGINI DASI *v.* NOBIN CHAND GHOSE

[I. L. R., 8 Calc., 788 : 11 C. L. R., 370

26. ——————— *Express trust.*—Where the property became vested in the defendants for specific purposes; and, although it was no longer in their hands, the money could be traced to the hands of the trustees, and the losses were caused by their misconduct and improper dealing with it,—*Held* that the suit fell within the section, and that, under the provision of section 10 of the Limitation Act (XV of 1877), it was not barred. THAKERSEY DEVRAJ *v.* HURBHUM NURSEY . I. L. R., 8 Bom., 432

27. ——————— and art. 62.—*Trust for specific purpose.—Money received.*—*R.* sued his father and brother *A.* for partition of the family estate, and obtained a decree by which he was entitled to recover, *inter alia,* one third of a debt due to the family. In May 1878 the debtor, having received no notice of *R.'s* claim, paid the debt to the father. The father died and his estate came into the possession of *A. Held,* in a suit brought by *R.* in July 1881 against *A.* for one third of the debt, that the money received by the father was not held in trust for a specific purpose within the meaning of section 10 of the Limitation Act, 1877, and that the suit was barred by limitation under article 62 of schedule II of the said Act. ARUNCHALA PILLAI *v.* RAMASAMYA PILLAI . . I. L. R., 6 Mad., 402

28. ——————— *Allegation of holding in trust.*—By Act XV of 1877, section 10, where property has become vested in a person in trust for a specific purpose, a suit to follow such property in his hands is not barred by lapse of time. Acting under Regulation V of 1804, the Court of Wards took charge of an impartible zemindari, on the death of the zemindar, leaving minor sons, of whom the eldest was afterwards recognised as heir and received possession on attaining full age. Upon a subsequent adjudication of forfeiture against him under Regulation VII of 1808, the Government obtained possession of the zemindari. *Held* that the Government was not placed in the position of a person in whom property had become vested for a specific purpose, and that the above section was not applicable to prevent the operation of the law of limitation under Act XV of 1877, which barred the suit brought by another of the sons, alleging title to the zemindari. VIZI-

**LIMITATION ACT, 1877, s. 10**—*continued.*

ARAMARAZU *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL

[I. L. R., 8 Mad., 525: L. R., 12 I. A., 120

**29.** ——— **and arts. 118, 123, and 145.**—*Limitation of suit relating to property held in trust.*—A suit, in order to fall within Act IX of 1871, section 10, excepting suits against trustees from limitation, must be brought for the purpose of recovering the trust property for the benefit of the trust; that section meaning that when trust property is used for some purpose other than that of the trust, it may be recovered, without any bar of time, from the hands of those in whom it has been vested in trust. Where the plaintiff sued to enforce his own personal right to manage an endowment dedicated to religious purposes, there being no question whether or not the property was being applied to such purposes by the manager in possession, the above section was held inapplicable. The possession of the defendant having been adverse for more than twelve years,—*Held* that the suit might fall within article 123 or 145 of the second schedule of Act IX of 1871, in force when the suit was brought. If it fell within neither of the above, it would be barred under article 118. BALWANT RAO *v.* PURAN MAL . I. L. R., 6 All., 1

S. C. BALWANT RAO BISHWANT CHANDRA CHOR *v.* PURAN MAL CHAUBE . L. R., 10 I. A., 90

**30.** ——— *Trust.—Resulting trust.—Suit against trustee for possession of share, and for account and recovery of profits.*—*M.* and *S.* purchased certain property jointly in 1865, and had equal interests in it till 1868, when *M.'s* interest was reduced to one third. *S.* paid the entire purchase-money in the first instance, and incurred expenses in conducting suits for possession of the property, and for registration of the deed, and ultimately obtained possession in 1869 or 1870, and took the profits from that date. *M.* did not pay any part of the money up to 1870, and it was not till 1871 that the whole of his share of it was subscribed, and he paid little or nothing towards the expenses. Subsequently he sued *S.* for possession of his share, to have an account taken of the profits, and to recover his share of them with future mesne profits and costs. *Held* that, under the above circumstances, there was a resulting trust in favour of the plaintiff, and the defendant became liable to account to him for his share; but inasmuch as there was no express trust, and the property did not become vested in trust for a specific purpose within the meaning of section 10 of the Limitation Act, and the suit was not brought for the purpose of following such trust property in the hands of a trustee, within the meaning of the section, such suit was not one which, under section 10, might not be barred by any length of time. *Bulwant Rao Bishwant Chor* v. *Puran Mal Chaube, L. R., 10 I. A., 90,* referred to. MUHAMMAD HABIBULLAH KHAN *v.* SAFDAR HUSAIN KHAN . . . . I. L. R., 7 All., 25

**31.** ——— *Constructive trust.*—*B.* and *D.*, father and son, were jointly entitled to a moiety of certain property, *B.'s* brother *E.*, and *K.*, *E.'s* son, being jointly entitled to the other moiety. *B.* and *D.* were transported for life. Thirty years afterwards (*B.* having meantime died) *D.* returned from transportation, and asserted his right to a moiety against a person deriving his title from *E.* and *K.*, who had taken possession of the whole. *Held*, looking to all the circumstances of the case, that *E.* and *K.* had taken possession subject to a constructive trust in favour of *B.* and *D.*, and that accordingly *D.* was entitled to assert his right, and no limitation could affect it. DURGA PRASAD *v.* ASA RAM

[I. L. R., 2 All., 361

**32.** ——— **and art. 98.**—*Liability of estate of deceased director.—Banker, Who is a.*—The plaintiffs' company went into liquidation early in the year 1879, in consequence of losses sustained by the failure of Nursey Kessowji & Co., which firm had been the bankers of the said company. The said firm had stopped payment on the 26th December 1878, having then in its hands the sum of R8,80,250-14-1, belonging to the company. In this suit the official liquidators of the company sought to recover that sum from the defendants, who had been directors of the company, and a further sum of R2,48,670-14-0 as damages sustained by the company through the fraud and gross negligence of the defendants in permitting Nursey Kessowji, the agent of the company, to deal with certain shares for his own purposes. One of the defendants (No. 3) died after the institution of the suit, and his sons were made parties. *Held*, that the estate of the deceased director was liable, on the ground that the misfeasance of a director is a breach of trust, and not a mere personal default. *Held*, further, that the claim, not being a claim for any specific property still in the hands of the representatives, was not covered by section 10 and article 98 of the second schedule of the Limitation Act, and was barred by the lapse of three years: but that as the limitation counted from the date of the institution of the suit, and not from the date of the amendment of the plaint, the whole claim survived in this case. NEW FLEMING SPINNING AND WEAVING COMPANY *v.* KESSOWJI NAIK

[I. L. R., 9 Bom., 373

**33.** ——— *Creditor's trust fund.—Suit for distribution of unclaimed dividends.*—Where a creditor's trust deed contained no provision for redistribution of unclaimed dividends and a suit was brought by the representatives of one of the creditors, party to the deed, for the administration and distribution of funds in the defendants' possession allotted to other creditors by way of dividends but unclaimed by them for forty years: *Semble,*—That as the trust sought to be established in favour of the plaintiffs would be a resulting trust not expressly declared, section 10 of the Limitation Act, 1877, would not apply. MANICKAVELU MUDALI *v.* ABBUTHNOT & Co.

[I. L. R., 4 Mad., 404

**34.** ——— *Suit by cestui que trust against trustee.—Trust.*—*A.* alleged that his father *B.* had, before his death, placed in the hands of *C.* a certain sum of money, and had also transferred to *C.* his landed property upon trust, that *C.* should, during the minority of *A.*, hold the money and manage the property for the benefit of *A.*, and maintain *A.*, and

**LIMITATION ACT, 1877, s. 10**—*continued.*

should, on *A.'s* attaining his majority, make over to him the property and so much of the money as should then be unexpended; and that *C.* had accepted the trust, but, upon *A.'s* coming of age, had refused to render any account. *A.*, accordingly, brought a suit for an account. *C.* pleaded that *A.* had attained his majority at a much earlier period than he alleged, and that the suit was barred by limitation *A.* replied that, under section 10 of Act XV of 1877, his suit could not be barred by any length of time. *Held* that section 10 of Act XV of 1877 did not apply to such a case, and that *A.'s* suit would be barred if not brought within six years from the time when he attained his majority, and became entitled to demand an account. In India, suits between a *cestui que trust* and a trustee for an account are governed solely by the Limitation Act (XV of 1877); and unless they fall within the exemption of section 10, are liable to become barred by some one or other of the articles in the second Schedule of the Act. To claim the benefit of section 10, a suit against a trustee must be for the purpose of following the trust-property in his hands. If the object of the suit is not to recover any property *in specie*, but to have an account of the defendant's stewardship, which means an account of the moneys received and disbursed by the defendant on plaintiff's behalf, and to be paid any balance which may be found due to him upon taking the account, it must be brought within six years from the time when the plaintiff had first a right to demand it. SARODA PERSHAD CHATTOPADHYA *v.* BROJO NATH BHUTTACHARJEE . I. L. R., 5 Calc., 910: 6 C. L. R., 195

——— **s. 12 (1871, s. 13; Act VIII of 1859, s. 333).**

*See* ART. 177 . . I. L. R., 1 All., 644

1. ——— *Computation of period of limitation.—Day on which cause of action arises.*—In calculating the period of limitation for bringing suits provided by Act XIV of 1859, the day on which the cause of action arose was to be excluded from the computation. MUNDY CHINNA COMARAPPA SETTI *v.* RAMASAMY SETTI . . . 4 Mad., 409

DURSHUN LALL SAHOO *v.* ASMUTOONISSA [19 W. R., 94

2. ——— *Calculation of period of limitation.*—In calculating the period of limitation for bringing suits, the day on which the cause of action arose should be included in the computation, and in excluding from the limitation the period during which a suit was pending, the day on which proceedings therein were commenced and the day on which they ended should both be counted. HURRO SOONDEREE DABEA *v.* KALLYMOHUN [Marsh., 138: W. R., F. B., 46: 1 Hay, 301

3. ——— *Exclusion of day on which contract is made or debt is payable.*—The date on which a contract is made is to be excluded in computing the time allowed for its performance. The date on which a debt becomes payable is to be excluded in calculating the period of limitation. LAKSHUMAN SAKHARAM *v.* RANU BIN SIDOJI [6 Bom., A. C., 51

**LIMITATION ACT, 1877, s. 12**—*continued.*

4. ——— *Exclusion of day on which agreement was made.*—In a suit for balance of an account stated, the defendant had given a written acknowledgment, on 22nd July 1867, that the sum sued for was due from him to the plaintiff. The plaint was presented on 22nd July 1870. *Held*, the day on which the acknowledgment was made was to be excluded, and, therefore, the suit was not barred. MADAN MOHUN DAS *v.* GAUR MOHUN SIRKAR [6 B. L. R., 293, note

5. ——— *Suit on bond.—Exclusion of date of bond.*—The day mentioned in a bond for the repayment of money as that on which the money is to be repaid is to be excluded from the period of computation under the Limitation Act. The borrower in such case has until the last moment of the day mentioned for the payment, and the right to sue accrues not on, but from that day. EX PARTE PALANY ANDY PILLAY . . . . 4 Mad., 330

6. ——— *Suit on bond.—Exclusion of day specified for payment.—Limitation Act, 1871, s. 13.*—In a suit on a bond where a day is specified for payment, the period of limitation is to be computed from, and exclusive of, the day so specified as being the day on which the right to sue accrued. RAM CHURN DEY *v.* INA SHEIK . 24 W. R., 463

7. ——— *Holiday.—Cause of action.—Promissory note payable on demand.*—The plaintiff sued on a promissory note payable on demand dated November 14th, 1867. He filed his plaint on November 14th, 1870, that being the first day on which the Court was open after the Durga Puja holidays. The 13th November was Sunday. *Held*, the day on which the note was made was to be excluded in computing the period of limitation, and that, therefore, the suit was not barred. ABDUL ALI *v.* TARACHAND GHOSE . . . . . 6 B. L. R., 292

S. C. on appeal. TARACHAND GHOSE *v.* ABDUL ALI . 8 B. L. R., 24: 16 W. R., O. C., 1

MUHTAB *v.* RAM DYAL . . 3 Agra, 319

8. ——— *Civil Procedure Code, 1859, s. 246.—Time for suing.*—The day on which judgment is pronounced is not to be reckoned within the time allowed for bringing a suit under section 246. PETAMBUR SHAHA *v.* KUROONA MOYEE DEBEA [W. R., 1864, 321

9. ——— *Civil Procedure Code, 1859, s. 246.*—The day on which the order under section 246 was passed must be excluded in computing the year allowed by that section. KASHEENATH SHAHA *v.* JOGENDRONATH BABOO . . 22 W. R., 68

10. ——— *Computation of period of.—Civil Procedure Code, 1859, s. 246.*—In computing the time for bringing a suit to set aside an order made under section 246 of the Code of Civil Procedure, the date upon which the order is signed, and not the date upon which it is verbally made, should be considered. BAPU BIN ISHVAR *v.* LAKSHUMAN BAJI . . . . . 10 Bom., 19

LIMITATION ACT, 1877, s. 12—*continued.*

11. ——————— *Computation of time.—Exclusion of day under s. 20 of the Limitation Act, 1859.*—The day on which the application for execution is made is not to be reckoned in computing the three years alluded to in section 20, Act XIV of 1859. VIRASAMY MUDALI *v.* MANOMMANY AMMAL. VENKATA BALAKRISHNA CHETTI *v.* VIJIARAGUNADHA VALAJI KRISHNA GOPALEE . 4 Mad., 32

12. ——————— *Act IX of 1871, s. 13.—Computation of period of limitation.*—In calculating the period of limitation prescribed in schedule II of Act IX of 1871 for applications as well as for suits and appeals, the day on which the order or decree appealed against was made should be excluded. GUJAR *v.* BARVE . I. L. R., 2 Bom., 673

MANCHARAM KALLIANDAS *v.* RATILAL LALSHANKAR . . . . 6 Bom., A. C., 39

13. ——————— *Execution of decree.—Holiday.—Sunday.*—A decree was passed on the 6th September 1865. Application for execution was made on 7th September 1868; the 6th September 1868 was Sunday. *Held* that the day on which the application for execution was made was not to be excluded from the computation, and that the application must be made within three calendar years from the passing of the decree. KHODIE LAL *v.* BISWASU KUNWAR

[4 B. L. R., A. C., 131: 13 W. R., 122

But *see* BRAJABEHARI *v.* KAMAL ROY

[1 B. L. R., S. N., 1

S. C. BROJO BEHAREE SAHOY *v.* KEWAL RAM

[10 W. R., 5

This section does away with the case of ELIAS *v.* HABOOL MOOSHEE MOOSHEE

[1 Ind. Jur., N. S., 18: Bourke, 382

in which it was held that on the original side delay in furnishing office copies of judgments afforded no ground for not filing the memorandum of appeal within the time prescribed.

14. ——————— *Time for obtaining copy of judgment.*—The time which intervenes between the putting in stamps and obtaining a copy of the decree should be excluded from the time prescribed for the presentation of an appeal. LALL GOPALNATH SAHEE DEO *v.* PUDUM KOONWAR

[5 W. R., Mis., 44

GOPEENATH ROY *v.* GOPEENATH CHATTERJEE

[6 W. R., Mis., 106

15. ——————— *Deduction of time necessary for obtaining copy of decree.—Copy of judgment.—Appeal.*—In computing the period of ninety days under section 13 of Act IX of 1871 for filing an appeal, the appellant is, as a matter of right, entitled to deduct the number of days required for taking a copy of the decree only. The word "decree" in that section does not include the "judgment." Under the circumstances, however, the Court admitted the appeal although presented after time. HORIL PATTUCK *v.* BHOWANEERAM

[15 B. L. R., 273, note: 21 W. R., 308

LIMITATION ACT, 1877, s. 12—*continued.*

16. ——————— *Deduction of time necessary for obtaining copy of decree.*—In computing the period of limitation prescribed for an appeal by section 13 of Act IX of 1871, the time from which the period must be taken to run is the date of the decree appealed against; and the days which, under that section, may be excluded are only the days requisite for obtaining a copy of the decree. But if in any case it is impossible for the appellant to obtain a copy of the decree or to obtain a copy of the judgment in time, the Court, if satisfied that the appellant is not to blame, may consider that there is sufficient cause within the meaning of section 5, clause *b* of Act IX of 1871, and may, on application, admit the appeal after the period of limitation prescribed by the Act. JAGARNATH SINGH *v.* SHEWRATAN SINGH

[15 B. L. R., F. B., 272: 24 W. R., 105

17. ——————— *Application for copy of decree.—Practice.*—A suit for possession of land having been decided on the 6th January 1881, a copy of the judgment was applied for on the 7th January, but the paper and fees for the copy were not deposited till the following day. The copy was delivered on the 31st January, and an appeal was filed by the applicant on the 2nd March. The Court to which the appeal was presented held that, according to the practice of the Court, the fees ought to have been paid on the day on which the application was made, and in calculating the period of limitation excluded only the period between the 8th and 31st January, and accordingly rejected the appeal as having been presented one day late. *Held*, on appeal to the High Court, that the question as to whether the period excluded should have begun on the 7th or 8th was a matter to be determined by the practice of the Court. NOBIN CHUNDER ROY *v.* BROJENDRO COOMAR ROY

[12 C. L. R., 541

18. ——————— and art. 151.—*Appeal.—Time requisite for obtaining a copy of the decree.*—A plaintiff wishing to appeal from a decision passed against him on the original side of the High Court, dated 16th August 1883, presented for filing his memorandum of appeal to the Registrar on the 5th September 1883, but by reason of the decree not having been signed on that date, no copy of the decree was presented therewith. The Registrar refused to accept the appeal. On the 6th September the decree was signed, and on the 7th an office copy thereof was obtained by the defendant's attorney, who, on the 8th September, served a copy at the office of the plaintiff's attorney. On the 12th September, the plaintiff applied for an office copy, which he obtained on the 13th, and on the 15th tendered such copy and his memorandum of appeal to the Registrar. The Registrar refused to accept the appeal, unless under an order of Court, it being in his opinion out of time. On the 6th December 1883 a Judge sitting on the original side admitted the appeal. The appeal subsequently came on for hearing, when the defendant contended that the appeal was barred, it not having been filed within twenty days from the date of the decree. The Court held that the appeal was so barred. *Held*, on review, that the plaintiff having allowed five days to expire after

**LIMITATION ACT, 1877, s. 12 and art. 151—*continued.***

the decree was signed before applying for a copy, and not having filed his appeal, after so obtaining a copy, at the earliest opportunity possible, such a delay being entirely unaccounted for, could not be held to be "time requisite for obtaining a copy of the decree," and that, therefore, the appeal was out of time. RAMEY *v.* BROUGHTON [I. L. R., 10 Calc., 652

19. ——— *Exclusion of time necessary for obtaining copy of judgment.*—Certain accused persons were convicted on the 29th February 1884, and made their first application for a copy of the judgment on the 25th March, tendering stamped paper for such copy on the 26th and 29th March. The copy was prepared on the 30th, and the prisoners, who had been admitted to bail on the 5th March, presented their appeal on the 7th April 1884, which was rejected as being out of time. *Held* that the appeal ought to have been admitted. IN THE MATTER OF JHABBU SINGH . . . . I. L. R., 10 Calc., 642

20. ——— *Appeal under cl. 10 of the Letters Patent.*—In computing the period of limitation prescribed for an appeal under clause 10 of the Letters Patent, the time requisite for obtaining a copy of the judgment appealed from cannot be deducted, such copy not being required under the rules of the Court to be presented with the memorandum of appeal. FAZAL MUHAMMAD *v.* PHUL KUAR [I. L. R., 2 All., 192

21. ——— *Time for obtaining copy of decree.*—In computing the time required for obtaining a copy of the decree appealed against the day on which the stamp paper was deposited and the day on which the copy was supplied must each be counted. BEER CHUNDER JOOBRAJ *v.* MOHAMED ASGUR [W. R., 1864, 145

22. ——— *Delay in appealing.—Time for obtaining copy of decree.—Civil Procedure Code, 1859, s. 333.*—In calculating the ninety days allowed for an appeal by Act VIII of 1859, section 333, the period between the date on which judgment was pronounced and that on which the decree was signed by the Judge was allowed to be deducted, as coming within the words, "exclusive of such time as may be requisite for obtaining a copy of the decree" in that section. IN THE MATTER OF CHOWDHRY MOHENDRO NARAIN ROY . . 18 W. R., 512

23. ——— *Time for obtaining copy of judgment.*—The "time requisite for obtaining a copy of the decree" appealed against, which, under section 12 of the Limitation Act XV of 1877, is to be excluded in computing the period of limitation for the appeal, is determined when the copy is ready for delivery. GOPAL CHUNDER ROY *v.* BROJO BEHARY MITTER . . . . 9 C. L. R., 293

24. ——— *Appeal presented after time.—Time requisite for obtaining copy of decree.*—Where a decree was passed on the 22nd September, and application for a copy was made not until 29th, and then with insufficient folios, and the Court was closed for the vacation from 30th September to 1st November, the deficient folios being filed on the day it reopened, 2nd November, the copy delivered on the 6th, and the appeal filed on the 14th,—*Held* that the appeal was out of time under section 12 of the Limitation Act, the appellant not being entitled to a deduction of the time occupied in ascertaining what the requisite number of folios was. GUNGA DASS DEY *v.* RAMJOY DEY . I. L. R., 12 Calc., 30

**LIMITATION ACT, 1877, s. 12—*continued.***

25. ——— *Exclusion of time between delivery of judgment and signing decree.—Time for obtaining copy of decree.*—Where a suitor is unable to obtain a copy of a decree from which he desires to appeal, by reason of the decree being unsigned, he is entitled under section 12 of the Limitation Act to deduct the time between the delivery of the judgment and that of the signing of the decree in computing the time taken in presenting his appeal. BANI MADHUB MITTER *v.* MATUNGINI DASSI. KALI SHUNKER DASS *v.* GOPAL CHUNDER DUTT [I. L. R., 13 Calc., 104

26. ——— and art. 154.—*Appeal by prisoner.—Limitation.—Time necessary to obtain copy of judgment.*—In computing the period of limitation prescribed for an appeal from a sentence of a Criminal Court by article 154 of schedule II of the Limitation Act, 1877, the time taken in forwarding an application by a prisoner for a copy of the judgment and in transmitting the same from the Court to the jail must be excluded. QUEEN-EMPRESS *v.* LINGAYA . I. L. R., 9 Mad., 258

27. ——— *Computation of limitation.—Act XIV of 1859, s. 1, cl. 6.*—In computing the period of limitation under clause 6, section 1, of Act XIV of 1859, the day on which the award was passed was to be excluded. RUMONEE SOONDERY DOSSIA *v.* PUNCHANUN BOSE . 4. W. R., 105

——— s. 13 (1871, s. 14; 1859, s. 13).

1. ——— *Ignorance of defendant's residence.—Absence from India.*—Ignorance of defendant's residence does not fall within any of the provisions of the Limitation Act, extending the periods of limitation prescribed by that Act. But under section 13 plaintiff is entitled to exclude from the computation of the periods of limitation applicable to his claims, the time during which the defendant is absent out of British territories. The law of limitation being a law which bars the remedy, and does not destroy the right, if by any of its sections indulgence is shown to suitors, the Court will feel bound to give full effect to the language in which that indulgence is conceded. MAHOMED MUSEEHOOD-EEN KHAN *v.* MUSEEHOODDEEN [2 N. W., 173

2. ——— and s. 9.—*Continuous running of time.—Exclusion of time of defendant's absence from British India.*—Section 13 of the Limitation Act, 1877, is not in any way affected or qualified by section 9 of the same Act. In computing, therefore, the period of limitation prescribed for a suit, the time during which the defendant has

**LIMITATION ACT, 1877, s. 13 and s. 9** —*continued.*

been absent from British India should be excluded, notwithstanding that such period had begun to run before the defendant left British India. *Narronji Bhimji* v. *Mugniram Chandaji, I. L. R., 6 Bom., 103,* dissented from. BEAKE & Co. *v.* DAVIS
[I. L. R., 4 All., 530

3. ——————— *Defendant's absence from British India.—Computation of the period of limitation.—Adjusted and signed account.*—Sections 9 and 13 of Act XV of 1877 adopt the law of limitation in England, and they must be read together in computing the period of limitation. Where the statutory period has once begun to run in respect of any cause of action, the subsequent absence of the defendant from British India will not stop it from running. The defendant adjusted and signed his account with the plaintiffs in Bombay on the 13th of January 1871, and shortly afterwards went to reside out of British India, in the territories of His Highness the Nizam. There was no subsequent payment of interest as such, and no payment of any part of the principal. *Held* that the plaintiffs' suit for the balance of the account was barred by the law of limitation, not having been brought within three years after the adjustment. NARRONJI BHIMJI *v.* MUGNIRAM CHANDAJI
[I. L. R., 6 Bom., 103

4. ——————— *Defendant's absence from India.*—The plaintiff sued on a bond, dated 20th August 1879, payable by monthly instalments, the first to be due on 4th September 1879; the bond provided that, if default should be made in one instalment, the obligor should, if so required, pay the whole amount. The defendant made default in the fourth instalment, and no more instalments were paid, and no demand of payment was made until 30th January 1884. The suit was brought on 28th April 1884. The defendant had been absent from India for more than two years and three months, out of the four years and four months which had elapsed between the date of the defendant's default, and the date of suit. *Held,* dissenting from *Naronji Bhimji* v. *Mugniram Chandaji, I. L. R., 6 Bom., 103,* that, even if the cause of action had arisen on the 4th December 1879, nevertheless the suit was not barred, inasmuch as the period during which the defendant had been absent from India was to be deducted in computing the period of limitation. HANMANTRAM SADHURAM PITY *v.* BOWLES
[I. L. R., 8 Bom., 561

5. ——————— *Absence of defendant from British India.*—Section 13 of the Limitation Act, which excludes the time during which a defendant has been absent from British India in computing the period of limitation for any suit, does not apply to a case when, to the knowledge of the plaintiff, the defendant, though not residing in British India, is represented by a duly constituted agent and mookhtar. HARRINGTON *v.* GONESH ROY
[I. L. R., 10 Calc., 440

6. ——————— *Absence from British India.—Proceedings in execution of decree.*—The provisions of section 13 of Act XV of 1877 are not applicable to proceedings in the execution of a decree. AHSAN KHAN *v.* GANGA RAM
[I. L. R., 3 All., 185

——————— **s. 14 (1871, s. 15; 1859, s. 14).**

*See* LIMITATION ACT, 1877.
[I. L. R., 10 Calc., 748

*See* s. 5 . . I. L. R., 5 All., 591

*See* ARTS. 128, 129.
[I. L. R., 5 Bom., 48

The corresponding section of the Act of 1859 was held not to apply to cases under the Rent Act X of 1859. ROY KALLY PROSONNO SEIN *v.* KISTO NUND DUNDEE . . . W. R., 1864, Act X, 13

SOUDAMONEE DOSSEE *v.* POORNO CHUNDER ROY
[W. R., 1864, Act X, 113

DABEE *v.* NUKEESUNNISSA
[W. R., 1864, Act X, 116

JUGGURNATH ROY CHOWDHRY *v.* RAJ CHUNDER ROY . . . W. R., 1864, Act X, 120

RAM SUNKUR SANAPUTTY *v.* GOPAUL KISHEN DEO . . . . . 1 W. R., 68

MODHOO SOODUN MOJOOMDAR *v.* BROJONATH KOOND CHOWDHRY . 5 W. R., Act X, 44

Nor to its amending Act for the North-West Provinces, Act XIV of 1863. NONA *v.* DHOOMUN DASS
[5 N. W., 30

It was also held not applicable to section 42 of Bombay Act VII of 1867. HARI RAMCHANDRA *v.* VISHNU KRISHNAJI . . . 10 Bom., 204

1. ——————— **and s. 6.**—*Application to special laws.—Bombay District Municipal Act (Bom. Act VI of 1873), s. 86.*—The general provisions of the Limitation Act, 1877, are applicable to cases for which periods of limitation are specially provided by local or special laws. Therefore, where a suit was brought in the Court of the District Judge of Belgaum on 30th January 1882 and was subsequently presented on the same day in the Court of the Subordinate Judge of Belgaum, the High Court held that the provisions of section 14 taken with section 6 of Act XV of 1877 applied to the case so as to exclude the period between 30th January and 6th February 1882 in computing the period of three months prescribed by the Bombay District Municipal Act (Bombay Act VI of 1873) section 86. *Golapchand Nowlukha* v. *Krishto Chunder, I. L. R., 5 Calc., 314; Nijabutoola* v. *Wazir Ali, I. L. R., 8 Calc., 910;* and *Khetter Mohun Chuckerbutty* v. *Dinabashy Shaha, I. L. R., 10 Calc., 265,* followed. *Hori Ramchandra* v. *Vishnu Krishnaji, 10 Bom., 204,* distinguished. GURACHARYA *v.* COLLECTOR OF BELGAUM
[I. L. R., 8 Bom., 529

2. ——————— *Special limitation under Acts other than the Limitation Act.—Suit under Registration Act (III of 1877), s. 77.*—Section 14 of the Limitation Act provides for cases in which a plaintiff

in perfect good faith, but under mistake, has instituted proceedings in a Court not having jurisdiction in the matter, and is applicable not only to the provisions of the Limitation Act itself, but also to the provisions of all Acts providing a special time for the limitation of suits. KHETTER MOHUN CHUCKERBUTTY *v.* DINABASHY SHAHA [I. L. R., 10 Calc., 265

The corresponding section of Act XIV of 1859 and Act X of 1871 was held not to apply to cases of execution of decrees. KHETTRONATH DEY *v.* GOSSAIN DOSS DEY . . 1 Ind. Jur., N. S., 49 [4 W. R., Mis., 18

SHEO NARAIN *v.* JOOGUL KISHEN RAM [7 W. R., 327

KRISHNA CHETTY *v.* RAMI CHETTY . 8 Mad., 99

NARAN APPA AIYAN *v.* NANNA AMMAL *alias* PARVATHY AMMAL . . 8 Mad., 97

MAHALAKSHMI AMMAL *v.* LAKSHMI AMMAL [8 Mad., 105

JIWAN SINGH *v.* SARNAM SINGH [I. L. R., 1 All., 97

TIMAL KUARI *v.* ABLAKH RAI [I. L. R., 1 All., 254

DHONESSUR KOOER *v.* ROY GOODER SAHOY [I. L. R., 2 Calc., 336

WOOMACHURN MITTER *v.* MOHAMOYA. WOOMACHURN MITTER *v.* BEJOY KISHORE ROY [W. R., 1864, 130

RANER KANT GHOSE *v.* HARAN KISTO GHOSE [24 W. R., 405

GIRIDHARA DOSS MANAKJI TADAHAYI BIRZI MOHANDOSS *v.* SURANENI LAKSHMI VENKAMMA ROW. CALAPATAPU KRISTNAYYA *v.* LAKSHMI VENKAMMA ROW . . . 5 Mad., 93

*Contra,* PROMOTHONATH ROY BAHADOOR *v.* WATSON & CO. . . . . 24 W. R., 303

But section 14 of Act XV of 1877 now expressly applies to applications of any sort.

3. ——————— *Deduction of time occupied by former suit under old law of limitation.*—The plaintiff instituted a suit under the old law (Bengal Regulation III of 1793), and was non-suited on appeal, because the plaint was defective in not stating the boundaries of the land claimed. While the appeal was pending, Act XIV of 1859 came into operation. He instituted a fresh suit, and claimed to deduct the time occupied in prosecuting the former suit and appeal under the provisions of Act XIV of 1859, section 14. *Held* (by the majority of the Court), that the plaintiff was non-suited owing to his negligence, and the time sought to be deducted from the period of limitation could not be allowed. *Per* LOCH and PUNDIT, *JJ.*—Under the circumstances the time should be deducted in computing the period of limitation. CHUNDER MADHUB CHUCKERBUTTY *v.* RAM COOMAR CHOWDHRY . B. L. R., Sup. Vol., 553 [6 W. R., 184



The former proceeding must have been taken by the plaintiff or some one through whom he claims (see the definition of "plaintiff" in section 3 of the Act) and this was the same under the former Acts. BARODAKANT ROY *v.* SOOKMOY MOOKERJEE [1 W. R., 29

MORRIS *v.* SAMBAMURTHI RAYAN . 6 Mad., 122

4. ——————— *Suit bonâ fide brought in Court without jurisdiction.*—The time for which suits may have been pending in Courts which had not jurisdiction should be deducted in computing the period of limitation if the Judge should find that the suits were prosecuted *bonâ fide* and with due diligence. NOBO COOMER CHUCKERBUTTY *v.* KOYLASCHUNDER BAROOEN . . . . 17 W. R., 518

5. ——————— *Deduction of time former suit was being prosecuted.*—The plaintiffs sued the son of a deceased debtor without ascertaining whether or not he was of age, and then, when the plaint was returned to them, they sued the minor's mother, also without ascertaining whether she was legally constituted guardian of the minor. The lower Courts determined the suit, but the High Court was unable to support their decrees in consequence of the defect, which came to light in special appeal. The plaintiffs having brought a second suit, it was held that, in computing the period of limitation, they were not entitled, under the provisions of section 15 of Act IX of 1871, to an exclusion of the time occupied by them in prosecuting the first suit. The Court doubted whether, assuming the case fell under the provisions of the section, the plaintiffs could be said, under the circumstances, to have prosecuted the first suit with due diligence and in good faith. BAHAL SINGH *v.* GAURI . 7 N. W., 284

6. ——————— *Execution of decree.—Attachment of decree.—Held* that, in calculating the period of three years from the date when effectual proceedings had last been taken to keep alive a decree, the period during which the decree had remained under attachment in execution of a decree against the judgment-creditor should be deducted, the decree-holder having been prevented from exercising due diligence. CHANDI PRASAD NANDI *v.* RAGHUNATH DHAR . . 3 B. L. R., Ap., 52

7. ——————— *Ineffectual appeal proceedings.*—When a person appealed from an award of a Collector under Act XIII of 1848, which appeal was struck off for default of prosecution, and he then sued to set aside the award,—*Held* that the proceeding had not been prosecuted with due diligence and that limitation commenced to run from the date of the award, and not from the date of the order in the ineffectual appeal proceedings. GHOLAM DURBESH CHOWDHRY *v.* SHAM KISHORE ROY [W. R., 1864, 378

8. ——————— *Due diligence.—Non-production of Collector's certificate.*—The plaintiff brought in 1876 a suit against the defendant in respect of the same cause of action as the present suit. In that suit a certificate of the Collector under

**LIMITATION ACT, 1877, s. 14**—*continued.*

section 6 of the Pensions Act (XXIII of 1871) which was necessary to give jurisdiction to the Court not having been obtained, the claim was rejected on that ground. *Held*, in the subsequent suit, that the non-production of the Collector's certificate does not necessarily constitute such a want of due diligence on the plaintiff's part as to disentitle him to the deduction of time allowed by section 14 of the Limitation Act XV of 1877. PUTALI MEHETI *v.* TULJA . . . . **I. L. R., 3 Bom., 223**

9. ——————— *Court having no jurisdiction.*—A deduction of the time a former suit was pending from the period of limitation can only be claimed under section 14, when the Court before whom the former suit was brought had no jurisdiction and where there has been no adjudication. NUND DOOLAL SIRCAR *v.* DWARKANATH BISWAS **[2 W. R., 9**

KALEE CHUNDER CHOWDHRY *v.* RUTTUN GOPAL BHADOORIE . . . **2 W. R., Mis., 1**

10. ——————— *Deduction of time former suit was pending.—Institution of fresh suit before former is disposed of.*—The period during which a suit is pending in a Court not having jurisdiction is to be excluded from the period of limitation provided by Act XIV of 1859, and the fact that the second suit, in bar of which the Act is pleaded, was instituted before the Court not having jurisdiction disposed of the first suit, is immaterial. MORRIS *v.* SAPAMTHEETHA PILLAY . . . . . **6 Mad., 45**

11. ——————— *Deduction of time proceedings are prosecuted in Court the order of which is afterwards set aside.*—A period, during which a party to a suit is engaged in prosecuting a claim for wasilat, counts towards limitation if the Court in which the claim is prosecuted has jurisdiction to adjudicate upon it though its order was reversed as being one which it was beyond the power of the Court to give. PERLADH SEIN *v.* GUNNESS LALL TEWARY . . . . **25 W. R., 540**

12. ——————— *Deduction of time claim was being prosecuted in another Court.*—To meet a plea of limitation a judgment-debtor was held entitled to a deduction of the time occupied by him in prosecuting his claim in the Civil Court according to the directions of the Collector. CHUNDEE ROY *v.* ISREE PERSHAD NARAIN SINGH BAHADOOR **[23 W. R., 274**

13. ——————— *Deduction of time suit was being prosecuted in another Court.*—*L.* and *R.*, the holders of a putni estate, granted in 1856 a dur-putni lease to *S.* at an annual rent, the lease stipulating that *S.* should have full power of sale and gift, but should not sublet without the putnidar's consent. The lease contained no stipulation for the registration of any vendee or donee. In 1860 *S.* sold the dur-putni lease to *K.*, the deed of sale, which was duly registered, providing for mutation of names in the putnidar's books. No such mutation was ever effected by *K.*, who was never recognised as their tenant by *L.* and *R.*, the rent of the dur-putni being paid in the name of *S.* In 1864, the rent due from the putnidars being in arrear, the zemindar proceeded to sell the putni under Regulation VIII of 1819. Thereupon *K.*, in order to protect his under-tenure, deposited in the Collectorate on 17th November 1864 a sum of money on which the sale was stayed. *K.* being then in arrear in the payment of his dur-putni rent, claimed to set off the amount deposited in the Collectorate against the rent due to *L.* and *R.* This *L.* and *R.* refused to allow, and they brought a suit in the Collector's Court against *S.* and his sureties to recover the arrears of rent. In that suit *K.* intervened claiming the benefit of the set-off, to which, however, the High Court on 26th June 1866 on appeal, held that he was not entitled, the deposit being merely a voluntary payment by *K.* On 30th October 1867, *K.* brought a regular suit against *S.* and *L.* and *R.* to recover the amount of the deposit, and obtained a decree, but the decision was reversed on appeal, and the suit dismissed for want of jurisdiction. On 6th June 1869 *K.* filed his plaint in the proper Court. *Held* that whether the period of three years under section 1, clause 9 of Act XIV of 1859, or of six years as provided by clause 16, section 1 of that Act, be the limitation applicable to such a suit, the suit was not barred, inasmuch as *K.* was entitled to deduct the time during which he was *bonâ fide* prosecuting with due diligence a suit for the same purpose in a Court not having jurisdiction. LUCKHINARAIN MITTER *v.* KETTRO PAL SINGH ROY **[13 B. L. R., P. C., 146 : 20 W. R., 380 24 W. R., 407, note**

Affirming decision of lower Court in KHETTER PAUL SINGH *v.* LUCKHEE NARAIN MITTER **[15 W. R., 125**

14. ——————— *Deduction of time suit was being prosecuted in another Court.*—A suit for arrears of rent was brought by the plaintiff in the Revenue Court, but it was held that there being no actual contract between the plaintiff and defendant, and the defendant's liability arising out of equitable considerations with which the Collector's Court could not deal, that Court had no jurisdiction to decide it. In a subsequent suit in the Civil Court,—*Held*, the plaintiff was, under section 14, Act XIV of 1859, entitled to a deduction of the time he was prosecuting his claim in the Revenue Court. PROSONNOCOOMAR PAL CHOWDHRY *v.* MUDDUN MOHUN PAL CHOWDHRY **[11 B. L. R., Ap., 31, note**

15. ——————— *Deduction of time suit was being prosecuted in another Court.*—Where a part-proprietor of a talook, who was also co-sharer in a fractional portion thereof, brought suits in the Revenue Courts against his co-talookdars for arrears of rent without allowing any deduction on account of his share, which suits were dismissed for want of jurisdiction,—*Held*, in a subsequent suit in the Civil Court for the rent for the same period, that the plaintiff was entitled, under section 14, Act XIV of 1859, to a deduction of the time during which he was prosecuting his suit in the Revenue Court. GOBINDO COOMAR CHOWDHRY *v.* MANSON **[15 B. L. R., 56 : 23 W. R., 152**

LIMITATION ACT, 1877, s. 14—*continued.*

16. ——————— *Deduction of time suit was being prosecuted in another Court.*—The plaintiff sued under Act X of 1859 in the Revenue Court to recover her share of certain arrears of rent due from the defendants on a kabuliat executed by them in favour of the plaintiff's mother, but her suit, on the objection by the defendants that her co-sharer was not a party, was dismissed by the Collector, and his decision was upheld by the High Court on appeal on 3rd July 1861. The plaintiff then brought a fresh suit under Act X of 1859, making her co-sharer a party defendant, but the suit was again dismissed, and the dismissal upheld by the High Court on 14th April 1870, on the ground that the plaintiff's share was not her own, and therefore the Collector's Court had no jurisdiction to determine any question of right as between her and her co-sharer. In a suit brought in the Civil Court on 31st May 1870 for a moiety of the rents from 1864 to 1869,—*Held*, it was not a suit for an arrear of rent as that term is defined in section 21, Bengal Act VIII of 1869, and section 29 of that Act would not apply. The limitation applicable was that provided by Act XIV of 1859, under section 14 of which Act the plaintiff was entitled to deduct the time during which she was *bonâ fide* prosecuting her claim in the Revenue Courts. HARIS CHANDRA DUTT *v.* JAGADAMBA DASI
[8 B. L. R., 190, note: 16 W. R., 61

17. ——————— *Deduction of time plaintiff was prosecuting another suit.*—Plaintiff as payee of an order drawn by defendant at Ahmedabad, where he (defendant) resided, on a firm at Bankok in Siam, and dishonoured on presentation, sued defendant and an agent of the Bankok firm who resided at Surat in the Subordinate Judge's Court at Surat. Permission to proceed with the suit against the defendant (the drawer) having been refused by the High Court, plaintiff withdrew his plaint and filed his suit in the Court at Ahmedabad against the drawer alone. The Subordinate Judge rejected the claim as barred by limitation. *Held*, by the High Court in appeal, that, under section 15 of the Limitation Act (No. IX of 1871), a deduction might properly be made of the time during which the suit was pending in the Court at Surat, and that the deduction on this account was to run from the filing of the plaint to the final refusal of the High Court to allow the suit to proceed at Surat against the drawer (defendant). SHETH KAHANDAS NARANDAS *v.* DAHIABHAI
[I. L. R., 3 Bom., 182

18. ——————— *Summary decree.—Calculation of period of limitation.*—A plaintiff is not bound to sue to enforce a summary decree against the immoveable property of the defendant pending a regular suit brought by the defendant in the Civil Court to set aside the summary decree. Limitation will count, not from the date of the summary decree, but from the date at which the suit brought in the nature of an appeal to set aside that decree is determined. GYAN CHUNDRA ROY CHOWDHRY *v.* KALEE CHURN ROY CHOWDHRY . . 7 W. R., 48

19. ——————— *Deduction from period of limitation of time during which former suit was pending.—Application for execution of decrees.*—In computing the period of limitation, for a suit to set aside a summary order, the time during which the judgment-creditor was prosecuting another suit to obtain a reversal of the order dismissing his application for execution of decree and for attachment of the property of the judgment-debtor cannot be deducted. KRISHNA CHETTY *v.* RAMI CHETTY
. [8 Mad., 99

20. ——————— *Computation of period of limitation.—Exclusion of time while prosecuting suit in Court without jurisdiction.*—On the 26th August 1878 *R.* and *B.* joined in instituting a suit in the Court of the Subordinate Judge, the period of limitation of which expired on the 21st September 1878. This suit was transferred to the District Court, which, on the 16th September 1878, returned the plaint to the plaintiffs on the ground that they should have sued separately. On the 23rd September 1878 *R.* presented a fresh plaint to the District Court, which, on the 1st October 1878, made an order rejecting it, on the ground that he should have instituted the suit in the Court of the Subordinate Judge. *R.* appealed from this order to the High Court, which affirmed it on the 28th January 1879, but observed that the plaint should be returned to *R.* On the 10th April 1879 *R's.* plaint was returned to him, and on the same day he presented it to the Subordinate Judge. *Held* that, in computing the period of limitation, *R.* could not claim to exclude any other period than from the 23rd September 1878 to the 10th April 1879, for from the 26th August 1878 to the 16th September 1878 he was prosecuting his suit in a Court which had jurisdiction, and the inability of that Court to entertain it did not arise from defect of jurisdiction or any cause of the like nature, but from misjoinder of plaintiffs—a defect for which he must be held responsible; and from the 16th to the 23rd September he was not prosecuting his suit in any Court, and could not claim to have that period excluded. RAM SUBHAG DAS *v.* GOBIND PRASAD . . . I. L. R., 2 All., 622

21. ——————— *Deduction of time suit was being prosecuted in another Court.*—Where *A.* brought a suit in the Munsif's Court, and it was found that the suit had been improperly valued, and that the Munsif had no jurisdiction to try it, and the Munsif returned the plaint in order that the suit might be brought in the proper Court,—*Held* that *A.* was entitled to deduct from the period of limitation the time during which he had prosecuted his suit in the Munsif's Court, and under section 14, Act XIV of 1859, his suit was not barred. CHANDI DASI *v.* JANAKIRAM . . . 1 B. L. R., S. N, 12.

*Contra*, SHAM KANT BANERJEE *v.* GOPAL LAL TAGORE . . . . 1 W R., 328

22. ——————— *Deduction of time suit was in wrong Court through being over-valued.*—A suit was instituted in the Court of the Subordinate Judge, who, after seven months, returned the plaint to be filed in the Munsif's Court on the ground that the suit had been over-valued. There was nothing to show want of *bona fides* in the plaintiff's instituting

**LIMITATION ACT, 1877, s. 14**—*continued.*

the suit in the Court of the Subordinate Judge. *Held* that, in computing the period of limitation prescribed for the suit, the time during which the plaint was on the file of the Subordinate Judge's Court must be deducted. OBHOY CHURN NUNDI *v.* KRITARTHAMOYI DOSSEE . I. L. R., 7 Calc., 284

23. ——————— *Deduction of time occupied by former suit.—Omission to obtain registered certificate.—"Cause of like nature."*—At a Court sale held on the 15th November 1871, in execution of a decree, the plaintiff's deceased husband purchased a house, but neglected to register his sale certificate. In attempting to recover possession he was obstructed by the defendant, who claimed the property as her own. Summary proceedings under section 269 of Act VIII of 1859 were thereupon instituted against the defendant, and the defendant's claim was upheld by an order passed on the 7th November 1872. In the meantime the plaintiff's husband having died, plaintiff filed, on the 31st March 1873, a regular suit to establish her title. On the 8th July 1873 she obtained a second certificate, and registered it. The Court of first instance awarded her claim, but on appeal by the defendant the lower Appellate Court reversed that decree, on the ground that, at the institution of the suit, plaintiff had not a registered certificate of sale. That decree was confirmed on the 17th November 1879, on second appeal, by the High Court. On the 30th April 1880 plaintiff brought this suit on the strength of her registered certificate. The Court of first instance allowed her claim. The defendant appealed, and the lower Appellate Court held her suit not maintainable. On appeal by plaintiff to the High Court,—*Held*, the suit was barred. The plaintiff was not entitled to a deduction of the time during which she was unsuccessfully prosecuting the former suit, inasmuch as her inability to produce a registered certificate was not a "cause of a like nature," to want of jurisdiction within section 14 of Act XV of 1877. BAI JAMNA *v.* BAI ICHHA . I. L. R., 10 Bom., 604

24. ——————— *"Prosecuting."—"Good faith."—"Other cause of a like nature."—Limitation Act, Construction of.*—In October 1881 an account was struck between *K.* and *M.*, and a sum of R1,457 was agreed between them to be the correct balance then due by the latter to the former. Of this amount a sum of R885 was paid. In March 1885 *K.* sued *M.* for the balance of R600 then due on the account stated. The plaintiff claimed the benefit of section 14 of the Limitation Act (XV of 1877) as suspending the running of limitation during the pendency of a former suit which he had prosecuted against the defendant in 1884 and 1885, and which had been dismissed on the merits. That was a suit for the redemption of certain zemindari property on which the defendant held a mortgage, and the plaintiff claimed in that suit that the amount of the balance due by the defendant on the account stated should be deducted from the mortgage-money under an oral agreement entered into by the parties in October 1881. *Held* that the plaintiff could not be said to have formerly prosecuted his remedy in respect of the items now claimed in a Court, which, for want of jurisdiction or other cause of a like nature, was unable to entertain it; that the provisions of section 14 of the Limitatian Act therefore were not applicable; and that the suit was barred by limitation. *Per* STRAIGHT, *Offg. C. J.*—The former suit was not founded upon the same cause of action as the present, inasmuch as it was founded upon the alleged oral agreement and not upon the account stated. *Per* MAHMOOD, *J.*—The Courts of British India in applying Acts of Limitation are not bound by the rule established by a balance of authority in England, that statutes of this description must be construed strictly. On the contrary, such Acts, where their language is ambiguous or indistinct, should receive a liberal interpretation, and be treated as "statutes of repose" and not as of a penal character or as imposing burdens. *Roddam v. Morley, 26 L. J. Ch., 438; Ali Saib* v. *Sanyairaz Peddabaliyra Simhula, 3 Mad., 5; Empress* v. *Kola Lalang, I. L. R., 8 Calc., 214; Beil* v. *Morrison, 7 Peters (U. S.) 360; Keramut Hossein* v. *Gulab Koonwar 3 W. R., 101;* and *Muhummud Bahadoor Khan* v. *Collector of Bareilly, L. R., 1 I. A., 167,* referred to. MANGU *v.* LAL KANDHAI LAL . I. L. R., 8 All., 475

25. ——————— *Prosecution of appeal bonâ fide.*—The time during which a plaintiff prosecutes an appeal *bonâ fide* and with due diligence, as well as that during which he prosecutes his case in the Court of first instance, must be deducted in computing the period of limitation. SHUMBHOONATH BISWAS *v.* KISTO DHUN SIRCAR [5 W. R., S. C. C. Ref., 8

26. ——————— *Deduction of period appeal was pending.*—Where a suit is brought and dismissed for want of jurisdiction, and an appeal is preferred in which the first decree is affirmed, if a suit be afterwards brought in the right Court, the period which elapsed between the decision of the first Court and the disposal of the appeal should be excluded in computing the period of limitation prescribed by Act XIV of 1859. RAJ KISTO ROY *v.* BEER CHUNDER JOOBRAJ . . 6 W. R., 308

27. ——————— *Deduction of time suit was pending in wrong Court.*—Where a suit, prosecuted *bonâ fide* and with due diligence, was dismissed in appeal for want of jurisdiction in the Court of first instance, and a second suit was afterwards brought in a right Court,—*Held* that, in computing under section 14 of Act XIV of 1859, the period of limitation of the suit, the time between the decree of the Court of first instance and the institution of the appeal should be excluded. AJOODHYA PERSHAD *v.* BISHESHUR SAHAI . . . 6 N. W., 141

28. ——————— *Deduction of time.—Prosecution of suit in another Court.*—A bond-suit was filed in a Munsif's Court on the day on which the Court reopened after the Dusserah vacation, during which the period of limitation expired as regards the payment of the bond-debt. The Munsif decreed the suit; but the Subordinate Judge in appeal found that the Munsif had no jurisdiction, and ordered him to return the plaint. This was done and the plaint was filed in the Small Cause Court on the same day.

**LIMITATION ACT, 1877, s. 14**—*continued.*

The defendants pleaded limitation. *Held* that, under Act IX of 1871, section 15, the plaintiff was entitled to exclude the time during which he had been prosecuting the suit in the regular Court up to the date of the lower Appellate Court's judgment, but not the time during which he waited to get the plaint back. ABHAYA CHURN CHUCKERBUTTY *v.* GOUR MOHUN DUTT . . . . . **24 W. R., 26**

**29.** ——————— *Suit not against same defendants.*—A former suit brought, not against the same defendants but only against one of them, did not fall within section 14, Act XIV of 1859; consequently the time of its pendency could not be deducted in computing limitation in a subsequent suit. NILMADHUB SURNOKAR *v.* KRISTO DOSS SURNOKAR **[5 W. R., 281**

**30.** ——————— *Deduction of time suit was being prosecuted in another Court.*—The question whether the plaintiff is entitled, in computing the period of limitation, to deduct the time occupied in prosecuting a former suit, depends in the first place upon the question whether the former suit was brought upon the same cause of action as the new suit. Where the plaintiff brought two suits, one against one branch of the family and the other against another branch, to recover a share of that portion of the property which was in the possession of each, and these suits were rejected on the ground of their having been improperly brought, it was held that in bringing a consolidated suit against all sharers for a general partition the plaintiff was not entitled to deduct the time occupied in prosecuting his former suits. JOITARAM BECHAR *v.* BAI GANGA . . **[8 Bom., A. C., 228**

**31.** ——————— *Deduction of time suit is being prosecuted in Court without jurisdiction.*—Under a decree made in a suit brought by *A.* against *B.*, *A.* obtained possession of certain property. The decree was reversed on appeal, but no order was made by the Appellate Court with regard to mesne profits. After such reversal, *B.* applied to and obtained an order from the Court of first instance for possession and mesne profits. This order, so far as it awarded mesne profits, was set aside by the High Court as being an order he had no power to make, no right to mesne profits having been declared by the Appellate Court, and as being made "altogether without jurisdiction;" they held that *B.* should have applied to the Appellate Court which reversed the decree, or should have brought a separate suit for the mesne profits. An application for review of this judgment being rejected, *B.* instituted a suit for such mesne profits. *Held, per* PEACOCK, *C. J.*, KEMP and MACPHERSON, *JJ.* (LOCH, *J.*, dissenting), that in the proceedings taken by *B.* in the former suit to obtain the mesne profits she was engaged in prosecuting a suit upon the same cause of action against the same defendant within the meaning of section 14, Act XIV of 1859. HURRO CHUNDER ROY CHOWDHRY *v.* SOOBADHONEE DEBIA **[B. L. R., Sup. Vol., 985: 9 W. R., 402**

**32.** ——————— *Suit for rent from alleged mal land.—Deduction.*—Where a plaintiff claims rent on account of lands as mal from defendants, who set up a lakhiraj title and produced lakhiraj sunnuds in support, he has first of all to prove that he has collected rents from the lands as mal within twelve years of the suit; and in calculating the period of limitation, the plaintiff is not entitled to deduction on account of the periods of pendency of suits for rent and for small portions of the land, they not being suits for the same cause of action. PEODHAN GOPAUL SINGH *v.* BHOOP ROY OJHA **[9 W. R., 570**

**33.** ——————— *Deduction of time suit is pending in Court without jurisdiction.*—Where limitation is pleaded, a plaintiff was not entitled, under section 14, Act XIV of 1859, to deduction for the time of the pendency of a suit brought by defendants upon the same cause of action, if it was not a suit in which the Courts were unable to decide the question from defect of jurisdiction or other such cause. OODOYMONEE DABEE *v.* BISHONATH DUTT . **9 W. R., 455**

**34.** ——————— *Deduction of time suit was pending.*—In a suit by an executrix, to recover, under deeds of mortgage and sale, dated, respectively, October 1837 and April 1840, executed to the testator by first defendant's deceased husband, certain villages which first defendant in 1848 and 1851 mortgaged to second and third defendants, the defendants pleaded that the suit was barred by lapse of time. For the plaintiff it was contended that the operation of the Limitation Act was suspended from 1844 until 1867, by reason of the pendency of an equity suit, commenced by bill filed by the present first defendant against the testator, to set aside the deeds of October 1837 and April 1840, which bill was dismissed by consent in June, 1867. *Held* (reversing the decision of the lower Court) that these proceedings had no such effect; that the plaintiff might have brought a suit for ejectment at any time; and that the present suit was barred. TRANQUEBAR SAMI AYYAN *v.* NATHAMBEDU AMMAI AMMAL . **6 Mad., 234**

**35.** ——————— *Deduction of time during which former suit for rent was pending which was dismissed for non-joinder of parties.*—In suits by the Receiver of the Tanjore estate to recover rent due under muchalkas executed by defendants, the mirasidars of certain villages, agreeing to take the villages on rent for five Faslis, from 1273 to 1277, at an annual rent, the defendants pleaded limitation as to part of the rent claimed. The plaintiff claimed to be entitled to the advantage of section 14 of that Act, because he was for a time prosecuting suits against defendants separately for the arrears of rents alleged to be barred, all which suits were dismissed on the ground that plaintiff could not sue the defendants separately while they had executed the muchalka jointly. The District Judge found for the defendant on the questions on the Act of Limitations. *Held*, on appeal, that the period of limitation applicable to a suit for rent was three years (under Act XIV of 1859), and that as to the claim to the exception under section 14, it failed at every turn. The cause of action was not the same, for there the obligation sued upon was several, here it is joint; and the Court

**LIMITATION ACT, 1877, s. 14**—*continued.*

which decided the former suits not only did not fail to decide them; but did decide them. MORRIS *v.* SIVARAMAYYAN . . . **7 Mad., 242**

**36.** ——— *Deduction of time former suit was pending.*—Where a plaintiff sues upon his jenm title, having previously instituted a suit in which he unsuccessfully set up his kanam right, the latter suit cannot avail to prevent the Statute of Limitations from running against him. PARAKUT ASSEN CUTTY *v.* EDAPALLY CHENNEN **[2 Mad., 266**

**37.** ——— *Meaning of "suit."—Appeal forbidden by law.—Good faith.—Held* that the word "suit" used in section 14, Act XIV of 1859, had only one, and that the common and ordinary sense of the term. *Held,* further, that the plaintiff, in preferring an appeal from a summary order, which appeal was expressly forbidden by law, could not be considered to have been prosecuting a suit within the meaning of section 14, and was therefore not entitled to the indulgence given by the aforesaid section, even assuming that section to be applicable to suits to contest the order under section 246, Act VIII of 1859. FUTTEH RAM *v.* MONOHUR LALL . **3 Agra, 39**

**38.** ——— *Deduction of time for appeal from order under s. 246, Civil Procedure Code, 1859.*—An unsuccessful claimant, instead of bringing a regular suit to establish his right as provided by section 246, Act VIII of 1859, chose to file an appeal against the order rejecting his claim. His appeal, though successful before the lower Appellate Court, having been thrown out in special appeal, as illegal under the section above cited, he sued to set aside the order rejecting his claim. *Held* that he was not entitled, under section 14, Act XIV of 1859, to deduct from the period of limitation the time during which the appeal proceedings were pending. RAMDASS BABOO *v.* WATSON . **W. R., 1864, 371**

**39.** ——— *Suit brought in wrong Court.*—Where a plaintiff, relying upon the defendant's representation as to the latter's place of residence, brought his suit in a Court which had not jurisdiction, the time of the pendency of the suit in such Court was held to be properly excluded under section 14, Act XIV of 1859, in computing limitation. BANEE MADHUB LAHOREE *v.* BIPRO DASS DEY **[15 W. R., 69**

The words "or other cause of a like nature," in section 14, exclude many of the causes which were held to come within the meaning of the corresponding section of the Act of 1859.

**40.** ——— *"Other cause."*—The words "or other cause," in section 14, Act XIV of 1859, applied to cases where the action of the Court was prevented by causes not arising from *laches* on the part of the plaintiff,—in other words, by accidental circumstances beyond his control. LUCHMUN PERSHAD *v.* NIMHOO PERSHAD . . **17 W. R., 266**

RAMAKRISTNACASTRULU *v.* DARBA LAKSHMIDEVAMMA . . . . **1 Mad., 320**

**LIMITATION ACT, 1877, s. 14**—*continued.*

as where the former suit had been dismissed as not having been brought in proper form. KERAMUT HOSSEIN *v.* GOLAP KOONWAR . **3 W. R., 101**

**41.** ——— *Other causes of a like nature.—Suit wrongly non-suited.*—Where a suit was non-suited wrongly on a point unconnected with jurisdiction, it was held in a subsequent suit that the time could not be deducted. DHUNMONEE CHOWDHRAIN *v.* BRINDABUN CHUNDER SIRCAR CHOWDRY **[7 W. R., 160**

**42.** ——— *Other causes of a like nature.—Suit against wrong party.*—For litigation against a wrong party no deduction can be allowed. MUNNA JHUNNA KOONWAR *v.* LALJI ROY **[1 W. R., 121**

KAVASJI SOREBJI *v.* BARJORJI SORABJI **[10 Bom., 224**

**43.** ——— *Suit on bond against obligor missing.—Subsequent suit against his representatives on presumption of his death.*—Section 14 of the Act of 1859 was held to apply to a case in which the plaintiff was unable, after due diligence, to procure due service upon the defendant of the summons to appear and answer the claim, and consequently to prosecute the suit to a decision, and would, where a suit on a bond had been afterwards brought against the representatives of the obligor on presuinption of his death, prevent the suit from being barred. KARUPPAN CHETTI *v.* VERIYAL . . . **4 Mad., 1**

**44.** ——— *Deduction of time in suit by adoptive son to set aside alienation by mother.*—No deduction from the period of limitation can be allowed to the adopted son for the period of pendency of suits brought by or against him, to prove or disprove the validity of his adoption. KISHEN MOHUN KOOND *v.* MUDDUN MOHUN TEWAREE **[5 W. R., 32**

**45.** ——— *Suit for mesne profits.*—In a suit for mesne profits, the Limitation Act allows no deduction for the pendency of the suit for possession. The only deduction which that Act allows is for the pendency of a suit not adjudged on its merits owing to some objection as to jurisdiction, &c. ISSUREENUND DUTT JHA *v.* PARBUTTY CHURN JHA **3 W. R., 13**

**46.** ——— *Mesne profits.*—Plaintiff sued for, and recovered possession of, land. He afterwards sued for mesne profits. *Held per* PEACOCK, *C. J.,* and NORMAN and SETON-KARR, *JJ.* (*dissentiente* STEER, *J.*) that, under Regulation III of 1793, section 14, the plaintiff was entitled to recover mesne profits for twelve years prior to suit, excluding from such computation the period of the pendency of the suit for possession from the date of the plaint till the final decree. ANNADA GOBIND CHOWDHRY *v.* SWARNAMAYI. ABHAY GOBIND CHOWDHRY *v.* SWARNAMAYI . . **B. L. R., Sup. Vol., 7**

S. C. UNNODA GOBIND CHOWDHRY *v.* SURNOMOYEE. OBHOY GOBIND CHOWDHRY *v.* SURNOMOYEE . . . . **W. R., F. B., 163**

LIMITATION ACT, 1877, s. 14—*continued.*

47. ——————— *Deduction of period occupied by suit annulled from defect in jurisdiction or other like cause.*—Under a decree made in a suit brought by *A.* against *B.*, *A.* obtained possession of certain property. The decree was reversed on appeal, but no order was made by the Appellate Court with regard to mesne profits. After such reversal *B.* applied to and obtained an order from the Court of first instance for possession and mesne profits. This order, so far as it awarded mesne profits, was set aside by the High Court as being an order the Court had no power to make, no right to mesne profits having been declared by the Appellate Court; and as being made altogether without jurisdiction. The High Court held that *B.* should have applied to the Appellate Court which reversed the decree, or should have brought a separate suit for the mesne profits. An application for review of judgment being rejected, *B.* instituted a suit for the mesne profits. *Held, per* KEMP, MACPHERSON, and LOCH, *JJ.* (PEACOCK, *C.J.*, dissenting), that the order of the Court of first instance awarding mesne profits was not annulled from "defect of jurisdiction or for any such cause" within the meaning of section 14, Act XIV of 1859; and, consequently, that the period occupied in obtaining and seeking to uphold such order could not be deducted in computing the period of limitation for the suit subsequently brought by *B.* for the mesne profits. HURRO CHUNDER ROY CHOWDHRY *v.* SOORADHONEE DEBIA

[B. L. R., Sup. Vol., 985: 9 W. R., 402

48. ——————— *Deduction of time former suit was pending.*—An objector's claim under Act VIII of 1859, section 246, having been disallowed he brought a regular suit to establish his right, and to have the sale stayed. The attached property was, however, sold pending this suit which was subsequently dismissed. He then brought another suit for a declaration that the property (which was still in his possession) was his, and was not affected by the sale,—*Held* that, in calculating limitation, no deduction could be made for the time consumed, it not having been dismissed for defect of jurisdiction or for some analogous cause to defect of jurisdiction, in the first suit; and it was also barred because the cause of action in the second suit was the same as that in the first. RAGHOONATH PERSHAD *v.* SURJOO PERSHAD SINGH

[22 W. R., 162

49. ——————— *Exclusion of time of proceeding bonâ fide in Court for a cause of like nature to want of jurisdiction.*—The plaintiff on the 31st March 1884 brought a suit in the Small Cause Court on a promissory note, dated the 24th April 1879. In his plaint he omitted to set out certain payments of interest by the defendant, which payments (if so set out) would have had the effect of saving the suit from being barred by limitation. The Judge of the Small Cause Court held that, on the face of the plaint, the suit was barred, and rejected the plaint on the 24th April 1884, under clause (*c*) of section 54 of the Civil Procedure Code. On the 25th April 1884 the plaintiff brought a fresh suit on the same promissory note, and in his plaint set out how it was that he claimed exemption from limitation. *Held* that, in computing the period of limitation, the plaintiff was not entitled under section 14 of Act XV of 1877 to exclude the time during which he was prosecuting the previous suit. NOBIN CHUNDER KURE *v.* ROJOMOYE DOSSEE

[I. L. R., 11 Calc., 264

50. ——————— *Deduction of time during which another suit was being tried.*—The defendants cut down and carried away some trees which had been growing on the plaintiff's land. The plaintiff's manager brought a suit in his own name against the defendants for the value of the trees so cut and carried away. This suit was dismissed, on the ground that the manager had no cause of action against the defendants. In a subsequent suit brought by the plaintiff against the defendants for the value of the same trees, he contended that the time occupied in the former suit ought to be excluded in computing the period of limitation prescribed for the second suit. *Held* that the provisions of Act XV of 1877, section 14, did not apply, and that the time could not be excluded, as the reason why the previous suit was dismissed was, because it was brought in the name of the wrong person, not from defect of jurisdiction, or from any cause of a like nature. RAJENDRO KISHORE SINGH *v.* BULAKY MAHTON . . I. L. R., 7 Calc., 367

51. ——————— *Deduction of time during prosecution of suit with due diligence.—Defect of jurisdiction.—Cause of like nature.*—On the 2nd of September 1869 a suit was instituted for, among other things, the possession of land claimed under a kobala, dated the 31st October 1867. This suit was dismissed on the ground of misjoinder of causes of action. On the 14th of Apri 1881, the plaintiff sued for possession of the land only. *Held* that the suit was not barred by limitation as the plaintiff had, within the meaning of section 14, been prosecuting his claim in a Court which, from a cause of "like nature" to defect of jurisdiction, was unable to entertain it. *Ram Subhag Das* v. *Gobind Prasad I. L. R., 2 All., 622.* DEO PROSAD SING *v.* PERTAB, KAIREE

[I. L. R., 10 Calc., 86: 13 C. L. R., 218

52. ——————— *Deduction of period.—Defect of jurisdiction.*—In a suit for rent in which limitation was pleaded the plaintiffs alleged that, in answer to a former suit brought against them by the defendants, they had *bonâ fide* claimed to set off the same rent, but that their claim to a set-off had been, on technical grounds, disallowed on appeal, and they contended that, under section 14 of the Limitation Act XV of 1877, they were entitled to exclude the period during which that suit was pending. *Held* that the plaintiff's claim of set-off was not disallowed on account of any defect of jurisdiction nor any defect of a like nature, and that therefore he was not entitled to exclude the period as he contended. HAFIZUNNESSA KHATUN *v.* BHYRAB CHUNDER DASS

[13 C. L. R., 214

53. ——————— *Withdrawal of application with leave to renew it.—Deduction of time.—Civil Procedure Code, 1877, s. 374.*—The rule laid down in section 374 of the Code of Civil Procedure, Act X of 1877, that, where a suit is withdrawn with leave to

**LIMITATION ACT, 1877, s. 14**—*continued.*

bring a fresh suit, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been brought, applies to applications for execution. The bar created by section 374 of the Code of Civil Procedure is, in such a case, not removed by section 14 of the Limitation Act, as causes for which the withdrawal of a suit or application may be permitted are not causes "of a like nature" with defect of jurisdiction. PIRJADE *v.* PIRJADE . . . I. L. R., 6 Bom., 681

54. ——— *Mistake or want of enquiry.—Deduction of time during which plaintiff was prosecuting another suit.*—A plaintiff who, through want of enquiry or mistake, brings a suit which he is unable to establish, will not be allowed, on discovering his error and bringing a suit in which he would have been entitled to recover, had he brought it within time, to take advantage of his own mistake to relieve himself from the law of limitation. HURRO PROSHAD ROY *v.* GOPAL DASS DUTT [I. L. R., 3 Calc., 817 : 2 C. L. R., 450

S. C. on appeal to Privy Council [I. L. R., 9 Calc., 255 12 C. L. R., 129 L. R., 9 I. A., 82

55. ——— *Suit in foreign Court, Deduction for.*—The provision of the Limitation Act, 1877, section 14, which excepts such time as is spent in litigating in a Court of defective jurisdiction in favour of a plaintiff does not apply where the plaintiff brought his suit in a foreign Court which, according to its own laws, had ample jurisdiction, but according to the law of British India had no jurisdiction whatever. PARRY & CO. *v.* APPASAMI PILLAI . . . . . I. L. R., 2 Mad., 407

56. ——— *Deduction of time pending suit.*—A plaintiff is entitled to deduction from the period of limitation of the period of pendency of a former suit in which he as defendant was urging the same claim as he afterwards prefers as plaintiff. JUGTENDER BUNWAREE *v.* DIN DYAL CHATTERJEE [1 W. R., 310

1. ——— s. 15.—*Deduction of time injunction afterwards dissolved has been in force.*—Where an injunction obtained against the execution of a decree has been dissolved, the time during which it was in force cannot be deducted under section 15 of Act XV of 1877 in computing the period of limitation within which an application for execution may be made. Section 15 only relates to injunctions which stay the institution of suits, and the word "suit" does not include an application (section 3). KALYANBHAI DIPCHAND *v.* GHANASHAMLAL JADUNATHJI . . . I. L. R., 5 Bom., 29

2. ——— *Injunction to restrain partner collecting debts.—Suit by receiver.*—In a suit brought in 1880 by the widow of a deceased partner, to wind up a partnership, the surviving partner was prohibited by the Court, at the instance of the plaintiff, from collecting debts due to the firm; but leave was given to apply for the recovery of debts which might become barred by limitation.

**LIMITATION ACT, 1877, s. 15**—*continued.*

After decree, on the application of the plaintiff, a receiver was appointed to collect outstanding debts for the purpose of executing the decree. The receiver having sued in 1883 to recover a debt which was due to the firm in 1879, the suit was dismissed on the ground, among others, that the debt was barred by limitation. *Held* that, under section 15 of the Limitation Act, the suit was not barred. SHUNMUGAM *v.* MOIDIN . . . I. L. R., 8 Mad., 229

1. ——— s. 17.—*Suit for account against manager of company.—Accrual of right on death of manager against representatives.*—On the death of the manager of a company a fresh right to an account accrues to the employer as against the manager's representatives. In a suit for such an account accruing to the employer on the death of his manager, limitation will not commence to run until administration has been taken out to such manager's estate. LAWLESS *v.* CALCUTTA LANDING AND SHIPPING CO., LD. CALCUTTA LANDING AND SHIPPING CO., LD., *v.* LAWLESS . . . I. L. R., 7 Calc., 627

2. ——— *Suit against the representatives of deceased person.*—Where the defendant in a suit died before the plaint against him was filed, and the suit was some time after carried on against his representatives, the time during which the suit was being prosecuted *bonâ fide* against the dead man may be deducted in calculating the period of limitation against his representatives. MOHAN CHAND KANDU *v.* AZIM KAZI CHOWKIDAR [3 B. L. R., A. C., 233 : 12 W. R., 45

——— s. 18 (1871, s. 19; 1859, s. 9).

1. ——— *Fraud.—Want of knowledge of rights.*—Section 9, Act XIV of 1859, was only applicable when the plaintiff had been kept from a knowledge of his rights by means of fraud. MUKSOOD ALI *v.* GOWHUR ALI . W. R., 1864, 364

2. ——— *Fraud.—Person with means of knowledge.*—When he was or had been in a position in which he might have known of the fraud and ought to have done so, section 9, Act XIV of 1859, was not applicable; his knowledge must be presumed. INDROBHOOSUN DEB ROY *v.* KENNY [3 W. R., S. C. C. Ref., 9

3. ——— *Fraud.—Cause of action.—Act I of 1845, s. 29.—Semble,*—Section 19 of Act IX of 1871 was applicable only to those cases where the fraud was committed by the party against whom a right is sought to be enforced. *Per* MITTER, *J. Quære,*—Whether, if the plaintiffs' case were established, their claim would not be saved from the operation of the Law of Limitation by section 29, Act I of 1845. RAMDOYAL KHAN *v.* AJOODHIA RAM KHAN . I. L. R., 2 Calc., 1 : 25 W. R., 425

4. ——— *Suit against auction-purchaser.*—This section does not apply as against an auction-purchaser, unless the plaintiff can show that she was by intention and fraud ignorant of the sale at or immediately after the time it occurred. SHEO SAHAE PANDAY *v.* RUTTA BEEBEE . 2 N. W., 180

LIMITATION ACT, 1877, s. 18—*continued.*

5. ——————— *Fraud.—Person kept from knowledge of fraud.*—Where a plaint sufficiently alleged that the plaintiffs being entitled to property were ousted from its enjoyment under colour of a fictitious revenue sale in pursuance of a fraudulent contract, the fraud having been so contrived as to make the plaintiffs believe that they had no right of action at all, it was held that the allegation, if true, showed that the plaintiffs had been kept by fraud from a knowledge of their right of action and brought the case within Act XIV of 1859, section 9. DWARKANATH BHOOYA *v.* AJOODHYA RAM KHAN [21 W. R., 109

*See* ROBERT *v.* LOMBARD [1 Ind. Jur., N. S., 192

6. ——————— *Fraud.—Concealment of cause of action.*—In a suit to recover landed and other property to which plaintiff made title by inheritance, and endeavoured to set aside defendant's plea of limitation by alleging fraud,—*Held* that, even if the allegation were true, as it did not exhibit concealment of the cause of action within section 9, Act XIV of 1859, and the alleged fraud did not constitute an ingredient in plaintiff's cause of action, it could not get rid of the effect of time. BYJNATH SUHAYE *v.* BROHMO DEO NARAIN . . 9 W. R., 255

7. ——————— *Suit for money received by agent and concealed from principal.*—A suit against an agent to recover money received by him and concealed from the plaintiff fell within Act XIV of 1859, section 9. HOSSEIN BUKSH *v.* TUSSUDUCK HOSSEIN . . . . . 21 W. R., 245

8. ——————— *Application by Collector to set aside sale of unrecognised portion of bhag.—Bhagdari Act, Bom. Act V of 1862, ss. 1 and 2.*—*N.* held an unrecognised fourth share in a certain bhag. *R.* obtained a decree against *N.*, and in execution of it sold his right, title, and interest in the bhag on the 28th February 1876. It was purchased by *B.* The sale was subsequently confirmed, and *B.* was put in possession of a portion of the land. On the 30th September 1880, the Collector applied to the Court to set aside the sale, on the ground that it was illegal under Bombay Act V of 1862. It appeared that the Collector did not know till November 1877 that the land sold was an unrecognised portion of the bhag, and not the whole of it. *Held* that the sale might be set aside under the provisions of section 2 of Act V of 1862 notwithstanding its confirmation and the subsequent delivery of possession. *Held*, further, that the application was not barred, even if the provisions of Act XV of 1877 applied to it, inasmuch as, under section 18, time began to run against the Collector only from November 1877. *Quære,*—Whether any provision of limitation applied to such applications under the Bhagdari Act. COLLECTOR OF BROACH *v.* RAJARAM LALIDAS [I. L. R., 7 Bom., 542

No limitation does apply to such applications. *See* COLLECTOR OF BROACH *v.* DESAI RAGHUNATH [I. L. R., 7 Bom., 546

LIMITATION ACT, 1877, s. 18—*continued.*

9. ——————— *Fraudulent concealment of "necessary document."—Cause of action.*—Upon the construction of the passage in section 9 of Act XIV of 1859 "if any document necessary for establishing such right shall have been fraudulently concealed,"—*Held* that the preceding words of the section show clearly that the document must have been fraudulently concealed from the knowledge of the plaintiff; he must, through the fraudulent concealment, be unaware of its existence, and when this is so, the statute runs against the person guilty of the fraudulent concealment, or accessory thereto, from the time at which plaintiff had the means of producing or compelling its production, if it is a document necessary for establishing such right of action. What is a "document necessary" considered. MUNGAMURU ANANTA LAKSHMINARASU PANTALU *v.* YARLAGEDDA ANKINID [7 Mad., 22

10. ——————— *Notes lost or plundered in Mutiny.*—*Held* that the limitation applicable to suits for recovery of notes lost or plundered during the Mutiny is six years, and that this should be computed from the time of the losers having requisite knowledge to institute legal proceedings. ALI NUQUEE *v.* BHUGWAN DAS . . . 1 Agra, 213

——————— s. 19 (1871, s. 20; 1859, s. 1, cl. 15 and s. 4).

Col.
1. ACKNOWLEDGMENT OF DEBTS . 3198
2. ACKNOWLEDGMENT OF OTHER RIGHTS . 3211

*See* ART. 85 . I. L. R., 3 All., 523

*See* ART. 116 (1859, s. 1, CL. 10). [17 W. R., 406

*See* BENGAL RENT ACT, 1869, s. 30. [I. L. R., 5 Calc., 303

*See* CONTRACT ACT, s. 25. [I. L. R., 4 Calc., 500
I. L. R., 6 Bom., 683

## 1. ACKNOWLEDGMENT OF DEBTS.

This section, like section 4 of the Act of 1859 and section 20 of that of 1871, requires a distinct acknowledgment.

1. ——————— *Distinct acknowledgment.*—Act XIV of 1859 required a distinct acknowledgment of a debt as due by the person who makes the acknowledgment to entitle the creditor to a fresh period of limitation. KALAI KHAN *v.* MADHO PERSHAD . . . . . 3 N. W., 129

2. ——————— *Acknowledgment how to be gathered or inferred.*—Section 4 did not require that the writing should express in terms a direct admission that the debt, or part thereof, was due. It was left to the Court to decide in each case whether the writing, reasonably construed, contained a sufficient admission that the debt, or part of it, was due. KRISTNA ROW *v.* HACHAPA SUGAPA . 2 Mad., 307

It is not necessary to specify the precise amount of the debt.

LIMITATION ACT, 1877, s. 19—*continued.*

1. ACKNOWLEDGMENT OF DEBTS—*continued.*

3. ——————— *Acknowledgment of debt.*—Where a plaintiff sued for a debt due under a kararnama,—*Held* that in order to bring the case within the exception in the law of limitation, it was sufficient to show, by clear and positive proof, that within the period prescribed he had asserted his right to his claim under the kararnama, and that the defendant admitted this claim to be as of right. It was not necessary that a precise sum should have been mentioned by either party, or that a promise to pay should have been made by the defendant. GUPIKISHEN GOSWAMI *v.* BRINDABUN CHANDRA SIRKAR CHOWDHRY . . . . 3 B. L. R., P. C., 37

S. C. GOPEE KISHEN GOSHAMEE *v.* BINDABUN CHUNDER SIRCAR CHOWDHRY [12 W. R., P. C., 36 13 Moore's I. A., 37

*Contra,* NOBIN CHUNDER MOZOOMDAR *v.* KENNY [5 W. R., S. C. C. Ref., 3

4. ——————— *Promise to pay debt of third person.*—A promise to pay a third person's debt would be sufficient though the amount were not ascertained. PEAREE LALL SHAHA *v.* WOOMESH CHUNDER MOZOOMDAR . . 9 W. R., 140

5. ——————— *Letters containing no precise sum or promise to pay.*—In a suit for the price of goods, the period of limitation had expired, but the Court held that certain letters written by the defendant to the plaintiffs, though they contained no mention of the sum due, nor any promise to pay, were a sufficient acknowledgment of the debt under section 4, Act XIV of 1859. HARRISON *v.* HOPE [9 B. L. R., Ap., 43

6. ——————— *Want of assent to amount acknowledged.*—A creditor who does not openly assent to an amount acknowledged by his debtor to be due to him, is nevertheless entitled to take advantage of such acknowledgment so long as it remains uncontradicted and unexplained by his debtor. LALJEE SAHOO *v.* ROGHOONUNDUN LALL SAHOO [I. L. R., 6 Calc., 447

7. ——————— *Letter in indefinite terms.*—A letter containing no distinct admission of a debt, but only doubtful expressions,—*Held* not to be a written acknowledgment such as section 4, Act XIV of 1859 requires for the revival of a right of suit. GASH *v.* MCLEAN . . . 2 N. W., 403

8. ——————— *Acknowledgment inferred from tenor of correspondence.*—An acknowledgment not coming directly from the debtor himself, but merely deduced as an inference from the tenor of a series of letters, was not a sufficient acknowledgment to satisfy section 4, Act XIV of 1859. To satisfy that section, there must be some principal writing of a particular date, which can be relied on by itself, when properly construed, as constituting an acknowledgment of the debt. ROGERS *v.* MONTRIOU [6 B. L. R., 550

LIMITATION ACT, 1877, s. 19—*continued.*

1. ACKNOWLEDGMENT OF DEBTS—*continued.*

9. ——————— *Law under Punjab Code.*—*Acknowledgment.*—Under the Punjab Code, and before Act XIV of 1859 took effect in Oudh, letters offering to pay a debt by instalments, and praying to be excused from the payment of interest, were an ample acknowledgment of the debt to save limitation. MUKHUM LALL *v.* IMTIAZOODDOWLAH [5 W. R., P. C., 18: 1 Ind. Jur., N. S., 142 10 Moore's I. A., 362

10. ——————— *Letter with remittance "on old account."*—The defendant sent a letter, dated 22nd December 1865, to the plaintiffs, which contained the following postscript: "*P. S.*—Enclosed a remittance of £40 to old account." *Held* (on appeal, reversing the decision of NORMAN, *J.*), the words "remittance of £40 to old account" were ambiguous, and did not necessarily import that a further sum was due, so as to constitute an acknowledgment of a debt which would give a new period of limitation. SHEARMAN *v.* FLEMING [5 B. L. R., 619

11. ——————— *Admission of debt with averment it is not due.*—An admission of a debt with the appended averment that it is not yet payable in point of time, may be an acknowledgment of a debt under section 4, Act XIV of 1859. An assertion that a sum of money will be payable on the happening of an event future and uncertain is not an acknowledgment of a debt, but the allegation of incidents out of which a debt may at some time arise. YOUNG *v.* MANGALAPILLY RAMAIYA . . 3 Mad., 308

12. ——————— *Bom. Reg. V of 1827, s. 7, cl. 1.—Acknowledgment.*—*Held* that an admission in writing of the making of a promissory note, accompanied by a repudiation of liability in respect thereof, was not such an acknowledgment as would revive a barred claim. NARBADASHANKAR *v.* RUGHNATH ISHVARJI . . . 2 Bom., 349

13. ——————— *Admission of debt to third person.*—The admission to a third party in writing that a sum is due is not such an acknowledgment of a debt as to remove such debt out of the Statute of Limitations. PERSHAD DOSS *v.* DENONATH DEY [2 Hyde, 14

IN THE MATTER OF THE GANGES STEAM NAVIGATION COMPANY . 2 Ind. Jur., N. S., 180

14. ——————— *Admission to third person.*—An admission by *A.* of his debt to *B.* contained in a burat given by *A.* to his agent may take a suit against *A.* out of the Statute of Limitations. HURO CHUNDER ROY *v.* MONEE MOHINEE DOSSEE [3 W. R., S. C. C. Ref., 6

15. ——————— *Admission to third person.*—An acknowledgment made in writing to a third party and not to the creditor is sufficient under the section. *Quære,*—Whether an acknowledgment to satisfy the section must be made before suit. The

LIMITATION ACT, 1877, s. 19—*continued.*

1. ACKNOWLEDGMENT OF DEBTS—*continued.*

English and Indian Law of Limitation considered and contrasted. NIJAMUDIN *v.* MAHAMMADALI [4 Mad., 385

16. ——————— *Admission.—Exemption from limitation.*—In a suit for the recovery of costs incurred by the Government of Bengal, in virtue of the Statutes 3 and 4 Wm. IV, Cap. 41, authorising the Crown to appoint the East India Company to take charge of appeals, and bring them to a hearing, the admission by a defendant that a demand was claimable from some quarter or other, but not as against the property in question, was held not to be an admission within the meaning of Regulation III of 1793, excepting a suit from limitation under that Regulation. GOVERNMENT OF BENGAL *v.* SHUR-RUFFOTOONISSA . . . 3 W. R., P. C., 31 [8 Moore's I. A., 225

17. ——————— *Memo. of payments endorsed on bond.*—Memoranda of payments made, endorsed on the bond and signed by the defendant, were not acknowledgments in writing within the meaning of section 4, Act XIV of 1859. GORACHAND DUTT *v.* LOKENATH DUTT . . . 8 W. R., 334

18. ——————— *Verbal admission of correctness of account.*—A mere verbal admission of the correctness of an account, the items of which are barred by the Statute of Limitations, does not furnish a new starting-point for the operation of the Statute. SUBBARAMA *v.* EASTULU MUTTUSAMI [3 Mad., 378

19. ——————— *Admission of balance of account.*—When an indigo planter and a ryot contract, the former to make advances of money or seed for the cultivation of indigo plant, and the latter to deliver the indigo plant grown, a mere verbal admission by the ryot of the correctness of an account containing cross items due, without a written acknowledgment from him that the balance is due, does not operate to create or renew any liability with reference to the Law of Limitation. DOYLE *v.* ALLUM BISWAS [4 W. R., S. C. C. Ref., 1

DOYLE *v.* EDOO GAZEE [3 W. R., S. C. C. Ref., 13

20. ——————— *Suit for balance of account.—Balance struck and amount orally admitted.*—In a suit for the recovery of certain sums advanced as loans at different times the account rendered was simply a statement of advance, repayment, and balance which was adjusted, struck, and verbally admitted by the debtor,—*Held* that the balance so struck and admitted by the debtor did not amount to a written acknowledgment within the 4th section of Act XIV of 1859, or to a new contract so as to revive the old cause of action. KUNHYA LALL *v.* BUNSEE . . Agra, F. B., 94: Ed. 1874, 71

21. ——————— *Verbal promise to pay.—New contract.*—In a suit by the plaintiff to recover money lent more than three years before suit, the plaintiff alleged an express verbal promise by the debtor to pay the amount sued for made upon a settlement of accounts,—*Held,* by HOLLOWAY and KINDERSLEY, *JJ.*—That a verbal promise was not sufficient to prevent the application of the Act of Limitation. *Per* KINDERSLEY, *J.*—If a debtor and creditor enter into a new contract, the debtor promising to pay a barred debt, that would seem to be a new cause of action, and it is doubtful whether it was the intention of the Limitation Act to insist that the new promise should be in writing. KITTAPPA *v.* SOMANNA . . . . . 6 Mad., 51

22. ——————— *Acknowledgment to third person.*—An admission or acknowledgment in writing, under section 4, Act XIV of 1859, was sufficient to give a new period of limitation, although a promise to pay on request is not inferrible from it. The word "due" in the section means no more than that the debt is owing and that there is an existing obligation to pay it. NIJAMUDIN *v.* MAHAMADALI [4 Mad., 385

23. ——————— *Promise to pay sum for which promissory note was given.*—A suit was brought on a promissory note, by which the defendant promised to pay to the plaintiff R1,000 with interest at the rate of 12 per cent. per annum. The defendant afterwards wrote the following letter to the plaintiff: "I further hold myself responsible to you for the two sums of R1,000 and R900 respectively, the latter sum bearing interest at 24 per cent. per annum. Both these sums of R1,000 and R900 I engage to pay you." *Held* that the letter was an acknowledgment within section 4, Act XIV of 1859. UMESH CHUNDER MOOKERJEE *v.* SAGEMAN [5 B. L. R., 633, note

S. C. WOOMESH CHUNDER MOOKERJEE *v.* SAGEMAN [12 W. R., O. C., 2

*See* GUPIKISHEN GOSWAMI *v.* BRINDABUN CHANDRA SIRKAR CHOWDHRY [3 B. L. R., P. C., 37: 12 W. R., P. C., 36 13 Moore's I. A., 37

24. ——————— *Admission in bill of sale.*—The defendant, who was the owner of a moiety of certain property (the plaintiff and another being owners of the other moiety), mortgaged his moiety to the plaintiff; the mortgage-deed, dated 11th June 1863, contained a covenant to pay off the principal and interest at the expiration of a year, and gave a power of sale in default of payment. The whole property, including the mortgaged portion, was conveyed to one *I. D.* on 27th November 1864, by a bill of sale executed by the three owners of the property. On the execution of the bill of sale the sum of R16,250, the half of the purchase-money which belonged to the defendant, was handed over to the plaintiff in part-payment of a sum of R19,555, which was therein recited as being then due on the mortgage. In a suit for the balance brought in November 1869, the defence was that it was barred by the law

LIMITATION ACT, 1877, s. 19—*continued.*

1. ACKNOWLEDGMENT OF DEBTS—*continued.*

of limitation. *Held* that the admission by the defendant contained in the bill of sale of November 1864, was a sufficient acknowledgment to take it out of the operation of Act XIV of 1859, section 4. MADHUSUDAN CHOWDHRY *v.* BRAJANATH CHANDRA [6 B. L. R., 299

25. ——————— *Admission in writing.*—In a suit to recover the balance alleged to be due on certain promissory notes, the plaintiff relied on a document to prevent the operation of Act XIV of 1859, which was in these terms,—"If I have to stump up, the sooner it is done the better, though it would go against all my ideas of justice and right." *Semble,*—There was no admission that a debt was due. UNCOVENANTED SERVICE BANK *v.* MARSHALL [6 N. W., 306

26. ——————— *Admission in writing.*—A debt due on a decree is a sufficient consideration for the making of a promissory note, although execution of the decree be barred by limitation at the time the note is made. Where the endorsee of certain promissory notes sued to recover their value, alleging that in respect of four of the notes a new period of limitation had been created by the letter of the maker to the holder's agent which follows, *viz.:* "with regard to your communication anent promissory notes given by me to Mr. *S.*, and which I have not paid, I must only say that Mr. *S.* must trust to my integrity to pay him, and as soon as I have cleared off a couple of decrees against me I will commence paying him; but if you put the matter into Court, I must only plead want of consideration, and throw Mr. *S.* back on the original decree which had lapsed some three years before I wrote the promissory notes,"—*Held* that the letter was a sufficient acknowledgment to take the claim on the four notes out of the statute of limitation. MULLINS *v.* BEDDY . 6 N. W., 150

27. ——————— *Suit for compensation for land.—Acknowledgment in writing.—Held,* in a suit for compensation for lands taken by Government under Act VI of 1857, that a letter from the Commissioner of Revenue expressing his willingness to recommend Government to pay for certain land, is not an acknowledgment in writing within section 4. HILLS *v.* MAGISTRATE OF NUDDEA . 11 W. R., 1

28. ——————— *Acknowledgment in writing.*—*R.*, who owed *V.* money, drew a hundi in favour of *V.* which was dishonoured. *V.* sued *R.* to recover the sum for which the hundi had been drawn. Within three years before suit *R.* wrote a letter to the drawee of the hundi requesting him to pay the amount due by *R.* upon the hundi. *Held* that the letter was a sufficient acknowledgment, within the meaning of section 19 of the Limitation Act, 1877, of *R.'s* liability for the debt for which the hundi was drawn. RAMAN *v.* VAIRAVAN [I. L. R., 7 Mad., 392

29. ——————— *Default on payment of instalment.*—Where a default having been made in payment of an instalment the debtor subsequently filed a suit to compel his creditor to receive his debt by instalments as they should become due, and in his plaint set out the provisions of the bond, and stated that he had tendered the instalments as they became due to his creditor, which the latter had refused to receive, and that thereupon the debtor had deposited the amount with a third person. It was held that the plaint did not contain such an acknowledgment of the whole debt being due as to give a new starting-point from which the limitation commenced to run. NARAYANAPPA *v.* BHASKAR PARMAYA [7 Bom., A. C., 125

30. ——————— *Admission after execution of decree.*—The admission of a debt after execution is taken out gives a decree-holder a fresh starting point from which to reckon limitation. DIGAMBUREE DEBIA *v.* SARODA PERSHAD ROY [3 W. R., Mis., 27

JOTEERAM DOSS *v.* HURUF . 6 W. R., Mis., 115

LUCHMEE NARAIN *v.* SHUDASHEO SINGH [5 W. R., Mis., 12

PROSUNNO COMMAR ROY CHOWDHRY *v.* KASHEE KANT BHUTTACHARJEE . 5 W. R., Mis., 31

CHUNDER KANT MITTER *v.* RAMNARAIN DEY SIRCAR . . . . . 8 W. R., 63

31. ——————— *Instalment bond.—New contract.*—An instalment bond is not "a promise or acknowledgment" within the meaning of Act IX of 1871, section 20; but is complete in itself and does not require any reference to the old bond which it supersedes. It is a new contract with new stipulations and terms, and limitation runs from the due dates therein mentioned. TARA SOONDUREE KULOONEE *v.* BIOOBUN CHUNDER GHOSE [23 W. R., 462

32. ——————— *Admission of debt.—Petition to file kistbundi.*—A petition put into Court by a judgment-debtor, for time to pay the instalments due under a kistbundi, may be considered as evidence of a new contract formally entered into with the decree-holder and declared in Court. PEAREE MOHUN MITTER *v.* MOHENDRO NARAIN SINGH [23 W. R., 465

33. ——————— *Signature not by debtor.*—A letter not signed by the debtor was not an acknowledgment in writing within the meaning of section 4, Act XIV of 1859. RAMNARAIN *v.* HUREE DASS [3 Agra, 81

34. ——————— *Acknowledgment not signed.*—An acknowledgment in writing sealed, but not signed, by a defendant, was not an acknowledgment within the meaning of section 4, Act XIV of 1859. LUCHMUN PERSHAD *v.* RUMZAN ALI [8 W. R., 513

35. ——————— *Signature not formally added.*—To entitle a plaintiff to the benefit of a new

LIMITATION ACT, 1877, s. 19—*continued.*

1. ACKNOWLEDGMENT OF DEBTS—*continued.*

period of limitation under that section, he must prove that the party sued has in writing authenticated by his signature, either in express terms or by reasonable construction, acknowledged and admitted that the debt or a part thereof is due from him. This signature need not be formally subjoined or added to an acknowledgment writtten by the debtor, unless it appears from the writing that such signature was intended, or unless the writing would be incomplete in itself, as an admission without a signature. If the body of the admission is in the debtor's own handwriting, and contains his signature, and was given over by him as complete in itself, it would be an acknowledgment in writing within the meaning of section 4. MUHAMMAD JANULA *v.* VENKATARAYAR [2 Mad., 79

36. ——————— *Signature by mark.—Acknowledgment in writing.*—Payment endorsed on a bond by direction of the obligor who cannot write and signed with his mark is an acknowledgment in writing within the meaning of section 20 of Act IX of 1871. BHEEMANGOWDA *v.* EEBANAH [7 Mad., 358

37. ——————— *Suit for balance of account for advances.*—In a suit to recover a balance on account of indigo advances made on a kabuliat executed by defendant, where defendant had broken no contract, but the discontinuation of the cultivation had been the act of the plaintiff, limitation was held to run from the date of the kabuliat, which operated as a written acknowledgment signed by defendant (section 4, Act XIV of 1859). *Held*, too, that a statement of balances found in one of plaintiff's books duly verified, without any signature by defendant (who could not write), was not an acknowledgment within the meaning of section 4. The entry of defendant's name in one column, taken in connection with a cross in another column, formed no valid signature. BENGAL INDIGO COMPANY *v.* KOYLASH CHUNDER DOSS [10 W. R., 293

38. ——————— *Acknowledgment of debt.—Secondary evidence of acknowledgment.—Authority to bind minor by acknowledgment.*—An original account book containing an acknowledgment of a debt had been filed in Court, and subsequently lost whilst in Court,—*Held*, that secondary evidence of such acknowledgment might be given, notwithstanding the words of section 19 of the Limitation Act. A person merely by reason of being the mother and guardian of a minor has no authority to make an acknowledgment of a debt on behalf of the minor so as to give a creditor a fresh start for the period of limitation. WAJIBUN *v.* KADIR BUKSH [I. L. R., 13 Calc., 292

39. ——————— *Acknowledgment.—Entry of a debt in a debtor's book.*—An entry in a debtor's own book does not amount to an acknowledgment within the meaning of section 19 of Act XV of 1877, unless communicated to his creditor or to some one on his behalf,—Explanation 1 to section 19 showing

LIMITATION ACT, 1877, s. 19—*continued.*

1. ACKNOWLEDGMENT OF DEBTS—*continued.*

that the acknowledgment is contemplated as "addressed" to the creditor. Every acknowledgment, in order to create a new period of limitation, must be signed by the debtor, or some one deputed by him no matter in what part of the document the signature is placed. MAHALAKSHMIBAI *v.* FIRM OF NAGESHWAR PURSHOTAM . I. L. R., 10 Bom., 71

40. ——————— *Application by judgment-debtor for postponement of sale.*—An application by the defendant for a postponement of the sale of his property when he promised to pay the amount of the decree was held to be an admission of the plaintiffs' right to execute the decree within the contemplation of section 19 of the Limitation Act (XV of 1877), and created a new period of limitation. VENKATRAV BAPU *v.* BIJESING VITHALSING [I. L. R., 10 Bom., 108

41. ——————— *Account stated.—Signing by debtor.*—Although to make an account a stated account it is not necessary that it should be signed, yet, unless it is signed by the debtor, the intention and effect of section 4 of Act XIV of 1859 is to prevent it being made the foundation of an action to recover a debt which would otherwise be barred by that Act. MULCHAND GULABCHAND *v.* GIRDHAR MADHAV . . . . . 8 Bom., A. C., 6

42. ——————— *Signature.*—Where an account stated was written by a debtor himself, by his name at the top of the entry, it was held to be sufficiently signed within the meaning of section 4 of Act XIV of 1859. ANDARJI KALYANJI *v.* DULABH JEEVAN . . . I. L. R., 5 Bom., 88

43. ——————— *Signature.*—Where the whole of an account stated (khata) was written by a debtor himself with the introduction of his name at the top of the entry, the khata was held to be sufficiently signed within the meaning of Act XV of 1877, section 19. JEKISAN BAPUJI *v.* BHOWSAR BHOGA JETHA . . I. L. R., 5 Bom., 89.

44. ——————— *Acknowledgment of guardian for minor.*—The signature of a guardian of a minor to an acknowledgment of a debt does not make it such an acknowledgment under section 19 of the Limitation Act as would give a new period of limitation against the minor, the signature of the guardian not being a signature by the person against whom the right is claimed. AZUDDIN HOSSAIN *v.* LLOYD . . . . . 13 C. L. R., 112

45. ——————— *Acknowledgment signed by agent.*—Under section 4, Act XIV of 1859 an acknowledgment in writing, signed by the agent or constituted attorney of the debtor, is not sufficient. PURSHOTAM MANCHARAM *v.* ABDUL LATIF [8 Bom., O. C., 67

BUDOOBHOOSUN BOSE *v.* ENAETH MOONSHEE [8 W. R., 1

LIMITATION ACT, 1877, s. 19—*continued.*

1. ACKNOWLEDGMENT OF DEBTS—*continued.*

46. ——————— *Acknowledgment of agent.*—The acknowledgment of an agent for the management of a zemindar's property is not the acknowledgment of the principal within the meaning of section 4, Act XIV of 1859. REAZOODEEN *v.* COLLECTOR OF CUTTACK . . . . **10 W. R., 175**

47. ——————— The plaintiff sued three executors for the balance due of their testator's simple contract debt of more than three years' standing. A part payment had been made by the defendants within the three years previous to the commencement of the suit. Two of the defendants had also, but during their testator's life-time, given a personal undertaking in writing to pay the debt out of a fund coming to their hands. The defendants had also signed as executors, and sent a letter to the plaintiff informing him that they had registered his claim against the testator's estate, and that notice would be given to him when the assets, if any, were to be distributed. *Held* that, neither the personal undertaking nor the letter was such an acknowledgment in writing as to bring the case within section 4, of Act XIV of 1859. IOVARA DAS *v.* RICHARDSON . . **2 Mad., 84**

48. ——————— *Acknowledgments by agent.*—Acknowledgments which, under Act XIV of 1859, were insufficient to keep alive a cause of action, because they were signed only by an agent,—*Held* to be sufficient to sustain a suit on the same cause of action under Act IX of 1871. Where a series of acknowledgments of a debt have been made, each within three years of the one next preceding, and the first of the series has been made within three years of the date on which the debt was contracted, a suit for the recovery thereof is, under Act IX of 1871, in time, if instituted within three years from the date of the last acknowledgment. Discussion as to who is an authorised agent, what is a sufficient signature and what amounts to a sufficient acknowledgment, within the meaning of section 20 of Act IX of 1871. Under section 20 of Act IX of 1871, the authorised agent may sign either his own name or that of his principal. MOHESH LAL *v.* BUSUNT KUMAREE **[I. L. R., 6 Calc., 340: 7 C. L. R., 121**

49. ——————— *Acknowledgment by agent.*—*Held*, upon the evidence in the case, that an acknowledgment of the debt sued for had not been signed by an agent of the defendant, generally or specially authorised in that behalf within the meaning of section 20, Act IX of 1871. Whatever general authority such agent may once have had from the defendant, it had ceased within the knowledge of the plaintiff at the time of the signature. Special authority in that behalf cannot be proved by secondary evidence of the contents of a letter, the non-production of which is not satisfactorily accounted for. DINOMOYI DEBI *v.* ROY LUCHMIPUT SINGH **[L. R., 7 I. A., 8**

50. ——————— *Acknowledgment by agent.—Signature.*—*B.'s* agent, under the orders of *B.*, wrote a letter to *S.* containing an acknowledgment in respect of a debt. This letter was headed as follows: "Written by *B.* to *S.*" The concluding portion of the letter was written by *B.* in his own handwriting. *Held* that, under these circumstances, there was sufficient evidence that the heading of the letter was written by an agent duly authorised. *Held*, also, looking at the heading of the letter, that the letter was "signed" by *B.* within the meaning of section 20 of Act IX of 1871. MATHURA DAS *v.* BABU LAL **[I. L. R., 1 All., 683**

51. ——————— *Acknowledgment by agent—Plaint signed by vakil.*—A plaint signed by a vakil before the Limitation Act IX of 1871 came into operation does not save limitation, as the earlier Limitation Acts do not give authority to an agent to sign an acknowledgment for his principal similar to that given by section 20 of that Act and section 19 of Act XV of 1877. Acknowledgments which are insufficient to keep alive a cause of action because they were signed only by an agent, are equally insufficient to sustain a suit on the same cause of action under Act XV of 1877, as section 2 of the Act expressly bars the revival of a right to sue barred under the earlier Acts, although they might have been sufficient under Act IX of 1871. DHARMA VITHAL *v.* GOVIND SADVALKAR . . . **I. L. R., 8 Bom., 99**

52. ——————— *Acknowledgment.—Authorised agent.*—A balance of account was written by a person at the request of an illiterate debtor in the debtor's name, and signed by the writer in his own name. *Held* a binding acknowledgment by a duly authorised agent within the meaning of section 19, explanation 2 of Act XV of 1877. HEMCHAND KUBER *v.* VOHORA RAJI HAJI **I. L. R., 7 Bom., 515**

53. ——————— *Signature by agent.*—An application by a judgment-debtor in writing for the postponement of a sale in execution of a decree and the issue of fresh notification of sale signed by the pleader expressly authorised to make it, is an acknowledgment "signed" by an "agent duly authorised in the judgment-debtor's behalf," within the meaning of section 19, Act XV of 1877. RAMHIT RAI *v.* SATGUR RAI . . . **I. L. R., 3 All., 247**

54. ——————— *Manager of joint Hindu family.—Agent, Authority of.—Principal and agent.*—The relation of the managing-member of a Hindu family to his coparceners does not necessarily imply an authority upon his part to keep alive, as against his coparceners, a liability which would otherwise become barred. The words of section 20 of Act IX of 1871 must be construed strictly, and the manager of a Hindu family, as such, is not an agent "generally or specially authorised" by his coparceners for the purpose mentioned in that section. KUMARASAMI NADAN *v.* PALA NAGAPPA CHETTI **[I. L. R., 1 Mad., 385**

55. ——————— *Manager of Hindu family.—Authority to revive barred debt.*—The manager of

**LIMITATION ACT, 1877, s. 19**—*continued.*

1. ACKNOWLEDGMENT OF DEBTS—*continued.*

a Hindu family has the same authority to acknowledge as he has to create debts on behalf of the family, but has no power, without special authority, to revive a claim, already barred by limitation, against the family. CHINNAYA *v.* GURUNATHAM **[I. L. R., 5 Mad., 169**

*See* GOPAL NARAIN MOZOOMDAR *v.* MUDDOMUTTY GOOPTEE . . . . **14 B. L. R., 21**

**56.** ——— **and art. 59.**—*Prescribed period.*—The expression "prescribed period" in section 20(*a*) of the Limitation Act IX of 1871 means the period prescribed by that Act. Where a suit was brought on the 11th September 1877 for money paid by the plaintiff on the 16th November 1868 to the use of the defendant, and the plaintiff based his claim upon two acknowledgments of the defendant in writing, of which the first was dated the 3rd November 1872,—*Held* that, to bring the case within section 20 (*a*) of the Limitation Act IX of 1871, the first acknowledgment should have been made before the expiration of the period prescribed by article 59 of schedule II of that Act, *viz.*, three years from the period when the money was paid. LUVAR CHUNILAL ICHHARAM *v.* LUVAR TRIBHOBAN LAL DAS . . . **I. L. R., 5 Bom., 688**

**57.** ——— *"Promise."—Suit on bond executed for barred debt.—Contract Act, s. 25, cl. 3.*—The "promise" referred to in section 20 of Act IX of 1871 is a promise introduced by way of exception, in a suit founded on the original cause of action, and not a promise constituting a new contract, and extinguishing the original cause of action. Accordingly a suit is not barred which is brought on a bond executed, in consideration of a barred debt, after the expiration of the period prescribed for its recovery. RAGHOJI BHIKAJI *v.* ABDUL KARIM **[I. L. R., 1 Bom., 590**

**58.** ——— *Promissory note for barred debt.—Contract Act, s. 25, cl. 3.*—Act IX of 1871, section 20, clause (*a*), does not prevent a plaintiff from maintaining a substantive action on a promissory note passed to secure the amount due on an old note which was barred by limitation at the time of the making of the new, the plaintiff's right to bring such action being recognised by the later enactment, Act IX of 1872, section 25, clause 3. CHATUR JAGSI *v.* TULSI . **I. L. R., 2 Bom., 230**

**59.** ——— *Acknowledgment of barred decree.*—In the case of a decree for money payable by instalments with the proviso that in the event of default the decree should be executed for the full amount, the decree-holder did not apply for execution within three years after default was made,—*Held*, the judgment-debtor having, three years after the first default, acknowledged in writing his liability under the decree, and signed such acknowledgment, that, the decree being already barred, such acknowledgment did not create a new period of limitation. SHIB DAT *v.* KALKA PRASAD **[I. L. R., 2 All., 443**

**LIMITATION ACT, 1877, s. 19**—*continued.*

1. ACKNOWLEDGMENT OF DEBTS—*continued.*

**60.** ——— *Agent.—Signature procured after determination of agency.*—Notwithstanding the general provisions of section 19 of the Limitation Act of 1877, by which a new period of limitation, according to the nature of the original liability, is allowed, provided that the acknowledgment of liability is made in writing before the expiration of the period prescribed for the suit, a suit cannot be brought upon an acknowledgment or account stated, signed by a person who has been an agent to collect rents, if his signature was not procured till more than a year after the determination of his agency. PAN BUTTINATH ROY *v.* TEJOMOY BANERJI **[I. L. R., 5 Calc., 303**

**61.** ——— *Account stated.—Adjusted account.—Adjustment of accounts, Effect of.—"Ruzu."—Contract Act (IX of 1872), s. 25, cl. 3.*—The "ruzu" or adjustment of an account can operate either as a revival of an original promise or as evidence of a new contract. If it is to be used as an acknowledgment giving a fresh starting-point for computing a new period of limitation it must be made in writing and signed before the expiration of the period of limitation prescribed. If it is to be used as evidence of a new contract furnishing a basis for a new cause of action, it must contain a promise in writing duly signed as required by the Contract Act IX of 1872, section 25, clause 3, a bare statement of an account not being such a promise. RAMJI *v.* DHARMA . . . **I. L. R., 6 Bom., 683**

**62.** ——— *Account stated.—Promise—Balance admitted due.—Baki deva.—Act IX of 1872, s. 25.*—The Gujarati words "baki deva," which are of common use in balancing accounts, import no more than the English words "balance due," from which an unwritten contract may be inferred, but which do not of themselves amount to a promise to pay within the sense of Act IX of 1872, section 25, clause 3. RANCHHODDAS NATHUBHAI *v.* JEYCHAND KHUSALCHAND . . **I. L. R., 8 Bom., 905**

*See* RAMJI *v.* DHARMA . **I. L. R., 6 Bom., 683**

**63.** ——— *Admission of debt being due in writing itself.*—To bring a case within section 4, Act XIV of 1859 the writing must contain within itself an admission that a debt is due, and oral evidence is not admissible to add to its meaning. LUTCHUMANAN CHETTY *v.* MUTTA IBURAKI MARAKKAYER . . . . . **5 Mad., 90**

**64.** ——— *Oral evidence.*—The want of an admission or acknowledgment in writing, as required by section 4, Act XIV of 1859 to qualify the limitation prescribed by clause 9, section 1 of that Act, cannot be supplied by oral evidence of the admission of the debt sued for. GIREE DHAREE SINGH *v.* KALIKA SOOKUL. DOORGA DUTT SINGH *v.* KALIKA SOOKUL . . . . . **7 W. R., 46**

WOOMA SOONDERY DOSSEE *v.* BIRESSUR ROY **[8 W. R., 289**

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LIMITATION ACT, 1877, s. 19—*continued.*

1. ACKNOWLEDGMENT OF DEBTS—*continued.*

65. ——————— *Contents of acknowledgment of debt, Secondary evidence of.—Evidence Act (I of 1872), s. 91.*—Paragraph 2, section 19 of the Limitation Act, 1877, belongs to that branch of the law of evidence which is dealt with by section 91 of Act I of 1872, and ought not to be read in derogation of the general rules of secondary evidence so as to exclude oral evidence of the contents of an acknowledgment which has been lost or destroyed. SHAMBHU NATH NATH *v.* RAM CHUNDRA SHAHA [I. L. R., 12 Calc., 267

66. ——————— *Registration.—Non-registration of kobala, Effect of.—Act VIII of 1871, s. 17.—Act IX of 1871, s. 20, cl. (c), and s. 49.*—Although, under section 49 of Act VIII of 1871, no instrument which is "required by section 17 to be registered shall, if unregistered, be received as evidence of any transaction affecting the property to which it relates," this provision does not prevent such an instrument being used for the purpose of showing that a fresh period of limitation has been acquired under section 20, clause (c) of Act IX of 1871, by an acknowledgment of a debt in writing signed by the party to be charged therewith before the expiration of the prescribed period of limitation. NUNDO KISHORE LALL *v.* RAMSOOKHEE KOORE [I. L. R., 5 Calc., 215 : 4 C. L. R., 361

2. ACKNOWLEDGMENT OF OTHER RIGHTS.

67. ——————— *Landlord and tenant.—Acknowledgment of different tenancy.*—Where a landlord sued to recover arrears of rent due from a tenant who entered as a mulgaini tenant for one year and continued in possession without executing a fresh agreement,—*Held* that an admission, made in writing, and signed by the tenant, that he held the land as mulgaini or permanent tenant at a lower rent, was not an acknowledgment of the landlord's right, which, under section 19 of the Limitation Act, 1877, would entitle the landlord to recover arrears of rent for three years prior to the date of the admission. VENKATARAMANAYYA *v.* SRINIVASA RAU [I. L. R., 6 Mad., 182

68. ——————— *Mortgage.—Right to redeem mortgage.*—Where a mortgage has not legally been put an end to, the mortgagor (or his representatives) is entitled to come into Court and ask to be allowed to redeem, provided sixty years have not elapsed since the last recognition by the mortgagee of the plaintiff's title to the mortgaged property. RUNJEET NARAIN SINGH *v.* SHUREEFOONISSA [10 W. R., 478

69. ——————— *Suit for redemption of mortgage.—Acknowledgment.*—A mortgage deed having been executed in 1761 and an acknowledgment of the mortgagor's right to redeem having been made in writing in 1838,—*Held* that a suit to redeem in 1878 was barred. The words "in the meantime" in clause 15 of section 1 of the Limitation Act XIV of

LIMITATION ACT, 1877, s. 19—*continued.*

2. ACKNOWLEDGMENT OF OTHER RIGHTS—*continued.*

1859 mean within sixty years from the date of the mortgage. *Vassudavan Nambudri* v. *Mussa Kutti, 6 Mad., 138,* followed. *Daiachand* v. *Sarfraz Ali, I. L. R., 1 All., 425,* dissented from. MUKKANNI *v.* MANNAN . . . I. L. R., 5 Mad., 182

KAMMANA KALLACHERI ILLATH VASSUDAVAN NAMBUDRI *v.* CHEMBRAKANDY MUSSA KUTTY [6 Mad., 138

MAHOMED ABDOOL RUZZAH *v.* ASIF ALI SHAH [3 N. W., 119

NARAIN LALL *v.* LALLA NUND KISHORE LALL [19 W. R., 78

70. ——————— *Acknowledgment made to third party.*—A written acknowledgment by the mortgagee of the title of the mortgagor, or of his right of redemption, was sufficient within the meaning of clause 15, section 1, Act XIV of 1859 though made to a third party and not the person entitled to the land. DUR GOPAL SINGH *v.* KASHEERAM PANDAY [3 W. R., 3

71. ——————— *Acknowledgment to third person.*—An acknowledgment of title under clause 15, section 1 of Act XIV of 1859, need not be made to the mortgagor or his representatives; any acknowledgment in writing signed by the mortgagee is sufficient. AHILOJI VALAD KHANDOJI *v.* DONGAR HARICHAND GUJAR . . 5 Bom., A. C., 176

UNICHA KHANDYIB KUNHI KUTTI NAIR *v.* VALIA PIDIGAIL KUNHAMED KUTTI MARACCAR [4 Mad., 359

ALI HOSSEIN *v.* RAMDYAL . 3 N. W., 78

72. ——————— *Suit to redeem mortgage.—Acknowledgment.*—The first plaintiff claimed to redeem a mortgage to defendants' ancestor for R320. Defendants pleaded that the mortgage was for R2-336-4, and redeemable only at the pleasure of the mortgagee. They also pleaded the Limitation Act. The original Court decreed redemption on payment of the amount stated by defendants. The lower Appellate Court reversed that decree, and dismissed the suit as barred. *Held,* reversing the decree of the lower Appellate Court, that an acknowledgment by the mortgagees of the mortgagor's title, sufficient to take the case out of the statute, was evidenced by their written answer in suit No. 238 of 1830, and by the answer in original suit No. 441 of 1861, as recited in the judgment in that suit, although the right to redeem and the amount of the mortgage were denied, and the acknowledgments were not made before those suits were brought. The Act for the limitation of suits does not require that the acknowledgment of the title of a mortgagor should be made to any particular person or at any particular time before the institution of the suit in which the bar is pleaded. NARAINA TANTRI *v.* UKKOMA . . 6 Mad., 267

73. ——————— *Entry in wajib-ul-urz.—Acknowledgment.*—An entry in a wajib-ul-urz is not

LIMITATION ACT, 1877, s. 19—*continued.*

2. ACKNOWLEDGMENT OF OTHER RIGHTS —*continued.*

tantamount to an acknowledgment on the part of the defendant, mortgagee, of the plaintiff's proprietary right so as to allow him to sue within sixty years from that date as provided by clause 15, section 1, Act XIV of 1859. CHUJJOO SINGH *v.* NAZIR HOSSEIN [2 Agra, 227

74. ——————— *Acknowledgment by vakil.*—A solemn and *bonâ fide* acknowledgment in writing of the mortgage and right of the mortgagor, made by the mortgagee for the purpose of a suit through his vakil, whose act and statement for the purpose of the suit were within the scope of his authority according to the law then in force (clause 1, section 21 of Regulation XXVII of 1814), and were to be considered as if his client were personally present and consenting, was a sufficient acknowledgment in writing of the mortgagor's right to redeem as provided by clause 15, section 1, Act XIV of 1859, and gave a fresh starting-point to the mortgagor to sue for redemption within sixty years from the date of such acknowledgment. Such acknowledgment in writing need not be made directly to the party entitled, or in other words, to the mortgagor. ESREE SINGH *v.* BISHESHER SINGH . . . 3 Agra, 255

75. ——————— *Acknowledgment by mooktear.—Usufructuary mortgage.*—Where sixty years have elapsed from the date of a usufructuary mortgage, a suit by the mortgagor to recover possession of the mortgaged property is barred by clause 15, section 1, Act XIV of 1859. Where a mortgagee signed a mooktearnama, in which he stated that he would abide by any arguments which might be urged, and any documents which might be filed, by the mooktear thereby appointed, and the mooktear subsequently filed a written statement signed by himself alone, in which he admitted the mortgagor's title,—*Held* that the mooktearnama and written statement could not be read together as amounting to an acknowledgment sufficient to satisfy the requirements of clause 15, section 1, Act XIV of 1859. LUCHMEE BUKSH ROY *v.* RUNJEET RAM PANDAY [13 B. L. R., P. C., 177: 20 W. R., 358

S. C. in lower Court . . 12 W. R., 443

*See* RAHMANI BIBI *v.* HULASA KUAR [I. L. R., 1 All., 642

76. ——————— *Acceptance of sale certificate.—Acknowledgment of title.*—The acceptance of a sale certificate granted by a Zilla Court in 1824 to the purchaser of a mortgagee's interest in land sold by auction in satisfaction of a decree, is not an acknowledgment, by the purchaser, of the title of the mortgagor which will satisfy the conditions of section 19 of the Limitation Act and give a fresh starting-point from which limitation will run for redemption. AMBALA VAVERI MANAKEL RAMAN SOMAYAJIPAD *v.* NADUVAKAT KRISHNA PODUVAL [I. L. R., 6 Mad., 325

77. ——————— *New period.—Revival of barred suit.—Plaint.—Receipt.—Decree.—Agent.—Vakil.—Mortgage.—Redemption.*—The plaintiff's ancestor mortgaged a piece of land to the defendants' ancestor in 1797, and placed him in possession as agreed upon. Three years afterwards both the mortgagor and the mortgagee went out of the country. The mortgagor returning first resumed possession of the land; the mortgagee returning afterwards filed a suit in 1826 to recover possession under the terms of the mortgage, and obtaining a decree in his favour possession was restored to him by the Civil Court in 1827. When taking delivery of the possession from the Court, the mortgagee passed to the officers of the Court a receipt in which the mortgagee acknowledged having received possession of the mortgaged land as directed by the decree. The plaintiff, the representative of the original mortgagor, on the 4th of December 1880, sued the defendant, the representative of the original mortgagee, to redeem the land. *Held* that the suit was barred: the receipt incorporating the decree by reference did not operate as an acknowledgment of a mortgage subsisting in 1827, so as to give to the mortgagor a new period of limitation under section 19 of Act XV of 1877. This section intends a distinct acknowledgment of an existing liability or jural relation, not an acknowledgment without knowledge that the party is admitting anything. DHARMA VITHAL *v.* GOVIND SADVALKAR . . . I. L. R., 8 Bom., 99

78. ——————— and art. 148.—*Redemption of mortgage.—Acknowledgment of the mortgagor's title signed by mortgagee's agent.—Held,* following the decision of the Privy Council in *Luchmee Buksh Roy* v. *Runjeet Roy Panday, 13 B. L. R., 177,* under Act XIV of 1859, that an acknowledgment of the title of the mortgagor or of his right of redemption signed by the mortgagee's agent is not sufficient, under article 148, schedule II of Act IX of 1871, to create a new period of limitation. RAHMANI BIBI *v.* HULASA KUAR. . . I. L. R., 1 All., 642

79. ——————— *Acknowledgment of title prior to Act XIV of 1859.*—In a suit for redemption of landed property the plaintiffs, representatives of the mortgagors, relied on an acknowledgment of the mortgagors' title contained in an entry in the settlement records of the year 1841, which was attested by the representatives of the mortgagees, defendants in the suit, and the lower Courts having differed as to whether the acknowledgment was sufficient without proof that it was made within sixty years from date of the alleged mortgage,—*Held* that, inasmuch as there was no limitation to suits for redemption of mortgage of landed property prior to Act XIV of 1859, it was unnecessary to ascertain when the mortgage was effected, the acknowledgment of 1841 being an acknowledgment of a right still subsisting, and one which fulfilled the requirements of article 148, schedule II, Act IX of 1871. DAIA CHAND *v.* SARFRAZ ALI . I. L. R., 1 All., 425

80. ——————— *Suit for redemption of mortgage.—Acknowledgment of title of mort-*

LIMITATION ACT, 1877, s. 19—*continued.*

2. ACKNOWLEDGMENT OF OTHER RIGHTS —*continued.*

*gagor or of his right to redeem.*—Where the defendants attested as correct the record-of-rights prepared at a settlement with them of an estate in which they were described as mortgagees of the estate, but which did not mention the name of the mortgagor,—*Held* (SPANKIE, *J.*, dissenting) that there was an acknowledgment of the mortgagor's right to redeem within the meaning of article 148, schedule II, Act IX of 1871. *Per* PEARSON, *J*—That there was also an acknowledgment of the mortgagor's title. *Per* SPANKIE, *J*, *contra.* DAIA CHAND v. SARFRAZ ALI . . . . I. L. R., 1 All., 117

But *see* MUKKANNI v. MANAN BHATTA [I. L. R., 5 Mad., 182

81. ——— *Suit for redemption of mortgage.—Acknowledgment of title of mortgagor or of his right to redeem.*—An acknowledgment, to be within the meaning of article 148, schedule II, Act IX of 1871, must be an acknowledgment of a present existing title in the mortgagor. An acknowledgment of the original making of the mortgage deed and of possession having been taken under it, coupled with the allegation of the subsequent execution of two other deeds practically superseding the mortgage and altering the relation of the parties, contained in a written statement filed previous to the expiry of the sixty years allowed, is not a sufficient acknowledgment within the meaning of that article, so as to prevent limitation from operating. RAM DAS v. BIRJNUNDUN DAS *alias* LALOO BABOO [I. L. R., 9 Calc., 616: 12 C. L. R., 284

82. ——— *Execution of decrees.—Petition.*—Section 4, Act XIV of 1859 is not applicable to the execution of decrees. Thus an incidental mention by a judgment-debtor, in a petition filed by him in another case in which another decree-holder had taken out execution, that he owed money to the decree-holder in the present case, was held not to be an admission within the meaning of that section to keep the decree alive. LUCHMUN KOONWAR v. LUCHMUN BHUKUT . . . 7 W. R., 79

83. ——— *Execution of decree.—Petition.*—The word "debt" in section 20 of Act IX of 1871 applies only to a liability for which a suit may be brought, and does not include a liability for which judgment has been obtained: therefore, where the last application for execution of a decree had been made on the 14th of December 1872, and a notice under section 216, Act VIII of 1859, issued on the 19th of January 1873, and on the 28th of April 1873 the judgment-debtor filed a petition notifying part-payment, which petition was signed by the judgment-creditor,—*Held*, in an application for execution made on the 27th of April 1876, that further execution was barried by limitation. KALLY PROSONNO HAZRA v. HEERA LAL MUNDLE . I. L. R., 2 Calc., 468

84. ——— *Execution of decree.—Petition.*—An application was made for execution of a decree against the heir of the judgment-debtor on the 26th July 1871. On the 30th November of the same year the debtor applied by petition for two months' time,—*Held* that the petition was not an acknowledgment within the meaning of section 20 of Act IX of 1871 so as to save limitation. *Kally Prosonno Hazra* v. *Heera Lal Mundle, I. L. R., 2 Calc., 468*, followed. ISHANA DABIA v. GRIJA KANT LAHIRY CHOWDHRY . . 3 C. L. R., 572

85. ——— *Acknowledgment in writing of debt by judgment-debtor.*—An acknowledgment in writing of a debt by a judgment-debtor is not such an acknowledgment as is contemplated by Act IX of 1871, section 20, and will not, therefore, operate to extend the period of limitation in favour of the judgment-creditor. The "debt" referred to in that section is not a judgment-debt, but a liability to pay money for which a suit can be brought. MUNGOL PRASHAD DICHIT v. SHAMA KANTO LAHORY CHOWDHRY . . . . I. L. R., 4 Calc., 708

86. ——— *Execution of decree.—Acknowledgment in writing.*—An application for the execution of a decree is an application in respect of a "right,"—that is to say, the "right" of the decree-holder to execution, within the meaning of section 19 of Act XV of 1877. An application in writing by a judgment-debtor for the postponement of a sale in the execution of the decree and the issue of a fresh notification of sale is "an acknowledgment of liability" within the meaning of the same section, in respect of such "right." RAMHIT RAI v. SATGUR RAI . . . . . I. L. R., 3 All., 247

87. ——— *Application for execution of decree.*—The provisions of section 19 of the Limitation Act, 1877, are not applicable to applications in execution of decrees. The ruling of the Allahabad Full Bench in *Ramhit Rai* v. *Satgur Rai, I. L. R., 3 All., 247*, dissented from. RAMA v. VENKATESA . . . . I. L. R., 5 Mad., 171

88. ——— *Application for execution of decree.—Acknowledgment.*—An application for the execution of a decree is an application in respect of a "right" within the meaning of section 19, Act XV of 1877, and a petition made by a judgment-debtor, and signed by his vakeel, praying for additional time for payment of the amount of a decree, constitutes an "acknowledgment of liability" within the meaning of that section, and a new period of limitation should be computed from the date of such petition in order to ascertain whether the execution of the decree is barred or not under the provisions of article 179, schedule II of the Limitation Act. *Ramhit Rai* v. *Sutgur Rai, I. L. R., 3 All., 247*; and *Ram Coomar Kur* v. *Jakur Ali, I. L. R., 8 Calc., 716*, followed. TOREE MAHOMED v. MAHOMED MAHBOOB . I. L. R., 9 Calc., 730: 13 C. L. R., 91

89. ——— *Execution of decree.—Acknowledgment in writing.—Part-payment.—Act XV of 1877, s. 20, and sch. II, No. 179.*—A decree

LIMITATION ACT, 1877, s. 19—*continued.*

2. ACKNOWLEDGMENT OF OTHER RIGHTS —*continued.*

for money, dated the 24th June 1878, directed that a certain instalment should be paid on the 22nd July 1878, and a like instalment on the 20th December 1878, and the balance by certain instalments commencing from a certain date, and that, in case of default, the decreeholder might realise the whole amount of the decree. The instalments were not paid at the fixed dates, but part-payments of the amount of the decree were made by the judgment-debtor from time to time out of Court. On the 7th May 1879 he made a part-payment and an endorsement on the decree to the following effect: "I, *G.*, judgment-debtor of this decree, have myself paid Rs.—, and have endorsed this payment on the decree in my own handwriting." On the 5th September 1881 the decree-holder applied for execution of the whole decree. *Held*, by the Court, that the application was governed by the rule contained in section 19 of the Limitation Act, 1877; that the endorsement made by the judgment-debtor on the decree was an acknowledgment of liability under the decree; and that consequently the period of limitation for the application should be computed from the time such endorsement was made, and the application was therefore within time. *Ramhit Rai* v. *Satgur Rai, I. L. R., 3 All., 247*, followed, but with doubt. *Per* MAHMOOD, *J.*—That, following the *ratio decidendi* in *Ramhit Rai* v. *Satgur Rai, I. L. R., 3 All., 247*, the part-payment made and endorsed on the decree by the judgment-debtor fell within the terms of section 20 of the Limitation Act, 1877. *Asmutullah Dalal* v. *Kally Churn Mitter, I. L. R., 7 Calc., 56*, distinguished. Also *per* MAHMOOD, *J.*—That it was doubtful whether in this case the decree-holder was bound to execute the whole decree when the first default occurred, as the terms of the decree appeared to give the decree-holder an option in the matter, and therefore whether the application for execution was barred because it was made more than three years after that date. *Shib Dat* v. *Kalka Prasad, I. L. R., 2 All., 443*, distinguished. JANKI PRASAD *v.* GHULAM ALI . . I. L. R., 5 All., 201

90. ——————— and art. 179.—*Acknowledgment in writing.—Authority to sign acknowledgment.*—On the 7th of December 1877, additional time for payment of the amount of a decree, dated the 24th of March 1876, was granted to the judgment-debtor upon a petition signed by his vakeel. On the 4th of December 1880 a fresh application for execution was made. *Held* that it was not barred under article 179, schedule II of Act XV of 1877, inasmuch as the petition constituted an acknowledgment of liability under section 19 of the same Act, and a new period of limitation began to run from the 7th of December 1877. The object of the words "application in respect of any property or right" in section 19 is to extend to the applications mentioned in schedule II the same privilege as is accorded to suits. *Ramhit Rai* v. *Satgur Rai, I. L. R., 3 All., 247*, approved of. RAM COOMAR KUR *v.* JAKUR ALI [I. L. R., 8 Calc., 716: 10 C. L. R., 613

LIMITATION ACT, 1877, s. 19—*continued.*

2. ACKNOWLEDGMENT OF OTHER RIGHTS —*continued.*

91. ——————— *Execution of decree.—Contract superseding decree.—Adjustment of decree.—Certification.—Civil Procedure Code, s. 258.—Acknowledgment in writing.*—In the course of proceedings in execution of a decree dated the 14th June 1878 the parties, on the 11th January 1881, entered into an agreement, which was registered, and filed in the Court executing the decree. The deed recited that the decree was under execution, and that a mortgage-bond, dated the 1st December 1873, in favour of the judgment-debtor by a third party, had been attached and advertised for sale, and that the decree-holder and judgment-debtor had arranged the following method of satisfying the decree: that the judgment-debtor should make over the said bond to the decree-holder, in order that he might bring a suit thereon at his own expense against the obligor, and realise the amount secured by the bond, and out of the amount realised satisfy the decree under execution, with costs and future interest, together with all costs of the suit to be brought against the obligor, and together with a sum due by the judgment-debtor to the decree-holder under a note of hand for R250 with interest; and other details which need not be stated. On the same day that this deed was executed, the decree-holder filed a petition in the Court, to the effect that under the agreement an arrangement had been made for payment of the judgment-debt, by which the judgment-debtor made over to him the bond advertised for sale, in order that the petitioner should file a suit under it at his own cost against the obligor, and realise the debt due under the decree in execution with interest and costs; and he prayed that the sale to be held that day might be postponed, and the application for execution struck off for the present, and the previous attachment maintained, and stated that, after realisation of the amount entered in the bond advertised for sale, an application for execution would be duly filed. On this the order was that the execution case be struck off the file, and the attachment maintained. On the 24th December 1883, the decree-holder applied for execution of the decree, alleging that the judgment-debtor had failed to make over the bond to him according to the agreement. The judgment-debtor objected that the decree was no longer capable of execution, having been superseded by the agreement of the 11th January 1881, and that the application was barred by limitation, the previous application being dated the 9th November 1880. *Held* that the application was within time, inasmuch as the acknowledgment in the deed of the 11th January 1881 came within the terms of section 19 of the Limitation Act so as to originate a fresh period of limitation in respect of the execution of the decree. *Ghansham* v. *Mukha, I. L. R., 3 All., 320; Janki Prasad* v. *Ghulam Ali, I. L. R., 5 All, 201;* and *Ramhit Rai* v. *Satgur Rai, I. L. R., 3 All., 247*, followed. FATEH MOHAMMAD *v.* GOPAL DAS . . . . . I. L. R., 7 All., 424

——————— s. 20 (1871, s. 21).

1. ——————— *Case under Punjab Code*

LIMITATION ACT, 1877, s. 20—*continued.*

*before Limitation Act, 1859.*—In a case under the Punjab Code before the Limitation Act of 1859 came into operation in Oudh it was held by the Privy Council that payments made by an agent upon account, and continued monthly for several months, ought to be regarded as tantamount at least to, if not correctly described as, a running account, and were therefore part-payments which amounted to "a partial satisfaction of demand," whereby the period of limitation was renewed. MUKKUM LALL *v.* IMTIAZ-OOD-DOWLAH

[5 W. R., P. C., 18: 1 Ind. Jur., N. S., 142
10 Moore's I. A., 362

*See* GOWRA BEBEE *v.* KISSEN MISSER
[1 Ind. Jur., N. S., 224

AND POTITPABUN SEN *v.* CHUNDER CAUNT MOOKERJEE . . . 1 Ind. Jur., N. S., 329

Under the Act of 1859 part-payment was not an admission of a debt though evidenced by writing. MUHAMAD JANULA *v.* VENKATANAYAR
[2 Mad., 79

ICVARA DAS *v.* RICHARDSON . . 2 Mad., 84

KRISTNA ROW *v.* HACHAPA SUGAPA
[2 Mad., 307

MADHO SINGH *v.* THAKOOR PERSHAD
[5 N. W., 35

2. ——————— *Prescribed period.*—Two of the sons out of a joint Mitakshara family, consisting of a father and three sons and the widow and sons of a deceased son, and carrying on business in partnership, sued to recover money due on a hath-chitta dated 11th December 1876: the last payment made and entered by the defendant being on the 20th July 1877: no time was fixed for payment of the money, so that it became payable on the date of the hath-chitta. The suit was instituted on the 19th July 1880 and came on for hearing on the 26th of July, when an objection was taken that all the parties who ought to sue were not on the record. On the application of the original plaintiffs, the names of the father and the third son were then added, and the plaintiffs were described as surviving partners of the deceased son. At the time the additional plaintiffs were made parties the suit was as regards them barred by limitation. *Held* that the suit, if all the plaintiffs had originally joined in suing, would not have been barred by section 20 of Act XV of 1877. The words "prescribed period" in that section mean, not the period prescribed for the payment of the debt, but the prescribed period of limitation. RAMSEBUK *v.* RAMLAL KOONDOO . . . I. L. R., 6 Calc., 815
[8 C. L. R., 457

IN THE MATTER OF MONGOLA KOIBORTO *v.* ANNODA RAM . . 12 C. L. R., 277

*See* LUVAR CHUNILAL ICHHARAM *v.* LUVAR TRIBHOVAN LALDAS . I. L. R., 5 Bom., 688

3. ——————— *Payment of interest.*—Section 21 of Act IX of 1871 has no application where the payments of interest admitted were made after the expiration of the period prescribed for the repayment of the loan. TARINEY CHURN NUNDY *v.* ABDUR ROHOMAN . . . 2 C. L. R., 346

LIMITATION ACT, 1877, s. 20—*continued.*

4. ——————— *Payment of interest.*—*Payment made before Act came into operation.*—The exception of payment of interest contained in section 21, Act IX of 1871, is not confined to payments made after that Act came into force, but applies also to payments made before that date. TEAGARAYA MUDALI *v.* MARIYAPPA PILLAI
[I. L. R., 1 Mad., 264

5. ——————— *Bond.*—*Payment of interest.*—*Adjustment of accounts.*—Suit to recover the principal sum and one year's interest due on a bond dated the 11th March 1866. By the terms of the bond the rent of certain land was assigned to the lender as security for interest. No date was specified in the bond for the payment of the principal sum. The interest was regularly paid up to October 1871, and the present suit was brought in June 1874. —*Held*, on special appeal, by HOLLOWAY, *J.*, that, assuming that the period of limitation was three years, and that it had run out both before action brought and before Act IX of 1871 came into operation, section 21 of that Act operated to save the action: that at the period of that law coming into force there was still a contractual right existing, and that the right of action was restored by the payment of interest. *Vencatachella Mudali* v. *Seshagherri Rau, 7 Mad., 283;* and *Mokatalla Naganna* v. *Pedda Narappa, 7 Mad., 288*, distinguished. *Held*, by MORGAN, *C. J.*, that no question of limitation arose. That the lender having been constituted by the bond a trustee and receiver of the rents and profits of land, it was only on an adjustment of his accounts that the principal became payable. VALIA TAMBURATTI *v.* VIRA RAYAN . . I. L. R., 1 Mad., 228

6. ——————— *Payment of interest.*—*Contract in writing.*—The defendant at different times made payments to the plaintiff, who was his creditor, in reduction of the general balance of account against him, but without intimating that any of such payments was to be appropriated in satisfaction of the interest due on his debt. *Held* that there had been no payment of interest, "as such," by the defendant so as to bring the case within clause 1 of section 21 of the Limitation Act (No. IX) of 1871, and that the plaintiff's claim was barred. HANMANTLAL MOTICHAND *v.* RAMBABAI . I. L. R., 3 Bom., 198

7. ——————— *Receipt of rent.*—*Payment of interest.*—*Mortgage.*—In 1858 land was mortgaged to the plaintiff with possession for a term of five years, and in 1861 the defendant, the mortgagor, took a lease of the land from the plaintiff, under which he paid rent until 1870-71. The mortgage-debt was repayable on the expiry of the term. Plaintiff brought the suit out of which this appeal arose to recover the debt from the mortgagor. It was pleaded that the suit was barred by limitation, to which plaintiff replied that the receipt of rent was in fact a payment of interest, and that from the last payment of interest a new period of limitation arose. *Held*, that the case being governed by the provisions of Act IX of 1871, the payment of rent under an agreement entirely independent of the original mort-

LIMITATION ACT, 1877, s. 20—*continued.*

gage could not be regarded as a payment of interest. UMMER KUTTI *v.* ABDUL KADAR [I. L. R., 2 Mad., 165

8. ——————— *Mortgage.—Suit for arrears of rent.*—Where a kanom was granted in 1858 for five years to secure repayment of a loan, and a lease made in 1861 to the grantor of the kanom by the kanom-holder and rent paid under the lease until 1871,—*Held* that a suit brought in 1877 to recover the kanom amount and arrears of rent for seven years was barred by limitation except as to three years' arrears of rent. PALLIAGATHA UMMER KUTTI *v.* ABDUL KADAR . I. L. R., 3 Mad., 57

9. ——————— *Entry of account stated by debtor in creditor's books.—Implied contract.*—An entry of an account stated, made by a debtor in his creditor's books, is not a contract in writing within the meaning of Act IX of 1871, section 21. AMRITLAL MANSUK *v.* MANIKLAL JETHA . 10 Bom., 375

This case was followed in HANMANTMAL MOTICHAND *v.* RAMBABAI . I. L. R., 3 Bom., 198

where it was held that, consequently, the payments made by the defendant on account were not such payments of the principal of the debt due by him as would bar the operation of the Act.

*See* RAMCHODDAS NATHUBHAI *v.* JEYCHAND KHUSAL CHAND . I. L. R., 8 Bom., 405

10. ——————— *Payments towards adjusted account.*—Where, subsequently to the adjustment of his account with the plaintiffs, the defendant had been credited with amounts of surplus proceeds of goods and of a hundi, held, that such amounts were not payments within the meaning of section 20 of the Limitation Act. NARRONJI BHIMJI *v.* MUGNIRUM CHANDAJI . . I. L. R., 6 Bom., 103

11. ——————— *Sum realised by execution sale.—Part-payment.*—A sum realised by an execution sale cannot be considered a part-payment under section 21, Act IX of 1871 so as to give a new period of limitation. RUGHOONATH DOSS *v.* SHIROMONEE PAT MOHADEBEE . . . 24 W. R., 20

BEMUL DOSS *v.* IKBAL NARAIN . 25 W. R., 249

RAMCHANDRA GANESH *v.* DEVBA [I. L. R., 6 Bom., 626

12. ——————— *Part-payment of principal of bond.—Endorsement, Facts which must appear in.*—To satisfy the conditions of section 20 of the Limitation Act, the endorsement in the handwriting of the person making a part-payment of the principal of a bond need not show the appropriation of the payment to principal but only the fact of the payment. JADA ANKAMMA *v.* NADIMPALLE RAMA [I. L. R., 6 Mad., 281

13. ——————— *Part-payment of principal.—Endorsement.—Handwriting of payer.—Marksman.*—In section 20 of the Limitation Act, 1877, the condition that the fact of payment in the case of part-payment of the principal of a debt must appear in the handwriting of the person making the same is satisfied if the payer signs or affixes his mark beneath an endorsement not written by him. MADABHUSHI SESHACHARLU *v.* SINGARA SESHAYA [I. L. R., 7 Mad., 55

14. ——————— *Part-payment of principal.—Endorsement.—Handwriting of payer.—Marksman.*—The mark of the payer subscribed to an endorsement not in the handwriting of the payer will satisfy the proviso to section 20 of the Limitation Act, 1877, which requires that the fact of the payment of part of the principal of a debt made by the debtor or his agent duly authorised in that behalf shall appear in the handwriting of the person making the payment, in order that a new period of limitation may run from the date of such payment. ELLAPA NAYAK *v.* ANUMATI GOUNDAN [I. L. R., 7 Mad., 76

15. ——————— *Part-payment of principal of debt.—Endorsement of cheque by debtor.*—Where the only evidence in the handwriting of the debtor of the part-payment of the principal of a debt was the endorsement of a cheque to the creditor,—*Held* that such endorsement did not satisfy the conditions of section 20 of the Limitation Act so as to give rise to a new period of limitation from the date of such endorsement. MACKENZIE *v.* THIRUVENGADATHAN . . . . I. L. R., 9 Mad., 271

16. ——————— *Unregistered mortgage.—Receipt of produce in lieu of interest.*—Receipt of the produce of land held under a deed of mortgage required to be, but not registered, cannot be deemed to be a payment for the purpose of section 20 of the Limitation Act, 1877. PICHANDI *v.* KANDASAMI [I. L. R., 7 Mad., 539

——————s. 21 (1871, s. 20, expl. 2; 1859, s. 4).

1. ——————— *Acknowledgment by partner.*—An acknowledgment by one partner sufficient to save limitation will not bind another partner who has not subscribed such acknowledgment. BENARSEE DASS *v.* KHOOSHAL CHUND. KHOOSHAL CHUND *v.* PALMER . . . . 2 Agra, Pt. II, 170

2. ——————— *Partnership accounts.*—Section 20, Act IX of 1871, does not apply to partnership accounts. KHOODEE RAM DUTT *v.* KISHEN CHAND GOLEECHA . . . 25 W. R., 145

3. ——————— *Acknowledgment given by one partner when binding on the firm.—Partnership.—Practice.—Parties.—Same person both plaintiff and defendant.*—The plaintiff, as heir of his mother, sued a firm, in which he was himself a partner, to recover the amount of certain loans which he alleged that his mother in her lifetime had made to the said firm. The plaintiff was made a defendant in the suit along with the other partners. The alleged loans were made on the 2nd November 1881 and the 12th October 1882. The present suit was not filed until December 1885. The plaintiff, however, relied on an acknowledgment signed in his mother's account book by himself as partner in the firm on the 1st November 1883. The first defendant did not appear, or put

**LIMITATION ACT, 1877, s. 21**—*continued.*

in any defence. The second defendant pleaded limitation, and alleged that on the 2nd November 1880, prior to the date of the alleged loans, he had retired from the firm, and, therefore, was not liable. From the evidence given at the hearing it appeared that the business stopped, so far as buying and selling and fresh trading were concerned, at the end of the year 1881, and that subsequently to that date the partners were occupied solely in winding up the affairs of the firm. *Held* that, under the circumstances, the acknowledgment given by the plaintiff did not bind the other partners, and that the claim against them was barred. If, at the time the acknowledgment was given, the firm had been a going concern, the plaintiff's authority to make such an acknowledgment on behalf of the firm might have been presumed; but in this case the business had been closed, and the partnership entirely dissolved. The presumption, therefore, which arises in active partnership, no longer existed, and there was no evidence that the plaintiff had been expressly authorised to act for the other partners in making the acknowledgment. The meaning of the word "only" in section 21 of the Limitation Act XV of 1877 is that it must also be shown that the partner signing the acknowledgment had authority, express or implied, to do so. In a going mercantile concern such agency is to be presumed as an ordinary rule. PREMJI LUDHA *v.* DOSSA DOONGERSEY . . . **I. L. R., 10 Bom., 358**

——— **s. 22 (1871, s. 22).**

*See* FALSE IMPRISONMENT.

**[I. L. R., 9 Bom., 1**

1. ——— *Party added under s. 73, Civil Procedure Code, 1859.*—When a party was substituted or added as a defendant, under section 73 of Act VIII of 1859, the suit was held to be commenced against him at that time, and not before; therefore, where *A.* sued *B.*, as representative of *C.* for land, and more than twelve years after the cause of action accrued found that *B.* was not in possession, but *D.*, and by order of Court *D.* was substituted as defendant,—*Held* the claim against *D.* was barred. RAJ KISHOREE DOSSEE *v.* BUDDEN CHUNDER SHAW **[2 Ind. Jur., N. S., 49: 6 W. R., 298**

NUNDO GOPAL ROY *v.* JANKEERAM CHUCKERBUTTY **[W. R., 1864, 316**

ESHAN CHUNDER BANERJEE *v.* KRISTO GUTTY NAG . . . . . **14 W. R., 377**

2. ——— *Act XIV of 1859.—Parties added after expiration of period of limitation.*—A suit was held not to be barred by the Limitation Act, 1859, as against parties added after the expiration of the period allowed by law, provided the plaint be filed against the original parties prior to the expiration of such period. ISSUREPERSAUD *v.* URJOONLOLL **[2 Hyde, 248**

KALEE KISHORE CHATTERJEE *v.* LUCKHEE DEBIA CHOWDHRANI . . . **6 W. R., 172**

3. ——— *Act XIV of 1859.—Suit by widow on behalf of minor son.—Son afterwards*

**LIMITATION ACT, 1877, s. 22**—*continued.*

*joined as plaintiff.*—In 1864 a Hindu widow, having a minor son, sued, in her own name and on her own behalf, to recover certain immoveable property. The action was brought on a lease which expired in 1854. The defendant denied the lease, and contended that the suit should be dismissed, as it could not be maintained by the widow in her own name. In 1871, the son, who had in the meantime attained his majority in 1865, was made a co-plaintiff on his own application. *Held* that the suit was barred, inasmuch as it must, if maintainable, be deemed to have been instituted in 1871, when the son was made a co-plaintiff, the plaint previously to that time having been in the widow's own name and expressly on her own behalf. *Held*, also, that making the son a co-plaintiff in 1871 could not change the character of the suit as it had existed previous to that date so as to defeat the law of limitation. Held (by PINHEY, *J.*) that the minor was wrongly made a plaintiff in 1871. *Dhurm Dass Pandey* v. *Sham Soondri Debiah, 6 W. R., P. C., 44,* distinguished. GOPAL KASHI *v.* RAMA BAI SAHEB PATVAR . . . . . **12 Bom., 17**

4. ——— *Act IX of 1871, s. 1 & s. 22.—"Commenced," "Instituted."—Added defendants.—Suit for contribution or partnership account.—Cause of action.—Quære,*—Whether the word "commenced" in section 22 of Act IX of 1871 is equivalent to the word "instituted" in section 1, and whether section 1 does not exclude from the operation of the Act all suits instituted before 1st April 1873 even as to defendants added after that date. Supposing the provisions of section 22 of Act IX of 1871 to apply to defendants added by amendment subsequently to 1st April 1873, in a suit instituted before that date, such added defendants will, under the terms of that section, and if that section does not apply, then under a general principle of law, be allowed to reckon the period of limitation on which they rely from the date at which they were added, but the periods of limitation provided by Act IX of 1871 do not necessarily apply to defendants so added. The plaintiff and three of the defendants, being four members of a partnership, consisting of seven persons, borrowed, in January and February 1865, on account of the partnership, from the Commercial, Finance, and Stock Exchange Corporation, two sums of R1,21,614 and R1,08,000, for which they gave their joint and several promissory notes, and shortly afterwards two of the partners retired, leaving the plaintiff and the four defendants alone constituting the firm. On 27th September 1865, the plaintiff and first defendant were sentenced to transportation for life, and on 15th April 1867 one of the other defendants became insolvent. On 25th April 1867, the liquidators of the Commercial, Finance, and Stock Exchange Corporation obtained a decree against the plaintiff and the three defendants who had joined in the making of the promissory notes for the amount due on their joint and several promissory notes and costs. In March 1868, the immoveable and moveable property of the plaintiff and the moveable property of the first defendant were sold in execution, and the whole of the proceeds of the plaintiff's immoveable property, together with the balance of the proceeds of the moveable properties

**LIMITATION ACT, 1877, s. 22**—*continued.*

of the plaintiff and first defendant, after satisfying thereout two prior decrees against them, were applied in part satisfaction of the decree of 25th April 1867, and the moneys so recovered were distributed to the shareholders by the liquidators, who, however, retained in their hands such portion as would have been payable in respect of the shares held by the judgment-debtors, and thus the whole decree was satisfied, leaving a balance of R25,212. The distribution of assets was made on 3rd April 1869, and the final dividend to shareholders other than the judgment-debtors paid on 3rd August 1869. The two defendants other than the first and the insolvent took the benefit of Act XXVIII of 1865, and obtained their discharge in April and December 1869. The plaintiff, therefore, sued the first defendant alone on 18th March 1873 as contributory for the satisfaction of the joint decree, but subsequently, by amendment made on the 6th February 1874, added the other defendants, and prayed for a decree that he was entitled to receive and appropriate the balance of R25,212, and that the first defendant should pay to the plaintiff the balance of the moneys paid by him in excess of his share in satisfying the decree of 25th April 1867, with interest, after deducting three fourths of the sum of R25,212, on that, if necessary, the partnership accounts might be taken, and the plaintiff be paid such sums as might be found to be due to him. *Held: 1st*—That the period of limitation as to all the defendants was that provided by Act XIV of 1859, whether the suit was to be treated as one for a partnership account, or one for contribution of an ascertained sum. *2nd*—That as to the first defendant the period of limitation was to be reckoned back from 18th March 1873. *3rd.*—That as to the added defendants the period of limitation was to be reckoned back from 6th February 1874. *4th*—That the plaintiff's cause of action arose in April 1868, when his property was sold and applied in satisfaction of the joint decree of 25th April 1867, and not on the date of the decree itself. DAYAL JAIRAJ *v.* KHATAV LADHA . . **12 Bom., 97**

5. ——— *Substitution of heirs of decree-holder.*—In a suit to set aside the sale of certain lands which had been attached and sold by a decree-holder as the property of his debtor, plaintiff brought his action against the decree-holder and a party whom he supposed to be the auction-purchaser. Subsequently, finding that his supposition had been erroneous, he applied to have the real purchaser made a party, and the heirs of the decree-holder (who had died) substituted as defendants. *Held* that the suit against the heirs was not barred by lapse of time, as it was originally brought within the period of limitation against the decree-holder, of whose death the plaintiff first learnt the news from the return made to the summons. SREE KISHEN CHOWDHRY *v.* RAM KISTO BHUTTACHARJEE . . **10 W. R., 317**

6. ——— and art. 60.—*Adding party as defendant.*—On 2nd August 1872, *A. K.* filed a plaint against *M. H.* and *M. R.* in which he alleged that on 1st April 1870 *M. R.* had given a hundi for R500, for value received, to *A. K.*; that on 27th March 1871 *M. H.* purchased this hundi

**LIMITATION ACT, 1877, s. 22 and art. 60**—*continued.*

from *A. K.*, promising to pay him R534 for it; that *M. H.* gave the hundi to his brother *I. H.* for the purpose of obtaining payment of the amount from *M. R.*; and that *I. H.* subsequently informed *A. K.* that the hundi had been lost. *A. K.* accordingly prayed that the defendants *M. H.* and *M. R.* might be decreed to pay him R534 with profit and interest. *M. H.* denied that he had purchased the hundi from *A. K.*, who, he alleged, had given the hundi to *I. H.* for the purpose of getting it cashed. *M. R.* admitted that he had executed the hundi, and had given it to *A. K.* for R500. He further alleged that it had been presented to him for payment by *I. H.*, to whom he had paid the amount with interest on 31st March 1871, and he produced the hundi with a receipt, purporting to be by *I. H.* indorsed on it. The trying Judge, after settlement of the issues, on 25th June 1874, added *I. H* as a party defendant. *I. H.* alleged that *A. K.* had given him the hundi for the purpose of getting it cashed, denied the payment by *M. R.*, alleged the indorsement on the hundi to be a forgery, and pleaded limitation. *Held*, with reference to section 22 of Act IX of 1871, that the law of limitation applicable to the suit, so far as *I. H.* was concerned, was schedule II, article 60 of that Act, and that, therefore, if the payment by *M. R.* to *I. H.* were not proved to have been made within three years before 25th June 1874, the day on which *I. H.* was added as a defendant, the suit as against him was barred. *Dayal Jairaj* v. *Khatav Ladha, 12 Bom., 97*; and *Chinnasami Iyengar* v. *Gopalacharry 7 Mad., 392* dissented from. ABDUL KARIM *v.* MANJI HANSRAJ **[I. L. R., 1 Bom., 295**

But *see* ISSUREPERSAUD *v.* URJOON LALL **[2 Hyde, 248**

7. ——— *Adding plaintiffs whose suit is barred.*—Where the original plaintiffs could only enforce their claim in conjunction with the added plaintiffs, and the added plaintiffs were barred by section 22 of Act XV of 1877,—*Held* that the claim of the original plaintiffs was also barred. *Boydonath Bag* v. *Grish Chunder Roy, I. L. R., 3 Calc., 26*, dissented from. RAMSEBUK *v.* RAM LALL KOONDOO . **I. L. R., 6 Calc., 815 : 8 C. L. R., 457**

8. ——— *Joint purchase.* — *Suit against one of the purchasers.—Addition of other purchaser as defendant.—Effect of suit as regards the latter being barred by limitation.*—*P.*, on the 12th April 1880, instituted a suit against *Z.* claiming to enforce a right of pre-emption in respect of the sale of a share of an undivided estate to the latter and his minor brother *A.* jointly, under an instrument dated the 12th April 1879. On the 3rd May 1880, *A.* was made a defendant to such suit. *Z.* being appointed guardian for the suit for him. *Held* that, inasmuch as such suit, as regards *A.*, was beyond time, and as the only relief which could be granted therein to *P.* was the invalidation of the joint sale to *Z.* and *A.*, such suit, even admitting it was within time as regards *Z.* was not maintainable. HABIB-ULLAH *v.* ACHAIBAR PANDEY . **I. L. R., 4 All., 145**

9. ——— *Adding defendant after suit barred.*—A suit for property in the possession

**LIMITATION ACT, 1877, s. 22**—*continued.*

of several persons was brought by the plaintiff against one of those persons only. After the institution of the suit, and after the period of limitation prescribed for a separate suit on the same cause of action against the other persons in possession had elapsed, these latter were added as defendants. *Held* that the suit must be dismissed as against the added defendants, on the ground that it was barred by limitation. OBHOY CHURN NUNDI *v.* KRITARTHAMOYI DOSSEE . **I. L. R., 7 Calc., 284**

**10.** ——————— *Joinder of persons as plaintiffs after period of limitation for suit has expired.—Frame of suit.—Parties.*—*A.*, who with his three brothers composed a joint Hindu family, brought a suit in his own sole name to recover a joint debt. When the objection was taken to the form of the suit on the ground of the non-joinder of *A.'s* three brothers, it was too late to add them as co-plaintiffs, by reason of section 22 of the Limitation Act, XV of 1877,—a suit on the debt being by that time time-barred. The three brothers at the hearing expressed their willingness that *A.* should sue alone. *Held* that such assent did not obviate the necessity of joining all the proper parties as co-plaintiffs, and that the suit, therefore, as framed, would not lie. *Held*, further, that *A.* would have been in no better position had he joined his three brothers as co-plaintiffs after the suit was, as regards them, time-barred; since such a suit would have been virtually a suit by himself alone, and therefore bad. *Boydonath Bag* v. *Grish Chunder Roy, I. L. R., 3 Calc., 26*, disapproved of. KALIDAS KEVAL DAS *v.* NATHU BHAGVAN **[I. L. R., 7 Bom., 217**

**11.** ——————— *Addition of parties on appeal.—Civil Procedure Code, 1877, ss. 32, 582.*—*S.* sued *N.* and *R.* jointly and severally for certain moneys. The Court of first instance gave *S.* a decree for such moneys against *N.* and dismissed the suit against *R.* *N.* appealed from the decree of the Court of first instance, but *S.* did not appeal from it. The Appellate Court, at the first hearing of *N.'s* appeal, made *R.* a respondent, the period allowed by law for *S.* to have preferred an appeal having then expired, and eventually reversed the decree of the Court of first instance, dismissing the suit as against *N.* and giving *S.* a decree against *R.* *Held* that, although the Appellate Court was competent to make *R.* a party to the appeal, under sections 32 and 582 of Act X of 1877, yet it was not competent, with reference to section 22 of Act XV of 1877, to give *S.* a decree against *R.*, the former not having appealed from the decree of the Court of first instance within the time allowed by law. RANJIT SINGH *v.* SHEO PRASAD RAM . . . . **I. L. R., 2 All., 487**

**12.** ——————— *Assignee of right of suit.—Leave to carry on suit.*—Section 22 of Act XV of 1877 does not apply to a case in which the persons to whom a right of suit is assigned after the institution of the suit, obtain leave to carry on the suit. SUPUT SINGH *v.* IMRIT TEWARI **[I. L. R., 5 Calc., 720: 6 C. L. R., 62**

**13.** ——————— *Names of partners inserted as defendants instead of name of company.*—In a suit against the Elgin Mills Company for recovery of the price of wood supplied up to 11th November 1879, the suit was instituted on 10th October 1882. In January 1883, the partners of the Elgin Mills Company were on their own application brought on the record as defendants. *Held* that section 22 of the Limitation Act refers to cases where a new defendant is substituted or added, and that when the partners of the Elgin Mills Company were brought on the record as defendants in January 1883, there was no institution or addition of new defendants, the defendants having been comprised in the designation of Elgin Mills Company, and at most what was done was to correct a misdescription. PRAGI LAL *v.* MAXWELL . . . . **I. L. R., 7 All., 284**

**14.** ——————— *Municipalities Act, N.-W. P. and Oudh, s. 43.—Suit against Secretary to Municipal Committee.—Substitution of President as defendant.*—Where, after a notice required by section 43 of Act XV of 1873, had been left at the office of a Municipal Committee, such Committee were sued within three months of the accrual of the plaintiff's cause of action in the name of their Secretary, instead of the name of their President, as required by section 40 of Act XV of 1873, and the plaintiff applied to the Court more than three months after the accrual of his cause of action to substitute the name of the President for that of the Secretary,—*Held* that, by reason of such substitution, such suit could not be deemed to have been instituted against such Committee when such substitution was made, section 22 of Act XV of 1877 applying to the case of a person personally made a party to a suit and not to the case of a Committee sued in the name of their officer, and that such substitution when applied for should have been made. MANNI KASAUNDHAN *v.* CROOKE . . . . **I. L. R., 2 All., 296**

——————— **s. 23 (1871, s. 23).**

*See* ART. 144—INTEREST IN IMMOVEABLE PROPERTY . . . **7 N. W., 53**

*See* PRESCRIPTION—EASEMENTS—RIGHTS OF WATER . **I. L. R., 6 Bom., 20**

**1.** ——————— *Consent decree for payment by instalments.*—A consent decree for payment by instalments is governed by section 23, Act IX, and, on default in the payment of one instalment, the whole amount becomes due. RUGHOO NATH DASS *v.* SHIROMONEE PAT MOHADEBEE . **24 W. R., 20**

**2.** ——————— *Breach of contract.—"Continuing breach."—Act IX of 1871 (Limitation Act), s. 23.*—The purchasers of certain land agreed to pay the vendors certain fees annually in respect of such land, and that in default of payment the vendors should be entitled to the proprietary possession of a certain quantity of such land. The purchasers never paid such fees, and more than twelve years after the first default the vendors sued them for possession of such quantity of such land. *Held* that there had not been a "continuing breach of contract," within the meaning of section 23 of Act XV of 1877, and therefore the provisions of that section

**LIMITATION ACT, 1877, s. 23**—*continued.*

were not applicable to the suit. BHOJRAJ *v.* GULSHAN ALI . . . . I. L. R., 4 All., 493

3. ——————— *Breach of covenant for title.—Continuing breach.—Covenants for quiet possession and further assurance.—S. L.*, by a deed of gift of 16th February 1847, granted and assured to *S.*, his daughter, certain immoveable property. By a subsequent unregistered deed of gift of 15th July 1865, *S. L.* purported, in consideration of natural love and affection, to grant and convey the same property, the value of which exceeded R100, to *B. R.*, the husband of *S.*, his heirs, executors, administrators, and assigns. The last-mentioned deed contained covenants on the part of *S. L.*, his heirs, executors, and administrators, with *B. R.*, his heirs, executors, administrators, and assigns, for title to "the hereditaments and premises hereinbefore expressed to be hereby granted and assured unto and to the use of the said *B. R.*, his heirs, executors, administrators, and assigns." *S.* died in the lifetime of *B. R.*, who in 1867 mortgaged the premises comprised in the deed of 15th July 1865, and died in 1868. In 1870 the mortgagee sold the premises by auction, under the power of sale contained in the mortgage-deed; the plaintiff became the purchaser; and the mortgagee, on 24th March 1871, executed to him a conveyance of the premises, which were then in the possession of the surviving members of the family of *B. R.* and *S.* The plaintiff having failed in a suit in ejectment against the parties in possession, who relied on the prior gift to *S.*, sued the representatives of *S. L.* for damages for breach of the covenants for title contained in the unregistered deed of 15th July 1865. *Held* that the breach of the grantor's covenant, so far as related to his present right to convey, took place on the day the conveyance to the covenantee was executed, *viz.*, 15th July 1865, and, consequently, a suit in respect of such breach was barred; but the covenant for quiet possession, admitting of a continuing breach, was not barred so long as the breach continued, and that of the covenant for further assurance there had been no breach at all, as such covenant would be broken only by refusal on the part of the covenantor or his representatives to execute a further assurance when required so to do by the covenantee or his representatives. RAJU BALU *v.* KRISHNARAV RAMCHANDRA

[I. L. R., 2 Bom., 273

——— s. 25 (1871, s. 26).

1. ——————— *Computation of time.—English calendar.*—In calculating time for the purpose of applying the law of limitation, the computation must be made according to the English calendar. In a suit brought on the 5th Assar 1273 (3rd July 1866), for recovery of a sum of money for goods sold and delivered, the debt for which the defendant acknowledged by a writing dated 8th Assar 1270 (9th June 1863),—*Held* that the suit was barred by lapse of time. JAY MANGAL SING *v.* LAL RUNG PAL SING . . . . . 4 B. L. R., Ap., 53

S. C. JOY MUNGAL SINGH *v.* LALL RUNG PAL SING . . . . . 13 W. R., 183

**LIMITATION ACT, 1877, s. 25**—*continued.*

2. ——————— *Bond.—Limitation Act, 1877, art. 66.—Gregorian calendar.*—Where a bond, by its terms, stated that money advanced should be repaid on the 30th Pous 1283 B.S., and it so happened that, in the year 1283, the month of Pous consisted only of twenty-nine days (the 29th Pous answering to the 12th January 1877)—*Held* that a suit brought on the 13th January 1880 was in time. ALMAS BANBE *v.* MAHOMED RUJA

[I. L. R., 6 Calc., 239 : 6 C. L. R., 553

3. ——————— *Native date.—Gregorian calendar.*—Where a bond bears a native date only, and is made payable after a certain time, that time, whether denoted by the month or the year, is to be computed according to the Gregorian (British) calendar: section 25 of Act XV of 1877. NILKANTH *v.* DATTATRAYA . . . I. L. R., 4 Bom., 103

4. ——————— *Native date.—Month.*—The plaintiff sued on a note, bearing a native date, Ashad Vadya 13th, Shake 1799 (7th August 1877), and containing a stipulation for payment of the money to this effect "In the month of Kartik, Shake 1799, —that is to say, in four months,—we shall pay in full the principal and interest." The plaint was filed on the 6th December 1880 in the Court of Small Causes at Poona. The Judge was of opinion that the claim was barred. On his referring the case to the High Court for its decision,—*Held* that the period of four months was, for the purpose of ascertaining whether the suit was barred by lapse of time, to be calculated according to the Gregorian calendar, under section 25 of the Limitation Act, XV of 1877, and that the claim was not barred. RUNGO BUJAJI *v.* BABAJI . . . . I. L. R., 6 Bom., 83

——— s. 26 (1871, s. 27).

*See* PRESCRIPTION—EASEMENTS—LIGHT AND AIR . . 15 B. L. R., 361

*See* PRESCRIPTION—EASEMENTS—RIGHT OF WAY . I. L. R., 1 Calc., 422
[I. L. R., 8 Calc., 956

*See* PRESCRIPTION—EASEMENTS—RIGHTS OF WATER . I. L. R., 5 Mad., 226
[I. L. R., 6 Bom., 20
I. L. R., 6 Calc., 394

*See* RIGHT OF WAY.
[23 W. R., 290, 401
I. L. R., 10 Calc., 214

1. ——————— *Enjoyment "as of right."—User in assertion of right.*—The enjoyment described in Act IX of 1871, section 27, by the words "as of right" does not mean user without trespass, but it means user in the assertion of a right. ALIMOODDEEN *v.* WUZEER ALI . . . 23 W. R., 52

2. ——————— *Easement.—Presumption of a grant.*—In a suit to establish an easement when limitation is pleaded, the proper issues to frame under section 26 of Act XV of 1877 are: (1) whether the easement in question was peaceably, openly, and as of right enjoyed by the plaintiff, or those through whom he claims, within two years of the institution

**LIMITATION ACT, 1877, s. 26**—*continued.*

of the suit; and (2) in the event of the above issue being found in the negative, whether there is evidence of enjoyment on the part of the plaintiff, or those through whom he claims, of such a character and duration as to justify the presumption of a grant or other legal origin of the plaintiff's right independent of the provisions of Act XV of 1877, section 26. ACHUL MAHTA *v.* RAJUN MAHTA

[I. L. R., 6 Calc., 812

3. ——————— *Right of way.—Easement.—User as of right.—Prescriptive right.*—For the purpose of acquiring a right of way or other easement under section 26 of the Limitation Act, it is not necessary that the enjoyment of the easement should be known to the servient owner. In this respect there is a difference between the acquisition of such rights under that Act and their acquisition under the English Prescription Act. ARZAN *v.* RAKHAL CHUNDER ROY CHOWDHRY . . . I. L. R., 10 Calc., 214

4. ——————— *Easement.—Light and air.—Apertures.—Enjoyment as of right.*—The enjoyment by the plaintiff of light and air through apertures in the wall of his house, when it is open and manifest, not furtive or invisible, and when it is not had in such wise as to involve the admission of any obstructive right in the owner of the servient tenement, is an enjoyment "as of right" within the meaning of section 26 of Act XV of 1877. The phrase does not imply a right obtained by grant from the owner of the servient tenement. MATHURADAS NANDVALABH *v.* BAI AMTHI

[I. L. R., 7 Bom., 522

5. ——————— *Prescription.—Easement.—Accrual of cause of action.*—At any time within twenty years, should injury accrue from the recurring use of an easement to the owner of the servient tenement, a new cause of action arises to the owner of the servient tenement, which he may put in suit within twelve years from its accrual. JOGAL KISHORE *v.* MULCHAND . . . . 7 N. W., 293

6. ——————— *Suit for easement based on continuous user.*—A suit to establish a claim to an easement, based upon a continuous user for twenty years, must, with reference to section 27, be brought within two years from the end of such period. LUCHMEE PERSHAD NARAIN SINGH *v.* TILUCKDHAREE SINGH . . . 24 W. R., 295

7. ——————— *Easement.—Prescription.—User.—Fishery, Right to.—Limitation Act, 1877, s. 3.*—The word "easement," as used in the Limitation Act, 1877, has, by force of the interpretation clause (section 3), a very much more extensive meaning than the word bears in the English law, for it includes any right not arising from contract by which one person is entitled to remove and appropriate for his own profit any part of the soil belonging to another, or anything growing, or attached to, or subsisting upon the land of another. An easement, therefore, under the Indian law, embraces what in English law is called a *profit à prendre*,—that is to say, a right to enjoy a profit out of the land of another. A prescriptive right of fishery is an "easement" as defined by section 3 of the Act, and may be claimed by any one who can prove a "user" of it,—that is to say, that he has of right claimed and enjoyed it without interruption for a period of twenty years, although he does not allege, and cannot prove, that he is, or was, in the possession, enjoyment, or occupation of any dominant tenement. CHUNDEE CHURN ROY *v.* SHIB CHUNDER MUNDUL

[I. L. R., 5 Calc., 945 : 6 C. L. R., 269

8. ——————— *Jalkar.—Easement.*—A jalkar is not an easement within the meaning of section 27 of Act IX of 1871, but is an interest in immoveable property within the meaning of schedule II, article 145 of that Act. PARBUTTY NATH ROY CHOWDHRY *v.* MUDHO PAROE

[I. L. R., 3 Calc., 276 : 1 C. L. R., 592

9 ——————— *Dispossession.—Fishery.—Custom.—Suit to restrain fishing in certain bhils.*—In a suit to restrain the defendants from fishing in certain bhils, which admittedly belonged to the plaintiff's zemindari, it appeared that the plaintiff had let out some of the bhils to ijaradars who had sued the defendants for the price of fish taken by them from the bhils, and that the suit had been dismissed, on the ground that the defendants, in common with other inhabitants of the villages in the zemindari, had acquired a prescriptive right to fish in the bhils. The defendants contended that they had been in possession of the bhils for more than twelve years, and that they had a prescriptive right to fish therein, under a custom according to which all the inhabitants of the zemindari had the right of fishing. *Held* that the mere fact that the defendants had trespassed and had misappropriated fish did not amount to a dispossession of the plaintiff, and that the suit was not barred by limitation. *Parbutty Nath Roy Chowdhry* v. *Mudho Paroe, I. L. R., 3 Calc., 276,* distinguished. *Held,* also, that no prescriptive right of fishery had been acquired under section 26 of the Limitation Act, and that the custom alleged could not, on the ground that it was unreasonable, be treated as valid. *Lord Rivers* v. *Adams, L. R., 3 Ex. D., 361,* followed. LUTCHMEEPUT SINGH *v.* SADAULLA NUSHYO

[I. L. R., 9 Calc., 698 : 12 C. L. R., 382

10. ——————— *Easement.—Right of way.—Prescription.—Effect of illustrations.*—On the 6th of April 1878, the plaintiffs sued for obstructing a right of way for boats in the rainy season. The defendants admitted the obstruction, but denied the right of way. The plaintiffs proved that the right was peaceably and openly enjoyed, and actually used by them, claiming title thereto as an easement and as of right, without interruption, from before 1855 down to November 1875, since when no actual user of the way by the plaintiffs had taken place. The lower Appellate Court dismissed the suit, on the ground that the plaintiffs had made no actual use of the way within two years previous to the institution of the suit. *Held,* reversing the decision of the Court below, that, notwithstanding Act XV of 1877, section 26, illustration (*b*), actual user within two

**LIMITATION ACT, 1877, s. 26**—*continued.*

years previous to the institution of the suit is not necessary, in order that the right claimed may be acquired under Act XV of 1877, section 26. Illustrations in Acts of the Legislature ought never to be allowed to control the plain meaning of the section to which they are appended, especially when the effect would be to curtail a right which the section in its ordinary sense would confer. KOYLASH CHUNDER GHOSE *v.* SONATUN CHUNG BAROOIE [I. L. R., 7 Calc., 132 : 8 C. L. R., 281

11. ——— *Suit to restrain co-sharer from appropriating portion of property to his own particular use.*—The Limitation Act, 1871, section 27, does not apply to a suit to restrain one co-sharer in a joint property from appropriating to his own particular use a portion of such property without the consent of other co-sharers. BISSAMBHAR SHAHA *v.* SHIB CHUNDER SHAHA . 22 W. R., 286

12. ——— *Easement.—Riparian proprietors.—Obstruction to flow of drainage water.—Prescription.—Right of action.—Special damage.—Held* that the right of a superior riparian proprietor to have the drainage water from his lands permitted to flow off in the usual course is not an easement within the meaning of Act IX of 1871. *Held*, further, that the defendants, lower riparian proprietors, who had obstructed such a right of the plaintiff by blocking up the stream, could only justify their act if they had acquired an easement to do it, that their act was actionable whether special damage had or had not accrued, and that so long as the obstruction was continued there was a continual cause of action from day to day. The English Law of Prescription and the provisions of section 27, Act IX of 1871, considered. SUBRAMANIYA AYYAR *v.* RAMACHANDRA RAU . . . . I. L. R., 1 Mad., 335

——— s. 28 (1871, s. 29).

*See* ART. 130 . I. L. R., 2 Bom., 586

*See* FOREIGN JUDGMENT. [I. L. R., 2 Mad., 400

*See* POSSESSION—EVIDENCE OF TITLE. [I. L. R., 1 Bom., 592

1. ——— *Effect of Law of Limitation (Act XIV of 1859).*—The Indian Law of Limitation (Act XIV of 1859) as to realty was held to bar the remedy, but not to extinguish the right. DOE D. KULLAMMAL *v.* KUPPU PILLAI . . 1 Mad., 85

VENKOPADHYAYA *v.* KAVARI HENGUSU [2 Mad., 36

2. ——— *Extinction of right as well as remedy.*—The rule of law laid down by the Privy Council that a person entitled to an interest in immoveable property loses, not only all remedy, but his title, by being out of possession for more than 12 years, was held to apply to the case of a recusant proprietor claiming malikana. CHUMMUN *v.* OM KOOLSOOM . . . . 13 W. R., 465

13. ——— and Bom. Reg. V of 1827.—*Cause of action to establish title and obtain*

**LIMITATION ACT, 1877, s. 28, and Bom. Reg. V of 1827**—*continued.*

*arrears founded on that title.*—Where there has been no recognition of title nor any payment of dues within the period of limitation prescribed by law, there is a sufficient bar to the claimant's right to recover, if he ever had any. The cause of action to establish title and the cause of action to recover arrears which rest on such title are not distinct and independent of each other; so that if the former be barred, even those arrears which may be within the law of limitation cannot be recovered. MADVALA BIN GINAPA *v.* BHAGVANTA BIN DEVJI [9 Bom., 260

4. ——— *Trees.—"Land."*—Trees growing upon land are "land," within the meaning of section 29, Act IX of 1871. Possession of land by a wrong-doer for twelve years not only extinguishes the title of the rightful owner of such land, but confers a good title on the wrong-doer. JAGRANI BIBI *v.* GANESHI . . I. L. R., 3 All., 435

5. ——— *Possession of land forming endowment.*—When the land in suit was alleged to have formed an endowment, it was held that the plaintiff by his twelve years' occupation had acquired a title, even though his vendor had not had power to alienc the property. NURSINGH DASS *v.* MOOSHAROO BHANDAREE . . . . 25 W. R., 282

6. ——— *Possessory title.—Mortgage.—Receipt of rent by co-owner of equity of redemption for fifteen years.*—Where the equity of redemption of a certain estate became, on the death of the mortgagor, the property of two divided branches of a Malabar tarwad, and the rents and profits of the land paid by the mortgagee were enjoyed exclusively by *K.*, the representative of one branch, for fifteen years,—*Held* that *K.* had not acquired thereby a title to the estate mortgaged. CHATHU *v.* AKU [I. L. R., 7 Mad., 26

7. ——— *Suit for hereditary office and for account.*—Where the plaintiff's right of succession to an hereditary office accrued in 1847, when *A.* took it under a will, and it was held his possession was adverse to the plaintiff,—*Held* that plaintiff was precluded from setting up a fresh right as accruing to him on the death of *A.* as the only male survivor of the founder's family, by the provisions of section 29 of the Limitation Act, IX of 1871. MANALLY CHENNA KESAVARAYA *v.* MANGADU VAIDELINGA . . . I L. R., 1 Mad., 343

8. ——— *Adverse possession.—Bar of remedy and extinguishment of right.—Debts.*—The 28th section of the Limitation Act of 1877 extends the doctrine that twelve years' adverse possession of land not only bars the remedy of the rightful owner, but extinguishes his right to property other than land; but *per* GARTH, *C. J.*, —*Quære*,—Whether this principle would apply to debts. RAM CHUNDER GHOSAUL *v.* JUGGUTMONMOHINEY DABEE [I. L. R., 4 Calc., 283 : 3 C. L. R., 336

9. ——— *Operation of Limitation Act, IX of 1871, and Act XV of 1877.*—The Limitation Acts (IX of 1871 and XV of 1877) merely bar

**LIMITATION ACT, 1877, s. 28**—*continued.*

the remedy, but do not extinguish the debt. NURSING DOYAL *v.* HURRYHUR SAHA [I. L. R., 5 Calc., 897: 6 C. L. R., 489

MOHESH LAL *v.* BUSUNT KUMAREE [I. L. R., 6 Calc., 340: 7 C. L. R., 121

Overruling the cases of KRISHNA MOHUN BOSE *v.* OKHILMONI DOSSEE . I. L. R., 3 Calc., 331

NOCOOR CHUNDER BOSE *v.* KALLY COOMAR GHOSE . . I. L. R., 1 Calc., 328

And RAM CHUNDER GHOSAL *v.* JUGGUTMONMOHINEY DABEE . I. L. R., 4 Calc., 283

*See* also VALIA TAMBURATI *v.* VIRA RAYAN [I. L. R., 1 Mad., 228

And MADHAVAU *v.* ACHUDA [I. L. R., 1 Mad., 301

——— **art. 3 (1871, art. 3; 1859, s. 15).**

Section 15 of Act XIV of 1859 was repealed by, and its provisions re-enacted in, the Specific Relief Act, I of 1877, section 9 of which is in similar terms with the addition of the modification made in section 15 by section 26 of Act XXIII of 1861, and an additional provision that no such suit shall be brought against the Government.

1. ——— *Suit to recover paramba after forcible dispossession.*—Section 15 did not abridge any rights possessed by a plaintiff, but was intended to give him the right, if dispossessed otherwise than by course of law, to have his possession restored without reference to the title on which he held. Where a plaintiff sued to recover a paramba of which he alleged that he was owner and that the defendant had forcibly dispossessed him,—*Held* that the suit was not barred by section 15. KUNHI KOMAPEN KURUPU *v.* CHANGARACHAN KANDIL CHEMBATA AMBU . . . 2 Mad., 313

*See* KUMUL DUTT *v.* MOHUN MOLLA [15 W. R., 278

2. ——— *Unlawful dispossession by Government officers.*—When a Deputy Collector, acting as agent for a minor, uses powers which belong to the Government alone for the resumption of invalid lakhiraj tenures, and by virtue of those powers resumes lands for the benefit of the minor and unlawfully dispossesses the previous holder,—*Quære,*—Whether such a dispossession is within the contemplation of section 15, Act XIV of 1859, or not. That section does not confer on the person who unlawfully acquires possession of land the advantage of a short period of limitation, on the expiration of which the dispossessed person is bound to show an absolute title to recover. It gives to the dispossessed person who has been wrongfully deprived of possession a right to recover possession within six months without regard to any title, however clear, which may be set up against him. If he sues after six months have expired, the parties to the suit are left in the same condition as they would have been in under the former law with reference to the production of proof. PROTAB CHUNDER BUROOAH *v.* KANTARSWURREE DABEE . . . . 2 W. R., 250

**LIMITATION ACT, 1877, art. 3**—*continued.*

3. ——— *Proof of title.—Possession.*—In a suit brought on the 11th March 1872, to recover certain plots of land (*a*) as re-formations after diluviation of lands which had belonged to the plaintiffs and as accretions thereto; (*b*) under a title by prescription; it appeared that the lands had formed in the bed of a river in 1859, and that the plaintiffs took possession thereof as of re-formed lands and had been maintained in possession under awards under Act IV of 1840, but that in 1868 they were ousted by the Collector who assessed the same under Regulation XI of 1825 and settled them with the co-defendants.—*Held* that section 15, Act XIV of 1859, barred the plaintiff's right to recover simply on the strength of their previous possession without entering into the question of title; the suit not having been brought within six months of dispossession. WISE *v.* AMEERUNNISSA KHATOON. WISE *v.* COLLECTOR OF BACKERGUNGE . L. R., 7 I. A., 73

——— **art. 7 (1871, art. 7; 1859, s. 1, cl. 2).**

1. ——— *Suit for servant's wages.*—A suit for servant's wages was governed by the limitation prescribed by clause 2, section 1. NOBIN CHUNDER MOZOOMDAR *v.* KENNY . [5 W. R., S. C. C. Ref., 3

2. ——— *Household servant.—Labourer.—Temple servant.*—A person whose duties are to sweep and clean a temple, provide flowers for daily worship and garlands for the idol, is not a household servant within the meaning of article 7 of schedule II of the Limitation Act. MUTTURANGOT MANAKAL BHAVATHARAN BHATTA THIRIPAD *v.* ERANGOT TRIKOVIL PISHAREETH RAMA PISHAROTI . . . . I. L. R., 7 Mad., 99

3. ——— *Suit for arrears of monthly payment for instruction.*—A suit for arrears of a monthly payment agreed to be made for instruction in fencing and wrestling is not governed by the 7th clause of the Limitation Act, as that clause does not apply to the pay of a teacher or instructor. PYLWAN JARKAN SAHIB VASTHATH *v.* JENAKA RAJA TEVAR [8 Mad., 87

4. ——— *Chowkidar.—Servant.*—Under Act XIV of 1859 a chowkidar was held to be a servant within the meaning of section 1, clause 2 of that Act. GOLAMEE *v.* POSLAN . 18 W. R., 298

The following were held not to be servants:—

A manager of a company. IN THE MATTER OF THE GANGES STEAM NAVIGATION COMPANY [2 Ind. Jur., N. S., 181

A tehsildar or collector of rent. ARUN CHANDRA MANDAL *v.* RAMANATH RAKHIT [1 B. L. R., S. N., 20

S. C. OROON CHUNDER MONDUL *v.* ROMANATH RUKHIT . . . . 10 W. R., 260

A mohurir under an Ameen for batwarra purposes. ABHAYA CHARAN DUTT *v.* HARO CHANDRA DAS BUNIK . . . 4 B. L. R., Ap., 68

**LIMITATION ACT, 1877, art. 7**—*continued.*

S. C. OBHOY CHURN DUTT *v.* HURO CHUNDER DOSS BUYEE . . . **13 W. R., 150**

A mooktear. NITTO GOPAL GHOSE *v.* MACKINTOSH . . . **6 W. R., Civ. Ref., 11**

5. ——————— *Employer and labourer.*—The plaintiff agreed with the defendant that in consideration of the possession and use of certain land and a third of the produce for the season he would provide seed and labour and carry on the cultivator's share of the produce. *Held*, the parties were not in the position of employer and labourer. ANDI KONAN *v* VENKATA SUBBAIYAD . **2 Mad., 387**

Under the present Limitation Act the servant must be a household servant to come within article 7.

6. ——————— *Suit by one servant against another.*—Clause 2, section 1, applies only to suits for wages brought by a servant against the person liable as the master in whose service he had been employed, and the section does not apply to a suit brought by one Government servant against another for the recovery of a sum of public money received by the defendant as a disbursement on account of the wages of the plaintiff, to whom the defendant was legally bound to pay it over. SIVA RAMA PILAI *v.* TURNBULL . . . . . **4 Mad., 43**

7. ——————— *Suit for servant's wages.*—*Fixed monthly salary.*—Where a servant is appointed on a fixed monthly salary, and there is nothing to show that the salary is to be paid in advance, the limitation as to each month's salary commences from the time at which the salary became due, *i.e.*, the end of the month, and not from the date of the dismissal of the servant. KALI CHURN MITTER *v.* MAHOMED SOLEEM . **6 W. R., Civ. Ref., 33**

——————— **art. 10 (1871, art. 10; 1859, s. 1, cl. 1).**

1. ——————— *Possession.*—*Constructive and actual possession.*—Under the Act of 1859, the possession necessary under the corresponding clause was held to be not a mere constructive possession, but actual manual possession. GOSHAIN GOBIND PERSHAD *v.* FATIMA . . . **2 W. R., 5**

KUMAR ALI *v.* AZMUT ALI . **8 W. R., 383**

MAHOMED HOSSEIN *v.* MOHSUN ALI **[7 N. R., 195**

JAI KUAR *v.* HEERA LAL . . **7 N. W., 5**

And under the present Act the cause of action dates from the obtaining of physical possession in cases where it is practicable to obtain it.

2. ——————— *Actual possession.*—*Possession opposed by person without right.*—The purchaser cannot be said not to obtain actual possession where he is only opposed in taking possession by some one who has no right to oppose his possession, as a mere farmer who was tenant of the vendor. BECHUN *v.* MAHOMED YAKOOB KHAN . . **3 W. R., 225**

3. ——————— *Pre-emption, Suit for.*—*Conditional sale.*—Where a shareholder, if he desires to transfer his share, is bound to offer the transfer of it to his co-sharers before transferring it to a stranger, the right of pre-emption, in the case of a conditional sale, under which possession is not transferred, arises, not when such sale is made, but when the conditional sale becomes absolute. Under article 10, schedule II of Act XV of 1877, the period of limitation runs from the date physical possession is taken of the whole of the property sold. JAIKARAN RAI *v.* GANGA DHARI RAI . . . . **[I. L. R., 3 All., 175**

JANKEE KOER *v.* LEKHANEE KOER **[W. R., 1864, 285**

**LIMITATION ACT, 1877, art. 10**—*continued.*

4. ——————— *Suit for pre-emption.*—*Foreclosure by conditional vendee.*—The defendant, a conditional vendee, foreclosed the mortgage, and subsequently sued the auction-purchaser of the rights of the conditional vendor for possession, and obtained a decree, in execution of which he obtained possession. *Held* that the suit of the plaintiff who claimed pre-emption was not barred by limitation, as it was instituted within one year from the date on which the vendee, whose purchase was sought to be set aside, obtained actual possession of the property to which his title, originally conditional, had become absolute. RADHEY PANDEY *v.* NUND KOMAR PANDEY **[2 Agra, Pt. II, 164**

5. ——————— *Pre-emption.*—*Possession after sale in execution of decree of conditional sale.*—In 1861 *B.* purchased conditionally certain immoveable property, which in 1865 was attached in execution of a decree. In 1874, the conditional sale having been foreclosed, *B.* obtained a decree for possession of such property. In February 1875 he obtained mutation of names in respect of such property. In November 1875, arrangements having been made by him to satisfy the decree in execution of which such property had been attached, the attachment was removed. In December 1875 he acknowledged having received possession of such property in execution of his decree. *K.* sued him in November 1876 to enforce his right of pre-emption in respect of such property. *Held* that limitation ran from the date when *B.* obtained such possession of the status of his conditional vendor as entitled him to mutation of names and to the exercise of the rights of an owner, and that the suit was barred by limitation. The principle laid down in *Jageshar Singh* v. *Jawahir Singh, I. L. R., 1 All., 311*, followed. BIJAI RAM *v.* KALLU . . . **I. L. R., 1 All., 592**

6. ——————— *Mortgage.*—*Conditional sale.*—*Time from which period begins to run.*—A conditional vendee, who was in possession, applied under Regulation XVII of 1806 to have the conditional sale made absolute. The year of grace expired in July 1878. In November 1871 the conditional vendee sued for possession of the property by virtue of the conditional sale having become absolute. He obtained a decree, in execution of which he obtained, on the 30th April 1879, formal possession of the property according to law. On the 23rd March 1880 a suit was brought against him to enforce a right of pre-emption in respect of the property. *Held* that the period of limitation for such suit ran, not from

**LIMITATION ACT, 1877, art. 10**—*continued.*

the expiration of the year of grace, but from the 30th April 1879, the date the conditional vendee obtained possession in execution of his decree. PRAG CHAUBEY *v.* BHAJAN CHAUDHRI . I. L. R., 4 All., 291

*Contra*, BUDDREE DOSS *v.* DOORGA PERSHAD [2 N. W., 284

7. ——————— *Purchase by mortgagee.—Claim for pre-emption.—Cause of action.*—Where a mortgagee becomes a purchaser of the mortgaged property limitation runs from the date of purchase, as against a claimant by right of pre-emption. BUDDREE DOSS *v.* DOORGA PERSHAD . 2 N. W., 284

8. ——————— *Suit for pre-emption.—Purchase by mortgagee in possession.*—When a mortgagee in possession purchased the property mortgaged,—*Held* that his possession as proprietor commenced from the date of purchase, and limitation would run from the date of the purchase against a claimant by right of pre-emption and not from the date he got his name recorded in the revenue record as proprietor. MAHOMED BANAZEER *v.* GUNGA RAM 3 Agra, 260

9. ——————— *Pre-emption, Suit for.—Held*, in a suit for pre-emption, where the property had been purchased by the mortgagee in possession, that the purchaser obtained physical possession of the property under the sale, not from the date of the sale-deed, but when the contract of sale became completed. *Held*, therefore, that the contract of sale having become completed on the payment of the purchase-money, the suit, being brought within one year from the date of such payment, was within time. LACHMI NARAIN LAL *v.* SHEOAMBAR LAL [I. L. R., 2 All., 409

10. ——————— *Sale by mortgagor of usufructuary mortgage.—Possession of vendee.—Cause of action.*—When landed property sold by a mortgagor is at the time of sale in the usufructuary possession of the mortgagee, the vendee must be held to have taken possession in the sense of the limitation law at the time when he acquired possession of that which was the subject of sale, *viz.*, the rights of the vendor, and of these he acquired full possession as soon as they had been conveyed to him by a valid transfer. The limitation of one year provided by clause 1, section 1 of Act XIV of 1859, should be computed from the date of such possession and not from the date of actual assumption of possession by the vendee after redemption of the property from the mortgagor. GANESHEE LALL *v.* TOOLA RAM [3 Agra, 376 : S. C., Agra, F. B., Ed. 1874, 167

11. ——————— *Suit for pre-emption—Cause of action.*—In a suit for pre-emption of a share it appeared that the share had been first mortgaged to certain persons and afterwards sold to the defendant, who brought a suit for redemption and obtained a decree. *Held* that the period of limitation of the suit should be calculated from the date of the sale, and not from the date of the redemption of mortgage. RUSTUM SINGH *v.* MAHURBAN SINGH [5 N. W., 179

12. ——————— *Pre-emption.—Actual possession.—Purchase of equity of redemption.—Held* (STUART, *C. J.*, dissenting) that the purchaser of the equity of redemption of immoveable property, which is at the time of the sale in the usufructuary possession of the mortgagee, takes "actual possession" of the property, within the meaning of that term in article 10, schedule II of Act IX of 1871, when the equity of redemption is completely transferred to and vested in him. *Per* STUART, *C. J.*—That such a purchaser does not take "actual possession" of the property until he takes visible and tangible possession thereof or enjoys the rents and profits of the same, after redemption of mortgage. JAGESHAR SINGH *v.* JAWAHIR SINGH [I. L. R., 1 All., 311

13. ——————— *Suit for pre-emption.—Cause of action.—Mutation of names.—Sale, Date of.*—In a suit to enforce the right of pre-emption on a sale of a share of a zemindari estate, the period of limitation should be computed from the date of the sale, not from the date of the mutation of names, the purchaser having acquired by his purchase such possession as the nature of the property sold admits of. Mutation of names, although it may be regarded as evidence that a transfer has been made, is not essential to give validity to the transfer. OMRAO KHAN *v.* IMDAD ALLEE KHAN. MAHOMED MASHOOK ALLEE KHAN *v.* IMDAD ALLEE KHAN [1 N. W., 9 : Ed., 1873, 8

14. ——————— *Suit for pre-emption.—Possession.*—On the 19th December 1876, *A.* gave *T.* a mortgage of his share in a certain village. The terms of the mortgage were that *A.* should remain in possession of his share and pay the interest on the mortgage money annually to the mortgagee, who, in the event of default in payment of the interest, was empowered to sue for actual possession of the share. On the 19th May 1877, *T.'s* name was substituted for that of *A.* in the proprietary registers in respect of the share. On the 8th February 1878, *G.* sued *T.* and *A.* to enforce his right of pre-emption in respect of the share, alleging that his cause of action arose on the 19th May 1877, and that *A.*, notwithstanding the mutation of names, was still in possession. *T.* alleged that he had been in possession since the execution and registration of the deed of mortgage. *Held* that whether *T.* had been in plenary possession of the share since the date of the deed, or whether he had had only such constructive or partial possession of it as was involved in the receipt of interest on the mortgage money, the plaintiff was equally bound to have sued within a year from the date of the deed, and was not entitled to reckon the year from the date on which the possession by the mortgagee of the share was recognised by the revenue department, and the suit was therefore barred by article 10, schedule II, of Act XV of 1877. GULAB SINGH *v.* AMAR SINGH [I. L. R., 2 All., 237

15. ——————— *Suit to enforce pre-emption of share of undivided mehal.—Physical possession.*—A share in an undivided zemindari mahal is not susceptible of "physical possession" in the sense of art. 10, schedule II of Act XV of 1877. Limitation, therefore, in a suit to enforce a right of pre-emption

**LIMITATION ACT, 1877, art. 10**—*continued.*

in respect of such a share, runs from the date of the registration of the instrument of sale. UNKAR DAS *v.* NARAIN . . . . **I. L. R., 4 All., 24**

**16.** ——————— *Joint sale of undivided mehal and other property.*—In a suit to enforce a right of pre-emption in respect of a sale of property consisting in part of a share of an undivided mehal, which does not admit of physical possession, limitation will run from the date of registration of the instrument of sale. BHOLI *v.* IMAM ALI **[I. L. R., 4 All., 179**

**17.** ——————— *Suit for pre-emption.*—In pleading limitation as a bar to a suit for pre-emption the defendant must show that he was in possession more than a year before the plaint was filed. HOSSEINEE KHANUM *v.* LALLUN . **W. R., 1864, 117**

——————— **art. 11.**

*See* CASES UNDER ART. 13.

*See* ART. 120.

**[I. L. R., 9 Calc., 163: 11 C. L. R., 409**

**1.** ——————— **& art. 146.**—*Order rejecting claim under s. 246, Civil Procedure Code, 1859.—Ss. 280, 281, 282 of Civil Procedure Code, 1882.—Suit for possession.*—Where, in consequence of an adverse order passed under the provisions of Act VIII of 1859, section 246, a suit is (since the Limitation Act, 1877, came into force) instituted to establish the plaintiff's right to certain property, and for possession, such suit is not governed by the provisions of article 11, schedule II of Act XV of 1877, but by the general limitation of twelve years. *Koylash Chunder Paul Chowdhry* v. *Preonath Roy Chowdhry, I. L. R., 4 Calc., 610: 3 C. L. R., 25; Matonginy Dossee* v. *Chowdhry Junmunjoy Mullick, 25 W. R., 513; Joyram Loot* v. *Panaram Dhoba, 8 C. L. R., 54;* and *Raj Chunder Chatterjee* v. *Shama Churn Garai, 10 C. L. R., 435,* cited. GOPAL CHUNDER MITTER *v.* MOHESH CHUNDER BORAL **[I. L. R., 9 Calc., 230: 11 C. L. R., 363**

BISSESSUR BHUGUT *v.* MURLI SAHU **[I. L. R., 9 Calc., 163: 11 C. L. R., 409**

**2.** ——————— *Civil Procedure Code, 1859, s. 246.—Release of property from attachment on application of defendant.*—The plaintiff applied for the attachment of a property, and on the objection of the defendant the property was released from attachment,—*Held* that the plaintiff was bound, under section 246, Act VIII of 1859, to sue in the Civil Court to establish his right within a year from the order of release. JUGOO LAL UPADHYA *v.* EKDALOONISSA . . . **7 W. R., 456**

**3.** ——————— *Civil Procedure Code, 1859, s. 246.—Date from which period of limitation runs.*—The effect of the last sentence of section 246, Act VIII of 1859, is to exclude a party to an investigation under that section from any other remedy than that expressly provided for him by that section,—*viz.,* a regular suit to be brought within one year from the date of the order made against him, and such party

**LIMITATION ACT, 1877, art. 11**—*continued.*

cannot wait till the sale of the attached property has taken place and been confirmed, and then bring his suit within one year from the last date. SETTIAPPAN *v.* SARAT SINGH . . . **3 Mad., 220**

**4.** ——————— *Civil Procedure Code, 1859, s. 246.—Money-debts.*—Act VIII of 1859, section 246, applies only to immoveable property or to specific moveable property, not to a debt due. When a debt due to a judgment-debtor is attached in the hands of the person who owes it, he may pay it into Court voluntarily under section 241, or under compulsion under section 242, or be sued for it under section 243. A person thus sued would not be barred because of the lapse of a year from setting up any ground of defence which he may have against the claim. RAMBUTTY KOOER *v.* KAMESSUR PERSHAD **[22 W. R., 36**

**5.** ——————— *Goods illegally seized in execution of decree.—Suit by owner.*—A person suing for goods which have been illegally sold in execution of a decree, or their value, must, under article 11, schedule II, Act XV of 1877, bring his suit within one year from the time when the adverse order in the execution proceedings was made. SHIBOO NARAIN SINGH *v.* MUDDEN ALLY **[I. L. R., 7 Calc., 608: 9 C. L. R., 8**

**6.** ——————— *Civil Procedure Code, 1859, s. 246.—Suit for possession by virtue of inheritance of portion of attached property.*—It was held that the mere fact that the plaintiff sued to recover possession, by virtue of inheritance, of one fourth only of certain immoveable property, to which he had laid claim, when attached in execution of decree, on the ground that it belonged to the common ancestor of himself and the judgment-debtor, and there had been a partition of the ancestral estate, and the property attached had fallen by the partition to his lot, and was in his exclusive possession, did not relieve him from the necessity of bringing a suit within one year from the date of the order, passed by the Court executing the decree, under section 246, Act VIII of 1859, to the effect that the partition had not been established, nor had he proved that he held exclusive possession of the property attached. TILOK CHAND *v.* SADA RAM . . **7 N. W., 113**

**7.** ——————— *Suit to avoid sale in execution of decree of Small Cause Court passed without jurisdiction.*—*A.* obtained a money-decree upon a bond in a Small Cause Court against *B.,* by which it was declared that certain landed property hypothecated by the bond was to be primarily liable for the debt. The decree was transferred to the Court of the Sudder Ameen of the same district, the property was put up for sale, and it was purchased by *C.* Prior to sale, *B.* alienated the property to *D.,* who, after sale, preferred his claim to it under section 246 of Act VIII of 1859, which was disallowed. More than a year after this *D.* brought this suit against *C.* to recover possession. In special appeal it was held that the decree of the Small Cause Court being, on the face of it, without jurisdiction, the suit was not

barred, and the case was remanded, to be tried on the merits. LALA GANDAR LAL *v.* HABIBANNISSA [7 B. L. R., 235: 15 W. R., 311

8. ——————— *Civil Procedure Code, 1859, s. 246.*—The period of limitation contained in section 246, Act VIII of 1859, is applicable only to a case in which the procedure prescribed by that section has been adopted. VENKATANARU *v.* AKKAMMA [3 Mad., 139

9. ——————— *Claim to attached property.*—Property attached was, on the claim of a third party, released by the Court without proceeding under the provisions of section 246, Act VIII of 1859. The attaching creditor sued more than a year afterwards for a declaration that the property belonged to the judgment-debtor. *Held* that the suit was not barred. JAGGABANDHU BOSE *v.* SACHYI BIBI . . 8 B. L. R., Ap., 39: 16 W. R., 22

10. ——————— *Order passed in miscellaneous department.*—Where an order is passed in the miscellaneous department without enquiry in conformity with the provisions of section 246, Act VIII of 1859, it is not to be regarded as an order within the terms of that section, and a suit to set aside such order would not necessarily be barred if not instituted within a year. BHOLA DUT *v.* AHMED [3 Agra, 397

11. ——————— *Claim to attached property.—Separate suit.—Civil Procedure Code, 1882, ss. 281, 283.*—The order contemplated by section 281 of the Code of Civil Procedure is an order made after investigation into the facts of the case, and it is only when the order is made after such investigation that the limitation of one year is applicable to a subsequent suit under section 283 of the Civil Procedure Code. CHANDRA BHUSAN GANGOPADHYA *v.* RAM KANTH BANERJI . . . I. L. R., 12 Calc., 108

12. ——————— *Limitation.—Applicability of s. 246.*—Limitation, under section 246, Act VIII of 1859, is not applicable to an adjudication upon a petition disallowed on the ground that the section did not apply at all to the petitioner's case, and that the case was not a fit one for adjudication under that section. RADHA NATH BANERJEE *v.* JODOO NATH SINGH . . . 7 W. R., 441

13. ——————— *Claim to attached property.—Suit for possession.*—A claim to property about to be sold in execution of a decree was made under section 246 of Act VIII of 1859, but the Court declined to entertain it, and passed an order under section 247 disallowing the investigation. *Held* that the claimant in bringing a regular suit to prosecute his claim was not bound to institute his suit within one year from the date of the order disallowing the investigation. MAHOMED AFZUL *v.* KANHYA LAL . . . . 2 W. R., 263

14. ——————— *Civil Procedure Code, 1859, s. 246.—Suit after order releasing property from attachment to establish right to bring property to sale.*—*N.* caused certain property to be attached as the property of his judgment-debtor. *M.* preferred a claim to the property and objected to its sale. The Munsif, without an investigation in conformity with the provisions of section 246 of Act VIII of 1859, released the property from attachment, and directed *N.* to bring a regular suit. *N.* sued to establish his right to bring the property to sale, alleging that his cause of action arose on the day the order was passed releasing it from attachment. *Held* that the suit was not barred by limitation by reason of not having been instituted within one year from the date of the order. KAMRAN *v.* NEIT RAM . . . . . 6 N. W., 185

15. ——————— *Limitation Act (IX of 1871), art. 15.*—A claimant against whom an order has been made under section 246 of the Civil Procedure Code (Act VIII) of 1859 must sue to establish his right within one year from the date of such order. But when the Civil Court disallows an investigation under section 247 of that Code, the claimant may bring his suit within the ordinary period of limitation applicable to his suit. VENKAPA *v.* CHENBASAPA . . . . I. L. R., 4 Bom., 21

*See* JETTI *v.* HOSSAIN [I. L. R., 4 Bom., 23, note

16. ——————— *Suit by purchaser at sale after rejection of claim in execution proceedings.*—In execution of a decree upon a mortgage executed by *A.*, the decree-holders purchased the tenure which was the subject of the mortgage. On an application for an order to be put into possession they were opposed by *B.*, *A.'s* son, who alleged that his father had relinquished the tenure, and that *C.*, who had subsequently become the purchaser under a sale of arrears of Government revenue, had avoided the tenure with *A.'s* consent. The Court to which the application was made thereupon refused to enter into evidence or make any enquiry, leaving the decree-holders to establish their right by a regular suit. The order was made under Act VIII of 1859. A suit having been brought,—*Held* that the one year's limitation provided by article 11 of Act XV of 1877 did not apply. RASH BEHARY BYSACK *v.* BUDDUN CHUNDER SINGH . . . 12 C. L. R., 550

17. ——————— *Refusal to stay sale in execution of decree.*—Certain lands having been attached in execution of a decree obtained by *A.* against *B.*, *C.* intervened under section 246, Act VIII of 1859, claiming their release on the ground that before the attachment they had been conveyed to him by *B.* under a deed of sale; and he prayed that the execution sale might be stayed to enable him to put in the deed after having it registered. The Court, however, refused to stay the sale, and the lands were sold in execution. More than a year from the date of the Court's refusal to stay the sale, *C.* sued to establish his right to the lands. *Held* that the suit was not barred by limitation under section 246, Act VIII of 1859, since the refusal of the Court to postpone the sale was not an order under that section, but was a mere refusal to order a post-

ponment under section 247. MUKHUN LALL PANDAY *v.* KOONDUN LALL [15 B. L. R., 228: 24 W. R., 75: L. R., 2 I. A., 210

18. ——— *Civil Procedure Code, 1859, s. 246.—Claim rejected otherwise than on the merits.*—Section 246, Act VIII of 1859, made no distinction in favour of cases not decided on the merits, but made it imperative on the party whose claim to attached property had been rejected, under any circumstances, to sue within one year. KHODA BUKSH *v.* PURMANUND DUTT . 5 W. R., 214

19. ——— *Rejection of claim on untrustworthy evidence.*—A claim under Act VIII of 1859, section 246, rejected because the evidence produced was unworthy of credit, was on the same footing as if the claimant had failed to produce any evidence, and the order rejecting it was one on the merits and not on default. A suit, therefore, for the property must be brought within one year after the rejection of the claim. GOOROO DOSS ROY *v.* SONA MONEE DOSSIA . . . . 20 W. R., 345

SREEMUNTO HAJRAH *v.* TAJOODDEEN [21 W. R., 409

KAMINEE DABIA *v.* ISSUR CHUNDER ROY CHOWDHRY . . . . 22 W. R., 39

TRIPOORA SOONDUREE DEBIA *v.* IJJUTOONNISSA KHATOON . . . . 24 W. R., 411

20. ——— *Order rejecting claim to attached property.—Dismissal of claim on failure to produce evidence.*—Certain property having been attached in execution of a decree, the plaintiff intervened claiming the property and was directed to adduce evidence, which, however, he failed to do, and the case was struck off. *Held* that the order striking off the case must be taken as an order disallowing the claim, and that the plaintiff was bound to bring his suit to establish his claim within one year from the date of the order. SADUT ALI *v.* RAM DHONE MISSER . . . 12 C. L. R., 43

21. ——— *Party refused admittance to proceedings.*—The law of limitation, under section 246, Act VIII of 1859, could not apply to a person whom the Court had refused to make a party to the proceedings under that section because he came in too late to be made such a party. ROGHOONATH DOSS MOHAPATTUR *v.* BYDONATH DOSS MAHARATHA [14 W. R., 364

22. ——— *Judgment-debtor not a party to proceedings.*—When the judgment-debtor was not made a party to a proceeding under section 246 of Act VIII of 1859, he was not bound by the law of limitation to sue to establish his right to the property within one year from an order under that section releasing it from attachment. IMBICHI KOYA *v.* KAKKUNNAT UPAKKI . I. L. R., 1 Mad., 391

23. ——— *Civil Procedure Code, 1859, s. 246.—Party against whom order is "given."—Right of suit.—Limitation.*—The plaintiff brought a suit to establish his right to certain property as against the claim which the defendant had successfully made under section 246 of the Civil Procedure Code in execution of a decree obtained against the plaintiff. The order of the Court directed the release of the property from attachment. The present suit was brought more than one year from the date of the order. *Held*, per SCOTLAND, *C. J.*, BITTLESTON and COLLETT, *JJ.* (INNES, *J.*, doubting), that the plaintiff was a party against whom the order was "given" within the meaning of the section, and that the suit was barred by the section. NETTIETOM PERENGARY-PROM *alias* PANISHERRY DAMODHEN NAMBUDRY *v.* TAYANBARRY PARAMESHWAREN NAMBUDRY [4 Mad., 472

24. ——— *Civil Procedure Code, 1859, s. 246.*—Certain lands were attached under a decree against the ancestor of the plaintiffs; but on the intervention of the defendant under section 246, Act VIII of 1859, they were released to him. *Held*, that was not an order made between plaintiffs and defendant, such as to make it necessary for the former to sue for declaration of title within one year. NITTA KOLITA *v.* BISHUNRAM KOLITA [2 B. L. R., Ap., 49

25. ——— *Civil Procedure Code, 1859, s. 246.*—On attachment of certain property, plaintiff and defendants preferred their respective claims thereto. The plaintiffs' claim was disallowed, but the defendants' claim was allowed. The plaintiff, after the lapse of a year from the date of the order disallowing his claim, sued to recover possession of the said property. The defence was that the suit was barred by lapse of time under section 246, Act VIII of 1859. *Held*, section 246 did not apply to such a suit. DURGARAM ROY *v.* NARSING DEB [2 B. L. R., A. C., 254

S. C. DOORGARAM ROY *v.* NURO SINGH DEB [11 W. R., 134

26. ——— *Suit to establish right.—Attachment in execution of decree.*—*B.* caused certain immoveable property to be attached in the execution of a decree. *M.* objected to the attachment, claiming to be in possession of such property on his own account. The investigation of such claim which followed under section 246 of Act VIII of 1859 took place as between *B.*, the decree-holder, and *M.*, *N.*, the judgment-debtor, not being a party to it except in name. *M.'s* objection was allowed in May 1871, but no suit was brought either by *B.* or *N.* to establish *N.'s* right to such property. *H.* subsequently obtained a decree against *N.* in 1877, and in execution thereof caused such property to be attached. *M.* objected to the attachment and his objection was allowed in April 1878. In March 1879 *H.* sued *M.* for a declaration that a moiety of such property belonged to *N.*, and to have the order removing the attachment cancelled. *Held* that *N.'s* right to a moiety of such property was not extinguished because he had not sued to establish it within one year of the making of the order of May 1871 in the execution proceedings of *B.*, and *H.* was competent to sue to establish such right. MANNU LAL *v.* HARSUKH DAS [I. L. R., 3 All., 233

27. ——————— *Claim by intervenors.—Share of attached property.*—When intervenors claim a share of attached property, the Court should define the respective shares of the debtor and the intervenors, and sell the debtor's definite share only. If the Court omits to do so, and sells the undefined rights and interests, there is no decision under section 246, Act VIII of 1859, of which the purchaser, by lying in wait without possession for one year, can take advantage. MONOHUR KHAN *v.* TROYLUCKHO NATH GHOSE . . . . . **4 W. R., 35**

28. ——————— *Civil Procedure Code (Act XIV of 1882), ss. 280, 283.—Mortgagee, Suit by, against mortgagor and third party who has intervened and obtained an order under s. 288, Civil Procedure Code.—Execution of decree.*—Article 11, schedule II of the Limitation Act (XV of 1877), refers only to suits contemplated by section 283 of the Civil Procedure Code. Where, therefore, a mortgagee having obtained a decree on his mortgage, and caused the property to be attached, was successfully opposed by a third party who intervened in his attempt to have the property sold, and an order was passed under section 280 of the Code of Civil Procedure releasing the property from attachment, and where the mortgagee, more than a year after the date of that order, instituted a suit against such third party and his mortgagor, to have his lien over the mortgaged property declared, and to bring it to sale in execution of his decree, alleging that the title set up by such third party was a fraudulent one, collusively created between the mortgagor and such third party with a view to deprive him of his rights, and asking to have the order passed under section 280 set aside,—*Held* that the suit was not barred by limitation under the provisions of article 11, schedule II of the Limitation Act. The right that was in litigation in the proceeding under section 280 was the right to attach and sell the property in dispute in execution of the decree which the plaintiff had obtained against the mortgagor, and so far as that right was concerned the present suit was barred; but so far as the other relief claimed in the present suit went, that article did not apply, and the suit was not barred. BUKSHI RAM PERGASH LAL *v.* SHEO PERGASH TEWARI . **I. L. R., 12 Calc., 453**

29. ——————— *Suit to establish right as auction-purchaser to immoveable property sold in execution of decree.—Adjudication of proprietary right.—Res judicata.—Possession.*—In a suit brought by plaintiff to establish his right as auction-purchaser to certain immoveable property sold in execution of a decree under the provisions of section 246 of Act VIII of 1859, disallowing the claim of the objector—represented by the defendant—and adjudging the property attached to be that of the judgment-debtor, represented by the plaintiff—the said order not having been set aside in a regular suit by the defendant,—*Held* (by a majority of the Full Court) that an order passed under the provisions of section 246 of Act VIII of 1859, unless overruled in a regular suit brought within the statutory period, is binding on all persons who are parties to it and is conclusive. PEARSON, *J., per contra.*—Section 246 of Act VIII of 1859 provides for an adjudication of proprietary right on the basis of possession, but the matter is not "*res judicata*" as to matters in dispute between decree-holder and claimant, unless the party against whom an order is passed under section 246 of Act VIII of 1859 fails to bring a regular suit to establish his right. In the case mentioned in the order of reference as apparently conflicting with the above view there had been no adjudication on the basis of possession by the Court passing an order under section 246 of Act VIII of 1859, and the defendant in possession was therefore at liberty to assert his proprietary title against the lien set up by plaintiff under the said order, passed without jurisdiction on the miscellaneous side. BADRI PRASAD *v.* MUHAMMAD YUSUF . . . . . **I. L. R., 1 All., 382**

30. ——————— *Suit to establish right.*—*B.* caused a certain dwelling-house to be attached in execution of a decree held by him against *M.* as the property of *M. J.* preferred a claim to the property which was disallowed by an order made under section 246 of Act VIII of 1859. Two days after the date of such order *M.* satisfied *B.'s* decree. More than a year after the date of such order *J.* sued *B.* and *M.* to establish her proprietary right to the dwelling-house, alleging that *M.* had fraudulently mortgaged it to *B.* *Held*, following the Full Bench ruling in *Badri Prasad* v. *Muhammad Yusuf, I. L. R., 1 All., 382*, that *J.*, having failed to prove her right within the time allowed by law, was precluded from asserting it by the order made under section 246 of Act VIII of 1859, and that whether or not the decree was satisfied after the order was made, the effect of the order was the same. JEONI *v.* BHAGWAN SAHAI . . **[I. L. R., 1 All., 541**

31. ——————— *Suit for declaration of right and confirmation of possession.*—The limitation of one year, in section 246, Act VIII of 1859, did not apply to a suit for declaration of right and confirmation of possession. WUZEER JAMADAR *v.* NOOR ALI . . . . . **12 W. R., 33**

32. ——————— *Possession.—Claim.*—In execution of a decree against *A.*, certain property was sold in 1868. During the proceedings which led to that decree, *B.*, the wife of *A.*, had preferred a claim to the property under section 246, on the ground that it was her stridhan, and that she had always been in possession of it. Her claim was rejected in 1866; but she remained in possession. *Held*, a suit by *B.* to establish her title to the land was not barred by the limitation provided by section 246, though brought more than a year after her claim was refused, since she was at the time in possession and had remained afterwards in possession of the property. LAKHI PRYA DEBI *v.* KHYRULLA KAZI . . . . . **7 B. L. R., 238, note**

S. C. LUCKHEE PREA DEBIA *v.* KHYROOLLAH KAZEE . . . . . **14 W. R., 367**

33. ——————— *Claimant in possession where claim is rejected.*—If a person making a claim under Act VIII of 1859, section 246, is in actual possession, his claim is only a declaration that his

**LIMITATION ACT, 1877, art. 11—*continued.***

possession is without title. A suit to establish his right, *i.e.*, for confirmation of his possession, must be brought within one year. BROJO KISHORE NAG *v.* RAM DYAL BHUDRA . . **21 W. R., 133**

**34.** ——— *Suit for declaration that property ostensibly held by one defendant belonged to another.*—A suit for a declaration that certain property which has been ostensibly held by one of the defendants, was in fact the property of another of the defendants who was the judgment-debtor of the plaintiff, is governed by section 246, Act VIII of 1859, and barred by the limitation of one year. ABDOOLAH *v.* SHOKOOR ALI . **14 W. R., 192**

**35.** ——— *Order rejecting claim to attached property.*—Certain property having been attached in execution of a decree, the plaintiff preferred a claim to it as being his exclusive property; but the Court in which the claim was made was of opinion that the plaintiff and the judgment-debtor were in joint possession, and it made an order directing that on the plaintiff's claim being notified the sale should proceed. More than a year afterwards the plaintiff filed a suit to establish his title and alleged exclusive possession. *Held*, distinguishing the cases of *Brijo Kishore Nag* v. *Ram Dyal Bhudra, 21 W. R., 133; Kaminee Debia* v. *Issur Chunder Roy Chowdhury, 22 W. R., 39*, and *Jodoonath Chowdhury* v. *Radhamonee Dossee, 7 W. R., 256*, that the order not having been adverse to the plaintiff the suit was not barred by reason of its not having been brought within a year from the date of the order. RASH BEHARI DASS *v.* GOPI NATH BARAPANDA MOHAPATU . . . . . **11 C. L. R., 352**

**36.** ——— *Failure to establish claim.—Suit for establishing title.*—A party failing to establish his claim to attached property under section 246, Act VIII of 1859, on the point of possession, is not debarred from afterwards bringing a suit to establish title within the period allowed by law for bringing such suit. BISHENPERKASH NARAIN SINGH *v.* BABOOA MISSER . . . **8 W. R., 73**

**37.** ——— *Right of one decree-holder against another.—Suit for declaration of prior lien.*—Two several judgment-creditors attached certain property, which was released upon the claim of a third party, under section 246 of Act VIII of 1859. One of them sued the successful claimant, and obtained a decree declaring the property in dispute to belong to the judgment-debtor, and thereupon caused the property to be sold, and became the purchaser thereof. Thereupon an assignee of the other judgment-creditor sued him, alleging an earlier lien, and praying a sale in satisfaction thereof. The defence set up was that, as the plaintiff did not come into Court to set aside the order under section 246 within a year from the date thereof, he was barred from bringing the present suit. *Held* that the omission to bring a separate suit for that purpose did not bar him from obtaining a declaration of his prior lien. CHINTAMANI SEN *v.* ISWAR CHANDRA **[3 B. L. R., Ap., 122**

S. C. CHINTAMONEE SEIN *v.* ISSUR CHUNDER CHUNDER . . . . . **12 W. R., 221**

**LIMITATION ACT, 1877, art. 11—*continued.***

**38.** ——— *Possession.—Civil Procedure Code, 1859, s. 246.*—In a suit for redemption of an itti by an alleged purchaser of the same, and for recovery of land on which he had purchased a kanam, the defence was that the purchase was made by the father of the first defendant, and that the plaintiff was constructively a mere trustee. The Munsif decreed for the plaintiff, and the Principal Sudder Ameen reversed his decree because the suit was not brought within a year of a release of the property from attachment under a claim of the defendants, which attachment was made in execution of two decrees for money against the present plaintiff. It appeared that in the proceedings had for releasing the property from attachment, no notice was issued to the judgment-debtor (present plaintiff). *Held* that the decision of the Principal Sudder Ameen was wrong. In the present case, the claimants in possession were not so according to any of the modes of derivation which section 246 enumerates as authorising the continuance of the possession and the dismissal of the claim. The possession was in the claimants, and there was nothing in the rights of the judgment-debtor which could make such possession his possession. This being so, even assuming that he was a party to the order made, such order could not be said to be against him, because his claim was one which could not have been determined by any order made under section 246. The order so made was perfectly consistent with his present condition. *Netietom Perengaryprom* v. *Tayanbarry Parameshwaren Nambudry, 4 Mad., 472*, distinguished. CHERIYARAKEL *alias* ARAKEL KUNHI KUTTIYALI *v.* VAYAKA PARAMBATH IMBICHI AMMAH . . . . . **6 Mad., 416**

**39.** ——— *Civil Procedure Code, 1859, s. 246.*—Certain property having been mortgaged by *B. D.* to *L.*, the mortgagee obtained a decree for its sale, had it sold in execution, and purchased it himself, subject to any right which certain parties (*B.* and *G.*) who had objected under Act VIII of 1859, section 246, might be able to establish. After this *L.* sold the property to the plaintiff, who, not being able to get possession, brought a suit against the defendants in whose hands some or all of the property seemed to be and who set up that they had purchased it from *B. G.* and *B. D.* *Held* that the suit was not barred because it had not been instituted within twelve months of the date when the objections of *B.* and *G.* were allowed. KAMESSUR PERSHAD *v.* KADIR KHAN . . . . . **20 W. R., 393**

**40.** ——— *Suit to recover property sold in execution.—Civil Procedure Codes (Act VIII of 1869, s. 246, and Act X of 1877, ss. 280, 281, and 282).*—Certain property, which the plaintiff alleged to belong to her, was sold in execution of a decree obtained by the purchaser of the property at the auction-sale, against a third party. The plaintiff put in a claim to the property under section 246 of Act VIII of 1859, which claim was rejected on the 6th of September 1873. The plaintiff, on the 10th of January 1878, brought a suit to recover possession of the property sold. *Held* that the suit was not barred under article 11 of schedule II of Act XV of 1877, which refers to the section in Act X of 1877,

**LIMITATION ACT, 1877, art. 11**—*continued.*

corresponding to section 246 of Act VIII of 1859. LUCHMI NARAIN SINGH *v.* ASSRUP KOER [I. L. R., 9 Calc., 43

41. ——————— *Suit after order rejecting claim to property attached in execution of decree.*—In execution of a decree against *M.* the plaintiff attached and advertised for sale certain property in mouzah A. At that time there were pending proceedings in execution of two other decrees obtained against *M.* by the first and second defendants respectively. These two decrees were obtained on a bond executed by *M.*, by which an eight annas share of mouzah A. was hypothecated as collateral security; and in execution of those decrees the defendants brought to sale, and themselves purchased, not an eight annas share only but the whole of mouzah A., and were allowed by the Court to set off the purchase-money against the amounts due to them under their decrees. At the same time the plaintiff's execution case was struck off on 30th June 1880. In a suit brought by the plaintiff under section 295 of the Civil Procedure Code for his share of the sale proceeds of mouzah A., in which the plaintiff alleged fraud on the part of the defendants in selling the whole mouzah under their decrees, of which he only became aware in July 1882, from which time he dated his cause of action, the defendants denied the fraud and contended that the suit should have been brought within a year of the order of the 30th June 1880. *Held* that the existence of the order of the 30th June 1880 was not inconsistent with the plaintiff's right, and the suit was therefore not barred as not having been brought within one year of that order. TAPONIDI HORDANUND BHARATI *v.* MATHURA LALL BHAGAT . . I. L. R., 12 Calc., 499

42. ——————— *Suit for possession after rejection of claim.*—In a suit for possession after rejection of a claim under section 246, Act VIII of 1859, there was nothing in that section to prevent a defendant from pleading that whatever title plaintiff might have had at some previous time it was extinguished by his having had no possession for twelve years preceding the suit. RAM SARUN SINGH *v.* MAHOMED AMEER . . . 13 W. R., 78

43. ——————— **and art. 13.**—*Civil Procedure Code, 1882, s. 332.*—Where an application was made under section 332 of the Code of Civil Procedure for possession of property and rejected, and the applicant brought a suit to recover the property more than one year subsequent to the order rejecting the application,—*Held* that the suit was not barred either by article 11 or article 13, of schedule II of the Limitation Act, 1877. AYYASAMI *v.* SAMIYA [I. L. R., 8 Mad., 82

44. ——————— *Civil Procedure Code, 1859, s. 269, Order rejecting application under.—Suit brought after one year.—Civil Procedure Code, 1877, s. 335.*—An order having been passed on the 10th August 1877 under section 269 of the Code of Civil Procedure, 1859, cancelling delivery of possession of land brought to sale and purchased by a decree-holder, no suit was

**LIMITATION ACT, 1877, art. 11 and art. 13**—*continued.*

brought by the decree-holder to establish his rights to the land until 1883,—*Held* that the repeal of section 269 of the said Code on 1st October 1877 did not deprive the order of the 10th August 1877 of the effect it possessed when passed, and therefore that the suit was barred by limitation under section 269, and articles 11 and 13 of Act XV of 1877, were not applicable. *Koylash Chunder Paul Chowdhry* v. *Preonath Roy Chowdhry, I. L. R., 4 Calc., 610,* and *Gopal Chunder Mitter* v. *Mohesh Chunder Boral, I. L. R., 9 Calc., 230,* distinguished. VENKATACHALA *v.* APPATHORAI . . I. L. R., 8 Mad., 134

45. ——————— *Civil Procedure Code, 1859, s. 269.—Party not in possession.*—Section 269, Act VIII of 1859, does not contemplate that the party in actual possession must sue regularly to get possession within one year, but that the person who is not in actual possession shall do so. FIDAYE SHIKDAR *v.* OOZEEOODDEEN . . 7 W. R., 87

46. ——————— *Civil Procedure Code, 1859, s. 269.—Claim by mortgagee.*—An attachment having been made in execution of a decree for rent, an intervenor claimed the land as mortgaged to himself, but his application was rejected, and he was directed by the Collector to bring his objection, if he had any, under section 269, Act VIII of 1859. *Held* that he was not bound to do so, and his omission did not bar his right to bring a suit to establish the validity of the mortgages under which he claimed, provided it was brought within the period permitted by Act XIV of 1859. DEEN DYAL BURMO DOSS *v.* PORAN DOSS . 9 W. R., 474

47. ——————— *Civil Procedure Code, 1859, s. 269.—Obstruction in taking possession after sale in execution of decree.—Order.*—A purchaser of immoveable property at a Court sale, having been obstructed by the defendant, made an application to the Court, under section 268 of Act VIII of 1859, for the removal of the obstruction, but subsequently withdrew his application. The Court thereupon made an endorsement upon the application to the effect that, as the applicant did not wish to proceed further, no investigation was made. *Held* that no such order had been made as was contemplated by section 269 of Act VIII of 1859, that section contemplating at least an order against one party or the other; and that, therefore, the provisions contained in the same section as to the time within which a suit may be brought, did not apply to the case of the plaintiff. BHIKHA *v.* SAKARLAL [I. L. R., 5 Bom., 440

——————— **art. 12 (1871, art. 14; 1859, s. 1, cl. 3).**

*See* ART. 95 (1871, ART. 95). [I. L. R., 3 Calc., 300

1. ——————— *Suit to set aside fraudulent sale.*—Clause 3, section 1, applied only to suits to set aside sales on account of irregularity and the like, but not to suits to set aside fraudulent deeds under colour of which the sale was made. KISSEN BULLUB MAHATAB *v.* ROGHOONUNDUN THAKOOR [6 W. R., 305

LIMITATION ACT, 1877, art. 12—*continued.*

2. ——————— *Suit to set aside sale in execution.*—The limitation of one year provided by section 1, clause 3, was not applicable to a suit brought by a judgment-debtor to set aside an execution sale, on the ground that the decree-holder fraudulently got the property sold in execution of a previous satisfied decree. BUDREE *v.* LOKEMUN [3 Agra, 89

3. ——————— *Suit by mortgagee to enforce lien.*—*Held* that the limitation of one year provided by clause 3, section 1, Act XIV of 1859, was not applicable to a mortgagee's suit seeking enforcement of his mortgage lien against the property. RAI PURDIMUN KISHEN *v.* ROUSHUN SINGH [1 Agra, 111

4. ——————— *Suit to set aside sale in execution of decree.*—*Civil Procedure Code, 1859, s. 264.*—*Quære,*—Whether the one year's limitation (of suits to set aside sales in execution of decrees) under clause 3, section 1, applied to a suit brought against a person who had obtained possession of property by delivery under section 264, Act VIII of 1859. SUBOORUN *v.* GOLAM NUJEE . 2 W. R., 55

5. ——————— *Sale of moveable property in execution of decree.*—*Irregularity in sale.*—*Civil Procedure Code, 1859, s. 252.*—The law (section 252, Act VIII of 1859) provides that no irregularity in the sale of moveable property under an execution shall vitiate the sale, but that any person injured thereby may recover damages by suit; but it does not follow that the right and interest of the judgment-debtor in such property may not be challenged and contested by any claimant within the period allowed by clause 3, section 1, Act XIV of 1859. HIRDEY BEBEE *v.* BESHESHUR PERSHAD [2 Agra, Pt. II, 175

KISHEN SOONDUR *v.* FUKEEROODEEN MAHOMED [W. R., 1864, 61

6. ——————— *Suit to set aside sale in execution of decree.*—*Per* INNES, *J.*—Article 12 of the 2nd schedule of the Limitation Act, 1877, which requires suits to set aside a sale in execution of a decree of a Civil Court to be brought within one year from the date the sale becomes final, does not apply to suits in which the plaintiff was not a party to, and not bound by, the sale sought to be set aside. SADAGOPA EDINTARA MAHA DESIKA SWAMIAV *v.* JAMUNA BAI AMMAL [I. L. R., 5 Mad., 54

7. ——————— *Suit to set aside sale.*—*Suit to recover land sold in execution of decree.*—*V.* having bought lands from *A.*, whose husband (deceased) acquired them at a Court sale, sued *S.* in ejectment in 1879. *S.* pleaded limitation on the ground that *B.* (her deceased husband) had purchased the lands in question at a Court sale in 1876. *Held* that, as *A.* was no party to the decree or the execution proceedings under which *B.* purchased, it was not necessary for *V.* to set aside the sale to *B.* in this suit, and it was not barred by article 12 of the Limitation Act, 1877. VENKATA NARASIAH *v.* SUBBAMMA . . . I. L. R., 4 Mad., 178

LIMITATION ACT, 1877, art. 12—*continued.*

8. ——————— *Sale of tarwad property in execution of decree against party not sued as karanavan.*—Where a suit was brought to recover money from the defendant, who was the karanavan of a Malabar tarwad, and it was not alleged in the plaint that the defendant was sued as karanavan or that the debt was binding on the tarwad,—*Held* that a sale of tarwad property in execution of the decree was not binding on the members of the tarwad, and therefore that article 12 of schedule II of the Limitation Act, 1877, did not apply to a suit brought by other members of the tarwad to recover the land sold in execution of the decree. HAJI *v.* ATHARAMAN. MUSSA *v.* ATHARAMAN [I. L. R., 7 Mad., 512

9. ——————— *Suit to set aside sale—Purchase of decree by joint debtor.*—*M.* sold to *S.* her rights under a decree for mesne profits which she had obtained against *A.* and two other persons, and *S.* thereupon proceeded to execute the decree against *A.'s* property, and that property was sold in execution of the decree obtained by *S.* and was purchased by *B.*; but in a suit brought by *A.* for a declaration that *S.* was not the real purchaser, the Court found that *S.* had in fact purchased the decree benami for *A.'s* two joint debtors, and that consequently he had no right to execute it against the property of *A.* In a suit brought by *A.* against *B.* in 1874 for the purpose of recovering the property,—*Held* that the purchase of the benefit of the decree by *A.'s* joint debtors, although it had the legal effect of satisfying the judgment-debt, did not affect the decree itself. The decree was not void, but only voidable, and the sale under it binding on *A.* The suit, therefore, was in effect a suit to set aside a sale under a decree within the meaning of clause 14 of schedule II of Act IX of 1871, and, inasmuch as it was not brought within one year from the date of the sale, was barred. ABUL MUNSOOR *v.* ABDOOL HAMID *alias* SUBHAN MIAH . . I. L. R., 2 Calc., 98

10. ——————— *Suit to set aside sale in execution.*—*Party to suit.*—After the death of the widow of *K.*, the plaintiff sued as the heir of *K.* to recover certain immoveable property alleged to have been granted to the widow for life by *K.* for her maintenance. It appeared that in execution of a decree obtained against the plaintiff in a previous suit in which upon the widow's death he was sued as representing the estate of the widow, the property in question was sold notwithstanding objection taken by the present plaintiff that the property was that of *K.* The plaintiff's suit was filed more than a year after the execution sale, and it was objected that it was therefore barred. *Held* that it was not necessary that the suit should have been filed within one year from the date of the execution sale, because (1), the setting aside the execution sale was only collateral to the main object of the suit; and (2), the present plaintiff was not a party in her own character to the suit in execution of the decree in which the property was sold. KALI MOHUN CHUCKERBUTTY *v.* ANANDA MONI DABEE . . 9 C. L. R., 18

11. ——————— *Suit to set aside sale of land in execution of decree.*—A suit to set aside a

**LIMITATION ACT, 1877, art. 12**—*continued.*

sale of land in execution of a decree against a third party was held not barred by limitation under clause 3, section 1, if brought within a year after the sale actually took place. DOSSEE *v.* SHEEBANEE DABIA [5 W. R., 123

*See* MAHOMED AFZUL *v.* KANHYA LALL [2 W. R., 263

RAM GOPAL ROY *v.* NUNDO GOPAL ROY [4 W. R., 42

But these cases were overruled by JODOONATH CHOWDHRY *v.* RADHOMONEE DOSSEE [B. L. R., Sup. Vol., 643: 7 W. R., 256

12. ——————— *Suit for possession by setting aside sale.*—In a suit not only for reversal of sale but also for possession and declaration of title, the limitation of one year does not apply. ANOORAGEE KOOER *v.* BHUGOBUTTY KOOER. SHAM SUNDER KOOER *v.* JUMNA KOOER . 25 W. R., 148

13. ——————— *Cause of action.—Suit for possession after sale in execution.*—The plaintiffs sued to recover possession by declaration of right to certain chur lands as accretions to a putni talook and for damages, alleging that they held possession under a mokurarri lease granted by the defendant No. 3, but were ejected by the defendant No. 1, who had purchased at a sale in execution of an *ex parte* decree for arrears of rent obtained by the defendant No. 2 against defendant No. 4 (who was the heir of No. 3's vendor), the ejectment having been effected under proceedings taken by the Deputy Magistrate under Act XXV of 1861, section 318. *Held* that the plaintiffs' cause of action accrued from the date of their ejectment. It was not a suit to set aside the sale, but a suit for possession on declaration of title. BANEE MADHUB BUKSHEE *v.* RADHA MADHUB MOZOOMDAR . . . 22 W. R., 196

14. ——————— *Suit for possession and declaration of right by setting aside sale.*—The plaintiffs sued for possession of, and a declaration of their right to, a share of a zemindari, and to set aside a collusive decree which defendant No. 1 obtained on the 13th September 1867 against the defendants Nos. 2, 3, and 4, and to set aside the sale which was held on the 16th December 1868 in execution of that decree. There was a further prayer that the names of the plaintiffs might be substituted for that of the defendant No. 1 on the Collectorate towji. *Held* that the suit, although a portion of the prayer was for possession and declaration of right, was substantially to set aside the sale of 16th December 1868, in virtue of which, unless got rid of, the purchaser-defendant's title must prevail over that of the plaintiffs. Accordingly the suit came within the purview of Act XIV of 1859, section 1, clause 3, and, not having been brought within one year from the date of the sale, was barred. RAM KANTH CHOWDHRY *v.* KALEE MOHUN MOOKERJEE . 22 W. R., 84

15. ——————— *Sale subject to claimant's right.*—Where a person's claim to attached property was not rejected, but the sale took place subject to it,—*Held* that he could sue to establish his right to the property at any time within twelve years, clause 3, section 1, not applying to such a case. RUTNESSUR KOONDOO *v.* MAJEDA BIBEE [7 W. R., 252

16. ——————— *Suit to recover immoveable property.*—Where the plaintiff asked in terms to have a sale in execution of her husband's right and interest in certain land, set aside on the ground that those rights had previously to the sale been conveyed to herself,—*Held* that the suit was in effect one to recover immoveable property, and not one to which clause 3, section 1, Act XIV of 1859, applied. RADHA KOONWAR *v.* JANKEE KOONWAR [9 W. R., 199

KINOO DOSS *v.* RUGHOONATH DOSS [4 W. R., 34

17. ——————— *Suit by claimant to recover property in which judgment-debtors have no interest.*—Where a claimant, without attempting to impeach either the proceedings in the suit or in the decree or in the subsequent sale, seeks to recover property belonging to himself in which the judgment-debtors had no right or interest, and upon which, therefore, the sale in execution could have no legal operation,—*Held* that a suit of this nature was not a suit to set aside the "sale of property sold under an execution" within the meaning of clause 3, section 1; and it was not incumbent on such a claimant to sue, as therein prescribed, within one year from the date of sale. The plaint might ask in terms to avoid the sale, but such an allegation cannot alter the real nature of the suit, if it is otherwise sufficiently disclosed. MAHOMED BUKSH v. MOHAMED HOSSEIN [3 Agra, 171
S. C. Agra, F. B., Ed. 1874, 145

*See* SHARAFATUNNISSA *v.* LACHMI NARAIN [7 N. W., 288

18. ——————— *Suit by prior purchaser for possession.—Sale to second purchaser.*—The one year's limitation provided in section 1, clause 3, did not apply to a suit by a prior purchaser to assert his rights after an auction sale of the right and interest of the judgment-debtor in the property to another purchaser subject to those rights. MUNGROO SAHOO *v.* JEYDAR SINGH . . . 2 Agra., 231

Nor where he has become the representative by purchase of the other purchaser. BITHUL BHUT *v.* LALLA RAJKISHORE . . 2 Agra, 284

19. ——————— *Suit to set aside sale in execution of decree.—Suit to recover possession.*—*A.* purchased immoveable property at an auction sale. The same property was subsequently purchased by *B.* at another auction sale. *Held* that a suit brought by *A.* against *B.* to recover the property was virtually a suit to set aside the last sale, and that it should have been brought within one year from the date of that sale; and that clause 3 (and not clause 12) of section 1 was applicable. KRISHNAJI JOSHI *v.* MUKUND CHIMANSHET [2 Bom., 18: 2nd Ed., 19

*Contra,* LALCHAND AMBAI DAS *v.* SAKHARAM [5 Bom., A. C., 139

**LIMITATION ACT, 1877, art. 12**—*continued.*

20. ——————— *Suit to set aside execution sale.—Suit for possession of immoveable property.*—The plaintiff, alleging that certain immoveable property belonging to him had been sold in execution of a decree as the property of another, sued the purchaser to have the sale set aside, and to recover possession of the property. *Held* that the suit was one for possession of immoveable property to which the period of limitation of twelve years was applicable. NATHU *v.* BADRI DAS [I. L. R., 5 All., 614

21. ——————— *Suit for possession after dispossession in sale proceedings in execution of decree.*—The rights and interests of plaintiff's co-sharer having been sold under a decree, the purchaser possessed himself of plaintiff's share as well as of his own. *Held* that, in a suit to recover, plaintiff was not bound to bring his action within one year from the date of dispossession, but had a right to the limitation of twelve years. TONOO RAM GOSSAIN *v.* MOHESSUR GOSSAIN . . 24 W. R., 302

22. ——————— *Suit to recover property taken in excess of right of attachment.*—It is not incumbent on a person seeking, not to interfere with the sale in execution of a decree of the right, title, and interest of the judgment-debtor, but to recover what has been taken in excess under colour of sale, to sue within the period of limitation prescribed by law for a suit to set aside the sale. The mere circumstance that there is a specification of the subject of the sale at the time of sale is of no force. It is not the property specified, but the right of the judgment-debtor therein, that is offered for sale and conveyed. *Mahomed Buksh* v. *Mahomed Hossein, 3 Agra, 171: S. C., Agra, F. B., Ed. 1874, 145,* followed. SHARAFATUNNISSA *v.* LACHMI NARAIN [7 N. W., 288

23. ——————— *Sale of land in execution of decree.—Suit by third party to recover.—Burden of proof.*—In a suit to redeem certain land demised on kanam in 1850 by *A.* to the predecessor of *B.*, *C.*, who was in possession of the land, was made a defendant. *A.* proved his title to the land and possession up to 1850. *C.* pleaded title to the land and denied that *B.* had ever been in possession. Both pleas were found to be false. It was found, however, that *C.* had been in possession from 1869 to 1885, and that in 1876 the land had been sold in execution of a decree against *C.* (to which *A.* was not a party) and purchased by *D.*, who re-sold to *C.* in 1879. The lower Court held that *C.'s* possession must be taken to have been derived from *B.*, till the contrary was proved; but that the suit was barred by article 12 of schedule II of the Limitation Act, 1877, because it had not been brought within one year from the date of the sale in 1876. *Held* that the suit was not barred by limitation. NILAKANDAN *v.* THANDAMMA . . I. L. R., 9 Mad., 460

24. ——————— *Decree.—Sale in execution.—Land described by boundaries in proclamation of sale.—Land so described really comprising two separate lots.—Suit by purchaser of one lot to set aside sale or for compensation.*—On the 17th November 1877, a certain piece of land described in the proclamation of sale as "Survey No. 294, Pot No. 3, measuring 24¾ gunthas," the boundaries of which were also set forth, was sold by auction in execution of a decree obtained by the first defendant against defendants Nos. 2, 3 and 4, and purchased by the plaintiff. The boundaries, as stated, really included another piece of land, Survey No. 294, Pot No. 4, which comprised 3 acres 2¼ gunthas. This latter piece of land was put up for sale on the following day, and was purchased by defendant No. 5. On 28th November 1877, the plaintiff applied to the Court to have the sale set aside and his money returned, unless he was put in possession of all the land included in the boundaries mentioned in the proclamation; but his application was refused, and the sale was confirmed on 20th July 1878. The plaintiff on the 3rd July 1881 brought the present suit, praying that he might be put into possession of the land as described in the certificate of sale, which was identical with the proclamation, and included Pot No. 4, or that the first defendant might be ordered to pay him the amount of his purchase-money with interest. Both the lower Courts rejected the plaintiff's claim. On appeal to the High Court,—*Held*, confirming the decree of the Court below, that the suit, regarded as one to set aside the sale, was barred by Act XV of 1877, schedule II, article 12, clause (*a*). MAHOMED SAYAD PHAKI *v.* NAVOJI BALABHAI . I. L. R., 10 Bom., 214

25. ——————— *Suit to set aside sale in execution of decree.—Suit for possession of immoveable property sold in execution of decree.—Limitation Act, IX of 1871, sch. II, No. 14.*—*P.* obtained a decree against *M.* in April 1874 in execution of which property belonging to the latter was sold in 1874, 1875, and 1876. In March 1880, this decree was reversed by the Court of last appeal. In February 1881, *M.* sued to set aside the sales of his property in execution of the decree and for possession of the property. *Held* that, both under No. 14, schedule II of the Limitation Act, 1871, and No. 12, schedule II of the Limitation Act, 1877, the suit was barred by limitation. PARSHADI LAL *v.* MUHAMMED ZAIN-UL-ABDIN. MUHAMMED ASHGAR ALI *v.* MUHAMMED ZAIN-UL-ABDIN . I. L. R., 5 All., 573

26. ——————— *Suit to set aside sale held in execution of decree.—Civil Procedure Code (Act XIV of 1882), ss. 311, 312.*—If on an application for execution the Court erroneously holds that the application is not barred and orders a sale, the order, though erroneous and liable to be set aside in the way presented by the procedure law, is not a nullity, but remains in full force until set aside, and a sale held in pursuance of such order is, until set aside, a valid sale: a suit to set aside such a sale is governed by article 12, clause (*a*) of schedule II of Act XV of 1877. The word "disallowed" in section 312 of the Civil Procedure Code has no reference to an order passed on an appeal, but refers to the disallowance of the objection by the Court before which the proceedings under section 311 are taken. On the 15th June 1878, a judgment-debtor filed a petition objecting to execution of a decree against him proceeding on the

**LIMITATION ACT, 1877, art. 12**—*continued.*

ground that the decree was barred. On the 18th November 1878, that objection was overruled and certain of his property sold. Against the order overruling his objection the judgment-debtor appealed, and ultimately, on the 13th January 1880, the order was set aside by the High Court, and the decree was held to have been barred. Pending these proceedings the judgment-debtor also, on the 17th December 1878, applied, under the provisions of section 311 of the Civil Procedure Code (Act XIV of 1882), to set aside the sale on the ground of material irregularity, but that application was ultimately rejected on the 17th May 1879, and the sale was confirmed on the 21st May 1879. On the 2nd April 1880, the judgment-debtor applied to set aside the sale on the ground that the decree, in execution of which it had taken place, had been held to be barred, and though an order setting aside the sale was made by the original Court, it was subsequently set aside by the High Court on the 13th April 1881, as having been made without jurisdiction. The judgment-debtor now brought a suit on the 4th January 1882 upon the same grounds to set aside the sale and recover possession. *Held* that the suit was barred. MAHOMED HOSSEIN *v.* PURUNDUR MAHTO

**[I. L. R., 11 Calc., 287**

**27.** ——————— *Endowment by Hindu.—Execution proceedings against manager, Suit to set aside.*—In 1866, *V.* (the father of the plaintiff) sued his brother *H.* and *G.* (one of the two sons of *H.* and defendant No. 1) to establish his right to a third share of the management of certain lands granted for the maintenance of a Hindu temple. In that suit *V.* obtained a decree that he should have the exclusive management every third year, but was ordered to pay costs. To enforce payment of these costs, *H.* in execution of the decree attached the third share of *V.* in the management of the land. The share was accordingly sold by auction in January 1870 to a Marwadi, who afterwards, in May 1870, re-sold it to the appellant *T.* (another son of *H.* and defendant No. 2). *V.* died in 1876. In 1879 the plaintiff sued *G.* and the appellant (the two sons of *H.*) for his share of the management. It was contended for the defence that as the execution sale of January 1870 was not set aside within a year, the right to treat it as void by the plaintiff was barred by article 12 of schedule II of Act XV of 1877. *Quære,*—Whether *V.* could have got himself reinstated in the management without bringing a suit to set aside the sale within a year from the date of the order confirming it. TRIMBAK BAWA *v.* NARAYAN BAWA

**[I. L. R., 7 Bom., 188**

**28.** ——————— *"Order" of revenue officer.—Judicial order.*—The "order" of a Collector or other officer of revenue, as the word is used in the latter portion of clause 3 of section 1 of Act XIV of 1859, means an order of the nature of a decree, or made by the Collector or other revenue officer in his judicial capacity. Where a piece of land, embraced within the operations of the Revenue Survey, and subjected to a defined assessment, was put up for sale by the Collector in consequence of the occupant refusing to pay a fine to be allowed to continue in occupation of it, and was purchased by one of the defendants, and the occupant, asserting that he had been wrongly dispossessed, sued to set aside the sale and to be declared entitled to recover the land and retain possession of it, on condition of paying the assessment as settled upon it by the revenue officers, but delayed bringing his suit until June 1869, the sale having taken place in January 1867, —it was held that, though more than one year had elapsed from the date of the sale, the suit was not barred under the provisions of clause 3 of section 1 of Act XIV of 1859. SAKHARAM VITHAL ADHIKARI *v.* COLLECTOR OF RATNAGIRI

**[8 Bom., A. C., 288**

**29.** ——————— *Fraud.—Suit to set aside sale in execution of decree.—Beng. Reg. XLV of 1793.*—In a suit for the cancelment, on the ground of fraud, of an auction-sale made under the provisions of section 12, Regulation XLV of 1793, and for the reversal of a Judge's order in appeal confirming the sale, the period of limitation was held (under section 9, Act XIV of 1859) to run at the latest from the date of the Judge's order of confirmation, and to extend to one year under clause 3, section 1. ENAET ALI KHAN *v.* KUMOLA KOONWAR . . . . . **11 W. R., 261**

**30.** ——————— *Suit to set aside sale.*—A sale having been effected by order of a Deputy Collector, an appeal was made to the Collector, who set aside the sale. The Commissioner, however, considering that the Collector had no jurisdiction, and that no injury had been made out, reversed the order of the Collector. *Held* that the sale did not become confirmed or otherwise final and conclusive before the date of the Commissioner's order, and therefore a suit within one year of that order was in time. PRANNATH ROY *v.* TROYLUCKONAUTH ROY

**[14 W. R., 284**

**31.** ——————— *Suit to set aside sale for arrears of Government revenue.*—A suit to set aside a sale for arrears of Government revenue must be brought within one year from the date when the sale becomes final and conclusive. RAJ CHUNDER CHUCKERBUTTY *v.* KINOO KHAN

**[I. L. R., 8 Calc., 329**

**32.** ——————— *Suit brought to set aside sale for arrears of revenue.*—Where lands had been sold for alleged arrears of revenue and bought in for Government, but the sale had not been registered under section 38 of Madras Revenue Recovery Act II of 1864,—*Held* that a suit brought to set aside the sale after one year from the date thereof against a *bonâ fide* purchaser for value from Government was barred by limitation. KARUPPA TEVAN *v.* VASUDEVA SASTRI . . **I. L. R., 6 Mad., 148**

**33.** ——————— *Sale in execution of decree for arrears of revenue.—Suit to recover land.*—The land of *D.* was improperly sold, in execution of a decree of a Civil Court obtained against *S.*, for arrears of revenue, by the assignee of the revenue of the lands of *D.* and *S.*,—*Held*, in a suit brought by *D.* to recover her land from the purchaser at the

**LIMITATION ACT, 1877, art. 12**—*continued.*

Court sale, that the suit, not having been brought within one year from the date of the confirmation of the sale, was barred by article 12 of schedule II of the Limitation Act, 1877. SURYANNA *v.* DURGI . . . . **I. L. R., 7 Mad., 258**

**34.** ——— *Bonâ fide purchasers.*—Article 12 of that schedule which prescribes a period of one year for suits to set aside sales for arrears of revenue is intended to protect *bonâ fide* purchasers only. VENKATAPATHI *v.* SUBRAMANYA **[I. L. R., 9 Mad., 457**

——— **art. 13 (1871, art. 15; 1859, s. 1, cl. 5).**

*See* ART. 11 . **I. L. R., 8 Mad., 82**

*See* ART. 132 (1871, ART. 132). **[7 N. W., 223**

*See* ART. 147 . **I. L. R., 5 Calc., 363**

**1.** ——— *Suit to set aside summary order.*—*Quære,*—Whether, with reference to clause 5, section 1, a suit will lie to set aside a summary order after the expiration of one year. GOBIND NATH SANDYAL *v.* RAMCOOMAR GHOSE **[6 W. R., 21**

**2.** ——— *Final decision.*—*Order dismissing appeal.*—The final decision, award, or order contemplated by clause 5, section 1, was a final decision of the Court which had competent jurisdiction to determine the case finally, and not the order of a Court superior to such Court dismissing an appeal from the decision of such Court for want of jurisdiction. OLEO-UNISSA *v.* BULDEO NARAIN SINGH . . . . . **7 W. R., 151**

**3.** ——— *Order under Act XIX of 1841.*—*Official Trustees Act.*—*Suit for possession.*—*Limitation Act XIV of 1859, s. 1, cl. 12.*—A summary order under Act XIX of 1841 for possession of property left by a deceased person is no bar to a regular suit to try the title to such property and to obtain possession under that title; it is, therefore, unnecessary to set aside the order before granting relief in the suit. Hence the period of limitation for such regular suit is that provided by clause 12, section 1, Act XIV of 1859, namely, twelve years, and not one year as provided by clause 5 of the same section. LAKNARAIN SINGH *v.* MANKOER . . . **B. L. R., Sup. Vol., 633**

S. C. LOKNARAIN SINGH *v.* MYNA KOER **[2 Ind. Jur., N. S., 191: 7 W. R., 199**

**4.** ——— *Civil Procedure Code, 1859, s. 246.*—The rights and interests of one of three brothers of a joint Hindu family having been sold in execution of a decree, a suit brought, not to set aside such sale, but in right of inheritance of the judgment-debtor's brother's share in the family property, was held not barred by limitation under clause 5, section 1, and section 246, Act VIII of 1859. LALLA BEHAREE LALL *v.* LALLA MODHO PERSAUD **[6 W. R., 69**

**LIMITATION ACT, 1877, art. 13**—*continued.*

**5.** ——— *Summary decision.*—*Certificate of administration under Act XXVII of 1860.*—*Order made under Official Trustees Act XIX of 1841.*—The period of limitation prescribed by Act XIV of 1859, section 1, clause 5, in the case of suits to alter or set aside summary decisions and orders of any of the Civil Courts not established by Royal Charter, when such suit is maintainable, namely, "the period of one year from the date of the final decision, award, or order in the case," applied to the grant of a certificate under Act XXVII of 1860. It also applied to an order made under Act XIX of 1841, the Official Trustees Act, refusing to put the applicant in the possession of property as mohunt. GREEDHAREE DOSS *v.* NUNDKISHORE DUTT . . . **Marsh., 573: 2 Hay, 633**

S. C. on appeal to Privy Council. GREEDHAREE DOSS *v.* NUNDKISHORE DOSS **[11 Moore's I. A., 405; 8 W. R., P. C., 25**

*Contra,* BIPRO PERSHAD MYTEE *v.* KANYE DEYEE . . . . . **1 W. R., 341**

**6.** ——— *Suit to recover properties by the rightful heir of deceased more than one year after grant of certificate of heirship to the rival claimant.*—*Effect of such a certificate.*—*Practice.*—In 1877 the plaintiff applied for a certificate of heirship to one *T.*, her husband's uncle, who had died in 1876. The defendant opposed the application, and alleged that *T.* had left a will in her favour. On the 28th July 1877, the District Judge made an order rejecting the plaintiff's application, and granting a certificate to the defendant. In 1879 the plaintiff brought the present suit, claiming to be entitled to the property left by *T.* It was contended (*inter alia*) for the defendant that the plaintiff's suit was barred, she having failed to apply to set aside the order granting the certificate to defendant within one year from the date of that order. The Court of first instance overruled the objection, and awarded plaintiff most of her claim. The defendant appealed, and the lower Appellate Court reversed the lower Court's decree, holding the suit barred. On appeal to the High Court,—*Held,* restoring the decree of the Court of first instance, that the plaintiff's suit was not barred. A certificate of heirship confers only the right of management of the property of the deceased, and is intended to give security to third persons in dealing with the person who claims to be the heir. Where the right of the person, to whom the certificate is granted to be the heir of the deceased, is in controversy, there is no necessity to have the order granting him the certificate set aside; and the question, whether the suit to determine the right claimed is in time, is to be determined by the sections of the Limitation Act relating to suits for the possession of property. BAI KASHI *v.* BAI JAMNA . . . . **I. L. R., 10 Bom., 449**

**7.** ——— *Suit to set aside order under Act XXVII of 1860.*—A suit to set aside a summary order passed under Act XXVII of 1860 may be brought within a year from the date of the order; but such order is no bar to a suit upon title,

**LIMITATION ACT, 1877, art. 13**—*continued.*

though brought after the year. KALEE PROSUNNO MOOKERJEE *v.* KOYLASH MONEE DEBIA [8 W. R., 126

8. ——————— *Order relating to landed property of intestate.—Summary order.—Held* that the Judge's order relating to the landed property of a person dying intestate, being apparently an order made without jurisdiction, had no legal operation, and was not a summary order within the meaning of the 5th clause of section 1, Act XIV of 1859. AUGUDH NATH *v.* DOORGA GIR . 1 Agra, 241

9. ——————— *Suit to eject representative of person put in possession by order of Civil Court.—Summary decision.*—The plaintiff was by an order of the Civil Court in execution of a decree, to which the plaintiff was no party, ejected from the possession of a muttah. He brought a suit more than three years afterwards to eject the legal representative of the person who was so put in possession. *Held* (reversing the decree of the Civil Court) that the order of the Civil Court was not a summary decision within the meaning of clause 5, section 1, and that the suit was not barred. That clause was only applicable to orders which the Civil Courts were empowered to pass deciding matters of disputed property raised for hearing and determination by a summary proceeding between the parties disputing. APPUNDY IBRAM SAHIB *v.* SAM . . . . . 4 Mad., 297

10. ——————— *Suit against order of Mamlatdar under Bom. Act V of 1864.*—Although a Mamlatdar's order under the last clause of section 1 of Bombay Act V of 1864 is a summary decision, a suit in the Civil Court to establish a right against the operation of such order is not a suit to set aside the order itself but for possession in opposition to that recognised by the Mamlatdar's order, and is not therefore within the limitation of one year under clause 5, section 1, Act XIV of 1859. BABAJI *v.* ANNA . . . . . 10 Bom., 479

11. ——————— *Suit for proceeds of sale in execution.*—A suit to recover the proceeds of sale in execution of a decree alleged to have been drawn out by defendant by virtue of an order of a Civil Court, under section 270, Act VIII of 1859, is in reality a suit to alter or set aside a summary decision of a Civil Court, and is governed by the limitation of one year prescribed by clause 5, section 1, Act XIV of 1859. DWARKANATH BISWAS *v.* ROY DHUNPUT SINGH . . . 17 W. R., 227

12. ——————— *Suit for money paid into Court by defendant but recovered from third person in execution of decree.*—A suit to recover money paid by the defendant into Court which was payable to the plaintiff, and which was afterwards recovered by the defendant in the execution of a decree against a third person, under an order of the Court executing the decree, was held not barred by limitation, under the provisions of Act IX of 1871, second schedule, 15, by reason of not having been instituted within one year from the date of the order. DEBI DAS *v.* NUR AHMAD . . . . . 7 N. W., 174

**LIMITATION ACT, 1877, art. 13**—*continued.*

13. ——————— *Suit for refund of sale-proceeds paid in accordance with order for distribution under s. 295, Civil Procedure Code, 1882.—Multifariousness.*—In execution of a decree against six persons the plaintiffs had certain property brought to sale, the proceeds of which were brought into Court. The defendants, who held five separate decrees against some of the persons against whom the plaintiffs' decree was obtained, applied to have the amount in Court rateably distributed; and in accordance with an order of the Court, dated 13th September 1880, this was done, the proceeds being distributed in proportion to the amounts of the decrees. In a suit brought on 24th August 1883 against the defendants, on the allegation that the plaintiffs were entitled to the whole of the proceeds, or in the alternative for distribution on a different principle,—*Held*, the suit was one to set aside the order, and not having been brought within one year from the date of the order was barred by limitation under article 13, schedule II of Act XV of 1877. *Ram Kishen* v. *Bhawani Das, I. L. R., 1 All., 333*, distinguished. GOWRI PROSAD KUNDU *v.* RAM RATAN SIRCAR [I. L. R., 13 Calc., 159

14. ——————— *Mortgage.—Sale by first mortgagee.—Arrears of rent.—Lien.—Claim by puisne mortgagee on proceeds of sale.*—Certain land was mortgaged to *A.* with possession to secure the repayment of a loan of R2,000 and interest. It was stipulated in the deed that the interest on the debt should be paid out of the profits, and the balance paid to the mortgagors. By an agreement subsequently made, it was arranged that the mortgagors should remain in possession and pay rent to *A.* *A.* obtained a decree for R2,060 and arrears of rent and costs and for the sale of the land in satisfaction of the amount decreed. The land was sold for R2,855 in March 1881. In May 1881 *B.*, a puisne mortgagee, applied to the Court for payment to him of R500 of this sum, alleging that *A.* was entitled only to R2,000 and R280 costs, but not to arrears of rent, in preference to his claim as second mortgagee. The claim of *B.* was rejected on the 27th May 1881 and the whole amount paid out to *A.* In February 1882 *B.* (who had filed a suit on the 23rd March 1881) obtained a decree upon his mortgage. On the 23rd May 1884 *B.* sued to recover R510 paid to *A.* on account of rent on the 27th May 1881. *Held*, on second appeal, that the suit was not barred by article 13 of the Limitation Act, neither that article nor article 12 being applicable to the case, that *B.* was entitled to recover the sum claimed. SIVARAMA *v.* SUBRAMANYA . . I. L. R., 9 Mad., 57

15. ——————— *Suit to recover possession from a successful claimant under s. 246, Act VIII of 1859.*—A suit brought, not to set aside an order of release under section 246 of Act VIII of 1859, but to recover possession from the successful claimant of the property released, was not governed by the limitation prescribed by clause 5, section 1. BHYRUBLALL BHUKUT *v.* ABDOOL HOSSEIN [8 W. R., 93

16. ——————— *Order of Judge on claim to attached property.—Summary decision.*—Property

**LIMITATION ACT, 1877, art. 13**—*continued.*

being attached under a decree obtained before Act VIII of 1859, a third party claimed to be entitled as against the judgment-creditor under a bill of sale. The Judge enquired into his claim, found that the assignment was fraudulent, and ordered that the property should be sold under the decree,—*Held* that the order of the Judge was a summary decision of a Civil Court within section 1, clause 5, and that a suit by the claimant for the recovery of the property instituted after the expiration of a year from the date of the order was barred by that clause. KHYRUT ALLY *v.* KHURRUCK DHAREE SINGH [Marsh., 520

17. ——————— *Suit to have property declared not liable to seizure in execution of a decree.*—The plaintiff sued to obtain a decree declaring that the ancestral land possessed by the family of the plaintiff was not liable to seizure and sale in satisfaction of an *ex-parte* decree obtained by the defendant in a suit against the yejaman of the plaintiff's family, on the ground that the decree had been obtained collusively and fraudulently for a debt alleged to have been contracted for the benefit of the family. The decree against the yejaman was passed on the 22nd June 1857, and upon attachment of the family property the plaintiffs made a claim, under section 246 of the Civil Procedure Code, alleging their independent right to the property and resisting a sale. The claim was disallowed on the 18th October 1861, and an appeal from that decision was dismissed on the 15th November 1861. The present suit was instituted on the 2nd February 1864. *Held* that this was not a suit to which the limitation provided by section 246 of the Civil Code, or by clause 5, section 1 of Act XIV of 1859, was applicable, and that the suit was not barred. RAMANADA BUTT *v.* BITHEE . . . . 4 Mad., 263

18. ——————— *Claim, Rejection of.—Suit to recover possession of property sold.*—On attachment of certain property, the plaintiff and defendant preferred their respective claims thereto. The plaintiff's claim was disallowed, but the defendant's claim was allowed. The plaintiff, after the lapse of a year from the date of the order disallowing his claim, sued to recover possession of the said property. The defence was, that the suit was barred by lapse of time under clause 5, section 1, Act XIV of 1859. *Held* that clause 5, section 1, Act XIV of 1859, did not apply to such a suit. DURGARAM ROY *v.* NARSING DEB . . 2 B. L. R., A. C., 254

S. C. DOORGARAM ROY *v.* NURO SINGH DEB [11 W. R., 134

19. ——————— *Suit to set aside order releasing property from attachment.—Irregular attachment.—Deduction of time when appeal was pending.*—In 1852 *K.* sued *A.* and *M.* to recover the amount with interest of a bond executed by *M.* (who was *A.'s* general agent) in the name of *H.* on the permission of the plaintiff for the purpose of paying off the debts of *A.* The Principal Sudder Ameen decreed the case against *M.* with costs, and released *A.* from *K.'s* claim. In appeal to the Sudder Court the plaintiff obtained a decree with interest and costs against

**LIMITATION ACT, 1877, art. 13**—*continued.*

*A.* as well as against *M.* In execution *K.* prayed on 2nd December 1858 for the attachment and sale of certain estates. A notice having been ordered to issue *K.* represented that the judgment-debtor was attempting to alienate her estates, and prayed that orders might be passed to prevent alienation of the estates mentioned in her application for execution. A process of attachment was issued accordingly on 28th March 1859, but without security being first demanded as prescribed in Regulation VIII of 1825, section 7. In September 1861 one *B. A.*, who had objected to the attachment, petitioned the Judge and obtained an order dated 14th September 1861, releasing the attached properties as being his in virtue of a hibbanama from *A.*, and in his possession. From this order *K.* appealed, but the appeal was struck off on 29th November 1862. On review the first order was upheld, but it was declared that this would not be a bar to a regular suit. She accordingly sued for a reversal of the Judge's order for the cancelment of the deed of gift as being collusive and for the sale of the property in question as that of her judgment-debtor *A.* The suit was decreed and an appeal preferred to the High Court. *Held* that the order of 28th March 1859 was wrong in ordering attachment without first requiring security; but the irregularity did not affect the jurisdiction of the Court or render the attachment void. *Held*, also, that the plaintiff had a right of appeal from the order of 14th September 1861, that the appeal was wrongly rejected on 29th November 1862, and it saved her from the operation of the law of limitation while it was pending, and as she brought her suit within a year from that time, she was within the period prescribed by Act XIV of 1859, section 1, clause 5. KHODAJAMNISSA *v.* STEVENS . . . . 20 W. R., 433

20. ——————— *Suit after release of property under s. 246, Civil Procedure Code, 1859.*—Where a property is released from attachment, and the person at whose instance attachment was made is not debarred by the order of release from proceeding with his execution, his suit is virtually a suit for a declaration of right, and not merely a suit for setting aside the order of release: and the rule of limitation applicable to his case is not in section 246 of Civil Procedure Code, which would allow one year, but in clause 15, schedule 2 of Act IX of 1871. MATONGINY DASSEE *v.* CHOWDHRY JUNMUNJOY MULLICK [25 W. R., 513

21. ——————— *Suit to recover attached property to which claim has been disallowed.*—A person who has been unsuccessful in a proceeding under section 246 of Act VIII of 1859, and who sues to recover the attached property from the purchaser at the Court sale, may be said to sue, not to set aside the sale, but to set aside the order of the Court under section 246, and therefore the suit must be brought within one year as provided in article 15 of the Limitation Act, 1871. The decision in *Jetti* v. *Hossain, I. L. R., 4 Bom., 23, note,* qualified. VENKAPA *v.* CHENBASAPA [I. L. R., 4 Bom., 21

22. ——————— *Suit to remove attachment.—Adverse possession.*—In a suit for a partition of

family property in the possession of the plaintiff and defendants, part of the property was attached at the instance of one of the defendants in 1852 and the remainder of the property in 1864. Nothing was done with regard to the first attachment, but in 1865 a petition was presented by the plaintiff praying for the removal of the attachments. The petition was rejected and the plaintiff brought this suit within one year from the date of the rejection of his petition. The plaintiff and defendants remained in possession notwithstanding the attachments. *Held* that the suit was not barred by lapse of time. MALRAJA *alias* KRISHNAMA RAJAH *v.* NARAYANASAMY RAJAH **[4 Mad., 281**

**23.** ——————— *Suit to establish title to property ordered to be sold in execution.—Suit to set aside summary order.*—The plaintiff's property was ordered to be sold in execution of a decree to which the plaintiff was not a party. The plaintiff appeared and asked the Court to release the property from attachment, but the Court refused his application, under section 246, Act VIII of 1859, and ordered the property to be sold. *Held* that a suit to establish the plaintiff's right to such property was not a suit to set aside a summary order within Act IX of 1871, schedule II, clause 15. KOYLASH CHUNDER PAUL CHOWDHRY *v.* PREONATH ROY CHOWDHRY **[I. L. R., 4 Calc., 610: 3 C. L. R., 25**

**24.** ——————— *Civil Procedure Codes, Act VIII of 1859, s. 246, and Act X of 1877, ss. 280, 281, and 282.—V.* (defendant No. 1) obtained a decree against *W.* and, in execution thereof, attached certain immoveable property as belonging to his judgment-debtor. The plaintiffs, who were *W.'s* five brothers, thereupon applied for the removal of the attachment under section 246 of the Civil Procedure Code (VIII of 1859), but their application was rejected on the 24th July 1875, and the property was sold by the Court to *K.* (defendant No. 2) on the 16th and 17th February 1876. The sale was confirmed on the 18th March 1876. The plaintiffs brought a suit on the 17th March 1877 against *V.* and *K.* (the judgment-creditor and auction-purchaser), alleging that the property was the joint ancestral property of themselves and their brother *W.* and was not liable to attachment and sale for his separate debt. They prayed that the sale should be set aside. The Subordinate Judge dismissed the suit as barred by article 15, schedule II of the Limitation Act (IX of 1871). His order was reversed, on appeal, by the District Judge, who held that article 14, schedule II of the Limitation Act applied to the case. *K.* thereupon appealed to the High Court. *Held* that article 15, and not article 14, of schedule II of Act IX of 1871 applied to the case, and that the suit was barred. The intention of the Legislature in passing section 246 of the Civil Procedure Code (Act VIII of 1859) was that the order made under that section should be a final bar to the plaintiff's right, unless such a suit, as that section prescribed, was brought to re-try the question of that right; and if on such action being brought, the Court on the trial held that the plaintiff had established his right, its ruling would amount to a reversal of the order made under section 246, and the suit would fall within article 15 of schedule II of the Limitation Act (IX of 1871), which is substituted for the limitation provided by the twelve repealed words in section 246 of Act VIII of 1859. *Settiappan* v. *Sarat Sing, 3 Mad., 220,* followed. *Koylash Chunder Paul Chowdhry* v. *Preonath Roy Chowdhry, I. L. R., 4 Calc., 610,* referred to and discussed. KRISHNAJI VITHAL *v.* BHASKAR RANGNATH . **I. L. R., 4 Bom., 611**

**25.** ——————— *Order declaring that Court has no jurisdiction.*—The period of limitation prescribed by article 15, schedule II, Act IX of 1871, for a suit to set aside an order of a Civil Court, does not apply where the order simply amounts to a declaration that the Court considers it has no jurisdiction to act in the proceeding before it. KRISTODASS KUNDOO *v.* RAMKANT ROY CHOWDHRY **[I. L. R., 6 Calc., 142: 7 C. L. R., 396**

**26.** ——————— *Suit to recover property sold in execution.—Civil Procedure Codes (Act VIII of 1859, s. 246, and Act X of 1877, ss. 280, 281, and 282).*—Certain property, which the plaintiff alleged to belong to her, was sold in execution of a decree obtained by the purchaser of the property at the auction sale, against a third party. The plaintiff put in a claim to the property under section 246 of Act VIII of 1859, which claim was rejected on the 6th of September 1873. The plaintiff, on the 10th of January 1878, brought a suit to recover possession of the property sold. *Held* that the suit was not barred by article 15, schedule II of Act IX of 1871, the suit not being one to set aside a summary order within article 15 of the schedule to that Act. *Koylash Chunder Paul Chowdhry* v. *Preonath Roy Chowdhry, I. L. R., 4 Calc., 610,* followed. LUCHMI NARAIN SINGH *v.* ASSRUP KOER **[I. L. R., 9 Calc., 43**

**27.** ——————— *Execution of decree.—Res judicata.—Act VIII of 1859, s. 246.—Civil Procedure Code (Act X of 1877), s. 278.*—In the course of certain execution proceedings in execution of a decree for arrears of rent, the decree-holder attached a tenure belonging to the judgment-debtor, who, pending the attachment, sold it to *A.* on the 21st March 1869. *A.* then applied, under section 246 of Act VIII of 1859, for an order to release the tenure from attachment; but the application was dismissed, on the ground that the alienation had been made pending the attachment. In 1877 the heirs and successors in title of the decree-holder above mentioned obtained another decree for arrears of rent against the same defendant, and in execution thereof again attached the tenure. *A.* applied under section 278 of the Code of Civil Procedure to have the property released, but his application was rejected on the 3rd of May 1879. In a suit brought by *A.* on the 6th of May 1879 to establish his right to, and confirm his possession of, the tenure, the lower Courts dismissed the suit, on the ground that it ought to have been brought within one year from the 24th of March 1869. On appeal to the High Court,—*Held* that the suit was not barred by limit-

**LIMITATION ACT, 1877, art. 13**—*continued.*

ation, nor as *res judicata*. UMESH CHUNDER ROY *v.* RAJ BULLUB SEN . **I. L. R., 8 Calc., 279 [10 C. L. R., 204**

**28.** ——————— *Order substituting one judgment-debtor for another.—Sale or transfer of dena-pownа.*—*A.*, the proprietor of an indigo concern, which comprised a putni talook, after mortgaging the entire concern to *B.*, allowed the putni talook to be sold for arrears of rent under Regulation VIII of 1819; *C.*, the dur-putnidar of the talook, whose rights were thus extinguished, then sued and obtained a decree for damages against *A.* After *C.* had obtained this decree against *A.*, *A.* sold his equity of redemption in the entire mortgaged concern to *B.*, and by this sale, all the dena and pownа, or liabilities and outstandings of the concern, were transferred from *A.* to *B.* *C.* then, after notice to *B.*, obtained an order, by which *B.* was made the judgment-debtor in the place of *A.* *B.* took no proceedings within one year to set aside this order; but, after the lapse of three years, upon *C.* attempting to execute his decree, instituted the present suit to set aside the order, and for an injunction to restrain *B.* from executing the decree against him. *Held* that *B.* was barred by limitation from suing to set aside that order, but he was entitled to an injunction restraining *C.* personally from executing the decree against him. DHURONIDHUR SEN *v.* AGRA BANK **[I. L. R., 5 Calc., 86 : 4 C. L. R., 434**

**29.** ——————— *Civil Procedure Code (Act VIII of 1859), s. 269, Summary proceedings under.—Neglect to set aside order passed in such proceedings within one year by purchaser at a Court sale.—Suit to establish title to property by such purchaser.*—At a Court sale held on the 15th November 1871 in execution of a decree, the plaintiff's deceased husband purchased a house, but neglected to register his sale-certificate. In attempting to recover possession he was obstructed by the defendant, who claimed the property as her own. Summary proceedings under section 269 of Act VIII of 1859 were thereupon instituted against the defendant, and the defendant's claim was upheld by an order passed on the 7th November 1872 In the meantime the plaintiff's husband having died, plaintiff filed, on the 31st March 1873, a regular suit to establish her title. On the 8th July 1873, she obtained a second certificate, and registered it. The Court of first instance awarded her claim, but on appeal by the defendant the lower Appellate Court reversed that decree, on the ground that, at the institution of the suit, plaintiff had not a registered certificate of sale. That decree was confirmed on the 17th November 1879, on second appeal, by the High Court. On the 30th April 1880, plaintiff brought this suit on the strength of her registered certificate. The Court of first instance allowed her claim. The defendant appealed, and the lower Appellate Court held her suit not maintainable. On appeal by plaintiff to the High Court,—*Held*, confirming the decree of the lower Appellate Court, that plaintiff's suit was barred. The Subordinate Judge having, by his order of the 7th November 1872, passed in the summary proceedings, disposed of the case on the ground that the property belonged to the defendant, the plaintiff was under an obligation to displace that order by a suit instituted within one year from its date. BAI JAMNA *v.* BAI ICHHA . . . **I. L. R., 10 Bom., 6[illegible]**

**LIMITATION ACT, 1877, art. 13**—*continued.*

**——————— art. 14 (1871, art. 16).**

**1.** ——————— *Suit for land of which a pottah has been granted by Collector after demarcation.—Suit to set aside official act.*—Plaintiff in 1877 claimed possession of land which had been demarcated as poramboke in 1860, and of which a pottah had been granted to defendant in 1875 by the Collector. *Held* that this suit was not governed by article 16, schedule II of Act IX of 1871, as it was not necessarily a suit to set aside an official act. It was governed by the twelve years' period of limitation running from the date of the grant by the Collector. KRISHNAMMA *v.* ACHAYYA **[I. L. R., 2 Mad., 306**

**2.** ——————— *Suit for declaration of title.—Suit to set aside an order of revenue authorities.—Land Registration Act (Act VII of 1876), s. 89.*—The Civil Court has no power to set aside an order passed under the Land Registration Act, and when a prayer for such relief is contained in a plaint which also asks for a declaration of right and title to, and confirmation of possession in, property, such prayer may be treated as mere surplusage. When, therefore, a plaint was filed containing separate prayers for the above relief, and when the original Court held that the main object of the suit was to have certain orders made by the revenue authorities set aside, and that the suit was accordingly governed by article 14, schedule II of the Limitation Act, and passed a decree dismissing the suit as having been brought more than a year after the date of such orders,—*Held* that such a decree was wrong; that the suit being one simply for the declaration of the plaintiffs' title in respect of the property in dispute, article 14 had no application to the case. LUCHMON SAHAI CHOWDHRY *v.* KANCHUN OJHAIN . . **I. L. R., 10 Calc., 525**

**3.** ——————— *Suit to set aside order of Commissioner directing payment of Government revenue.*—A suit to set aside an order of a Commissioner directing the plaintiff to pay Government revenue at a certain rate, was formerly held to be governed by clause 16 of section 1 of the Act of 1859; it would now probably be governed by this article. KEBUL RAM *v.* GOVERNMENT . **5 W. R., 47**

**——————— art. 15 (1871, art. 17; 1859, s. 1, cl. 4).**

**1.** ——————— *Suit to set aside transfer of land made by revenue authorities.*—A suit to set aside a transfer of land made by the revenue authorities for arrears of Government revenue comes within the words of clause 4, section 1, Act XIV of 1859. CHITRO NARAIN SINGH TEKAIT *v.* ASSISTANT COMMISSIONER OF THE SONTHAL PERGUNNAHS **[14 W. R., 203**

**2.** ——————— *Suit to establish right to hold land rent free.*—Where a person claiming to

**LIMITATION ACT, 1877, art. 15**—*continued.*

hold land free of Government assessment was compelled by the Collector to pay the same,—*Held* that though the 12 years' period of limitation applied to a suit to establish his right to hold the land free, yet the limitation of one year under section 1, clause 4 of Act XIV of 1859 was applicable to the suit so far as it sought to recover payments made. BHUJANG MAHADEV *v.* COLLECTOR OF BELGAUM . **11 Bom., 1**

**——— art. 16 (1871, art. 18; 1859, s. 1, cl. 4).**

——— *Act XIV of 1859, s. 1, cl. 4.*—*Suit for revenue.*—Clause 4 of section 1 of Act XIV of 1859 is not applicable where the revenue, for recovery of a portion of which a suit is brought, was a payment made to the Government on account of a clear and admitted liability, the object being to save the estate from sale. Plaintiff may be entitled to recover from a co-sharer what he has paid to the Government beyond his just share, but his case is not governed by the 4th clause. Clause 16, allowing six years, appears rather to be applicable. SHADEE LALL *v.* BHAWANEE . . . . **2 N. W., 52**

**——— art. 17 (1871, art. 19).**

——— *Suit for compensation for land.*—*Cause of action.*—In a case decided under Act XIV of 1859 the cause of action in a suit for compensation for land taken for public purposes was held to arise from the time the plaintiff was dispossessed, and not from the date when his application for compensation was rejected. HILLS *v.* MAGISTRATE OF NUDDEA **[11 W. R., 1**

This would not now be law.

**——— art. 19 (1871, art. 21).**

*See* FALSE IMPRISONMENT. **[I. L. R., 9 Bom., 1**

**——— art. 23 (1871, art. 25; 1859, s. 1, cl. 2).**

*See* ART. 36 . **I. L. R., 7 Bom., 427**

1. ——— *Suit for malicious prosecution.*—The limitation of one year prescribed by clause 2, section 1, for bringing a suit for damages for injury caused to reputation by malicious prosecution in a Criminal Court, runs from the date on which the plaintiff was discharged from custody, and not from the date on which the criminal charge was preferred. OBEDUL HOSSEIN *v.* GOLUCK CHUNDER **[8 W. R., 443**

2. ——— *Suit for damages for malicious statement.*—*Cause of action.*—In an action for damages for making a false and malicious statement in consequence of which the Magistrate took proceedings in the course of which the plaintiff's house was searched, and he alleged he was thereby injured in various ways, the alleged false statement was found to have been made more than one year previous to the suit, and there was nothing to show that any of the resulting damage which would constitute a cause of action occurred within a year before the suit. *Held* that the action was barred by section 1, clause 2, Act XIV of 1859. The cause of action did not arise from the date of the plaintiff's discharge. *Obedul Hossein* v. *Goluck Chunder, 8 W. R., 443,* distinguished. HARINARAYAN MAITI *v* AJODHYA RAM SHI . **1 B. L. R., S. N., 17: 10 W. R., 308**

**——— art. 24 (1871, art. 24; 1859, s. 1, cl. 2).**

——— *Cause of action.*—*Suit for defamation.*—*Held* that the cause of action in a suit for damages on account of defamation of character, arises on the date of the publication of the letter containing the defamatory matter, and that a suit not instituted within one year from that date is barred by clause 2, section 1, Act XIV of 1859. MAHOMED IMDADALLY *v.* AMEER ALY . . **2 Agra, 47**

**——— art. 29 (1871, art. 30; 1859, s. 1, cl. 2).**

1. ——— *Wrongful seizure of goods.*—*Injury to personal property.*—Wrongful seizure of goods under process of law was held to be not an "injury to personal property" within the meaning of clause 2, section 1, Act XIV of 1859. INDERCHUND *v.* NUNDEERAM SING . . . **Cor., 3**

But was governed by clause 16 of the same section. NUSEEUTOOLLAH *v.* ROOP SONA BIBEE **[7 W. R., 499**

2. ——— *Suit for damages for detention of bullocks.*—Plaintiff's bullocks having been seized in execution of a decree obtained by defendant against third parties, plaintiff put in a claim and the bullocks were released on 15th January 1874. On 15th January 1875 plaintiff instituted an action for damages caused by the detention of the bullocks. *Held* that the case fell under Act IX of 1871, schedule II, article 30, and that the suit was barred by limitation. RAM SINGH MOHAPATTUR *v.* BHOTTRO MANEE SONTHAL . . **24 W. R., 298**

3. ——— *Suit for money taken in execution of a decree.*—*Compensation.*—*Damages for loss of gain or interest upon money.*—A suit to recover money wrongly taken under a decree is a suit for compensation to which the limitation of one year under article 29 of Act XV of 1877, schedule II, applies. The same limitation under the same provision applies if, to the above demand, a claim be added to recover damages for the loss of gain or interest upon the money. JAGJIVAN JAVHERDAS *v.* GULAM CHAUDHRI . **I. L. R., 8 Bom., 17**

**——— art. 30 (1871, art. 36).**

*See* ART. 115 . **I. L. R., 5 Mad., 388**

1. ——— *Suit for compensation for value of goods short delivered.*—*Suit for breach of contract.*—The defendants were owners of a fleet of steamships plying periodically along the coast of British India by which they undertook to convey for freight parcels of goods for all persons indifferently from and to specified ports. In a suit against the defendants for compensation for the value of goods

**LIMITATION ACT, 1877, art. 30**—*continued.*

short delivered,—*Held* that clause 30, schedule II of the Limitation Act, would apply to the defendants; but that as this suit was for breaches of the contracts to deliver, it was governed by clause 115. *Semble,*—Clause 30, schedule II of the Limitation Act, applies to suits for compensation for loss or damage to goods arising from malfeasance, misfeasance, or nonfeasance independent of contract. BRITISH INDIA STEAM NAVIGATION COMPANY *v.* MAHAMMED ESACK & CO. . **I. L. R., 3 Mad., 107**

2. ——————— *Action against Railway Company for loss of goods.*—An action against a Railway Company for loss of goods, when there is no contract, is governed by schedule II, clause 30 of the Limitation Act. *B. I. S. N. Co.* v. *Mahammed Esack, I. L. R., 3 Mad., 107,* followed. KALU RAM MAIGRAJ *v.* MADRAS RAILWAY COMPANY **[I. L. R., 3 Mad., 240**

3. ——————— *Carrier by railway.—Loss.—Non-delivery of goods.—Onus of proof.*—Five hundred and sixty-three bags of grain were made over to the defendants at Cawnpore and Nagpur for carriage to Sholapur. All that was proved was that the defendants delivered to the plaintiff, the owner of the grain, 512 bags only, having previously obtained from his agent receipts for the full number as arrived at Sholapur. In a suit by the plaintiff to recover the price of the bags not delivered, brought after more than two, but within three, years of the time when the rest of the goods were delivered, the defendants claimed that the suit was barred by the provisions of article 30 of schedule II of Act XV of 1877, as not having been brought within two years of the time "when the loss occurred." *Held* that mere non-delivery of the bags was no proof of their loss, the onus of proving which as an affirmative fact lay on the defendants before they could claim the benefit of the special limitation of two years provided in article 30 of schedule II of Act XV of 1877; and that the suit, therefore, was in time. MOHANSING CHAWAN *v.* CONDER **[I. L. R., 7 Bom., 478**

4. ——————— **and art. 115.**—*Bill of lading.—Contract, Breach of, for delivery of goods.—Onus of proof of loss of goods.*—Where a plaintiff brings a suit for breach of contract for non-delivery of goods under a bill of lading, it is not open to the defendants, after having denied receipt of the goods, to set up, or for the Court, after finding that the goods had been shipped but not delivered, to assume, without evidence, that the goods were lost, in order to bring the case within article 30, schedule II of the Limitation Act of 1877. *Per* GARTH, *C. J.—Semble,*—Where a plaintiff sues for breach of contract and proves his case, the three years' limitation would be applicable, although the defendants were to prove that the breach occurred in consequence of some wrongful act of theirs, to which the shorter limitation would apply. *Mohansing Chawan* v. *Conder, I. L. R., 7 Bom., 478;* and *British India Steam Navigation Company* v. *Mahammed Esack, I. L. R., 3 Mad., 107,* approved. DANMULL *v.* BRITISH INDIA STEAM NAVIGATION COMPANY . . **I. L. R., 12 Calc., 477**

**LIMITATION ACT, 1877**—*continued.*

——————— **art. 32.**—*Suit for the removal of trees.—Civil and Revenue Courts.—Act XII of 1881, s. 93 (b).*—*Held* that a suit by a landholder for the removal of certain trees planted by the defendants upon land held by them as the plaintiff's occupancy-tenants was governed by article 32, schedule II of the Limitation Act (XV of 1877). *Raj Bahadur* v. *Birmha Singh, I. L. R., 3 All., 85; Amrit Lal* v. *Balbir, I. L. R., 6 All., 68;* and *Kedarnath Nag* v. *Khetter paul Sritirutno, I. L. R., 6 Calc., 34,* referred to. GANGADHAR *v.* ZAHURRIYA . **I. L. R., 8 All., 446**

——————— **art. 34 (1871, art. 41).**

——————— *Suit for recovery of person of wife.—Suits under Act XIV of 1859.*—Suits for the recovery of a wife's person were, under the Act of 1859, held to be governed by clause 16 of section 1 of that Act. BHUGNA *v.* GUNGOOA . **2 Agra, 170**

——————— **art. 36 (1871, art. 40).**

*See* ART. 48 . **I. L. R., 4 Calc., 665**

*See* ART. 109 (1871, ART. 109). **[I. L. R., 4 Calc., 625**

1. ——————— **and art. 23.**—*False complaint to Magistrate.—Attachment and detention of goods.—Action for damages.*—On the 26th of July 1878, *A.* complained to the Magistrate that *B.* committed theft of his grain. The Magistrate, of his own motion, attached the grain on the 10th of August 1878, pending inquiry into the complaint, then proceeded with the inquiry, and dismissed the complaint, but continued the attachment pending the decision of the Civil Court to which he referred the parties. *A.* in 1879 brought a suit against *B.* to establish his title to the grain, which was finally rejected on the 21st of June 1880, and *B.* recovered his grain on the 30th of September 1880, but in a damaged condition. *B.*, on the 13th of November 1881, sued *A.* for damages for wrongful detention of his grain, and its consequent deterioration in quality and value. *Held* that the date of the complaint was the date of the wrong, and limitation ran from that date, or, at the latest, from the date of the attachment, and that *B.'s* suit was, therefore, barred whether the period applicable was one year under article 23, or two years under article 36 of schedule II of Act XV of 1877. MUDVIRAPA KULKARNI *v.* FAKIRAPA KENARDI . . . **I. L. R., 7 Bom., 427**

2. ——————— *Suit to recover money paid into Court but afterwards recovered from third person in execution of decree.*—A suit to recover money paid by defendant into Court which was payable to the plaintiff and which was afterwards recovered by the defendant in the execution of a decree against a third person under an order of the Court executing the decree was a suit substantially for damages to which article 26, schedule II of Act IX of 1871 applied, and was barred, the cause of action having arisen at the date of the taking by the defendant of the money claimed. DEBI DAS *v.* NUR AHMAD . . . . **7 N. W., 174**

3. ——————— *Suit to set aside sale or for compensation.—Boundaries erroneously described in*

**LIMITATION ACT, 1877, art. 36**—*continued.*

*sale proclamation.*—"*Falsa demonstratio.*"—On the 17th November 1877 a certain piece of land was sold within the boundaries of which, as described in the proclamation, another piece of land was included. The land was sold in execution of a decree obtained by the first defendant against defendants 2, 3, and 4, and was purchased by the plaintiff. The second piece of land was sold on the following day and purchased by defendant No. 5. On 28th November the plaintiff applied to have the sale set aside and his money refunded unless he was put in possession of all the land included in the boundaries mentioned in the proclamation, but his application was refused and the sale confirmed on 20th July 1878. In a suit for possession of all the land or for return of his purchase-money with interest, it was contended, in the Courts below and on second appeal, that the plaintiff was, at any rate, entitled to damages or compensation because of the land as defined by the survey number proving to be of less acreage than that included in the boundaries, and the lower Court had held such a claim as barred also under article 36, schedule II of the Limitation Act, XV of 1877. *Held* that the suit, regarded as one for compensation, was not barred, as three years had not elapsed since the confirmation of the sale when the suit was brought—article 36 applying only to suits for compensation for tortious acts independent of contract. But the claim for compensation was not maintainable, as the property offered for sale was sufficiently identified by the description as "Survey No. 294, Pot No. 3, containing 24¾ *gunthas*," and the statement of boundaries, so far as it was inaccurate, might be properly regarded as "*falsa demonstratio.*" MAHOMED SAYAD PHAKI *v.* NAVROJI BALABHAI [I. L. R., 10 Bom., 214

——— **art. 37 (1871, art. 31).**

*See* PRESCRIPTION—EASEMENTS—RIGHTS OF WATER . I. L. R., 6 Calc., 394

The period for a suit for obstructing a water-course is changed from two to three years by the Act of 1877.

——— *Suit for obstructing water-course.*—Under the Act of 1859 a suit for obstructing a water-course was held to be governed by the general limitation of six years under section 1, clause 16 of that Act, or if the plaintiff were out of possession, by the limitation of twelve years. BUDDUN THAKOOR *v.* SUNKER DOSS . W. R., 1864, 106

VISWAMBHARA RAJENDRA DEVA GARU *v.* SARADHI CHARANA SAMANTARAYA GARU [3 Mad., 111

——— **art. 39 (1871, art. 43).**

1. ——— *Suit for compensation for trespass to land.—Right to declaratory decree.*—A person whose right to land has been disputed, and who has obtained an order under Chapter 40 of the Code of Criminal Procedure, 1872, from a Magistrate, declaring him entitled to retain possession, is entitled to sue for a declaration of his right to the land. Plaintiff sued on the 9th February 1880

**LIMITATION ACT, 1877, art. 39**—*continued.*

for compensation for loss of crops caused by the defendants taking possession of his well in January 1877. The District Judge on appeal dismissed the suit on the ground that time began to run against the plaintiff from January 1877, and that the claim was barred by section 36, 37, 39, or 40 of schedule II of the Limitation Act, 1877. *Held* that the plaintiff was entitled to sue for compensation for the trespass within three years from the date on which the defendants' possession ceased, and that the defendants were liable for any loss suffered within three years preceding the date of the suit. NARASIMMA CHARYA *v.* RAGUPATHI CHARYA [I. L. R., 6 Mad., 176

2. ——— *Right of caste to exclusive worship.—Infringement of right.*—Four persons of the Chitpavan caste brought a suit in 1876, alleging that they and the members of their caste, in common with certain other castes, possessed the exclusive right of entry and worship in the sanctuary of a temple, and that the defendants, members of the Palshe caste, not being of the privileged castes, infringed that right in 1871 and thereafter by entering the sanctuary and performing worship therein. They prayed for a declaration of their right and an injunction restraining the defendants from interfering with it. The defendants contended (*inter alia*) that the suit was barred by the law of limitation. *Held* that the suit was not barred by article 43 of schedule II of Act IX of 1871, and that nothing in the law of limitation prevented the establishment of such a right as that denied, merely because the first act of interference with it was more than a stated number of years ago. Such acts are not continuous like possession, and their only operation is to create, where often and consistently repeated during a long period, a presumption of their lawful origin. ANANDRAV BHIKAJI PHADKE *v.* SHANKAR DAJI CHARYA [I. L. R., 7 Bom., 323

3. ——— **and art. 143.**—*Suit for damages for trespass.—Suit to recover immoveable property from trespasser.*—The limitation of three years provided in clause 43, schedule II of the Limitation Act IX of 1871 applies only to suits for damages on account of trespass, and not to suits to recover immoveable property from a trespasser, for which the period of limitation is twelve years, as provided by clause 143. JOHARMAL *v.* MUNICIPALITY OF AHMEDNAGAR . I. L. R., 6 Bom., 580

4. ——— *Suit to have drain closed.—Cause of action.*—The cause of action in a suit in which the plaintiff claimed to have a drain closed on the ground that it passed through his land, was held to count from the last act of trespass, each act of trespass causing a fresh right of action, and that the suit was not barred by clause 16, section 1, Act XIV of 1859. RAMPHUL SAHOO *v.* MISHEE LALL [24 W. R., 97

——— **art. 40 (1871, art. 11; 1859, s. 1, cl. 2).**

——— *Suit for account of profits.—Infringement of patent.—Copyright Act (XX of*

**LIMITATION ACT, 1877, art. 40**—*continued.*

*1847), s. 16.—Patent Act (XV of 1859), s. 22.*—In a suit for an account of profits obtained by the infringement of an exclusive privilege, the period of limitation, the taking of an account being only a mode of ascertaining the amount of damages, is the same as the period of limitation for an action for damages on the same ground,—*viz.*, the period prescribed by article 11, schedule II, Act IX of 1871. KINMOND *v.* JACKSON . **I. L. R., 3 Calc., 17**

**——— art. 42.**

There was no special provision under the former Acts, 1859 and 1871, for damages caused by a wrongful injunction.

——— *Suit for damages caused by wrongful injunction.*—It was under the Act of 1859 doubted whether such a suit was governed by clause 2, section 1 of that Act, the Court inclining to the opinion that it was not. NANDA KUMAR SHAHA *v.* GOUR SANKAR **[5 B. L. R., Ap., 4: 13 W. R., 305**

Under both the former Acts, therefore, the general limitation of six years would probably have been applicable: now under article 42 of the present Act the period is three years from the cessation of the injunction.

**——— art. 44.**

*See* s. 7 . . **I. L. R., 4 Calc., 523**

**——— art. 45 (1871, art. 44); 1859, s. 1, cl. 6).**

1. ——— *Assessment for revenue or rent, Order for.—Award.*—An assessment for revenue or rent by a Collector was not a judical award within the meaning of clause 6 of section 1, Act XIV of 1859. The term "award" as used in that clause means an adjudication on rights as between rival claimants, made by a revenue officer under the judicial powers conferred by the regulations mentioned in such clause. HURRE MOHUN GHOSAUL *v.* GOVERNMENT **[2 N. W., 226**

2. ——— *Judicial award.—Proceeding of settlement officer as to cess.—Held* that the proceeding of the settlement officer representing a cess as a source of income to the zemindar was not a judicial award, and the limitation provided in clause 6, section 1, Act XIV of 1859, was not applicable to a suit to set aside that proceeding. RAM CHUND *v.* ZAHOOR ALI KHAN . . . **1 Agra, 134**

3. ——— *Order of revenue authorities as to registration of names.—Held* that an order passed by revenue authorities for entry of names in a proprietary register, not being passed after a trial in a suit of the nature referred to in clause 2, section 23, Regulation VII of 1822, was not an order in a suit to which the term of limitation mentioned in clause 6, section 1, Act XIV of 1859, applies. MADHO SINGH *v.* JEHANGEER . . . . **2 Agra, 229**

4. ——— *Entry made by settlement officer.*—An entry made by a settlement officer in the report of a co-sharer and on the strength of the report of the patwari and canoongoe in the absence of the party against whom it is made, was not an award within the provisions of section 1, clause 6 of Act XIV of 1859. KINHAR DANSHA *v.* GOKURUN **[3 Agra, 316**

5. ——— *Suit to contest adjudication of boundaries by Revenue Court under Act I of 1847.*—An adjudication of the boundaries by the revenue authorities under Act I of 1847 is not final and conclusive, but is, like any other judicial award made under Regulation VII of 1822, open to question by regular suit in the Civil Court within three years (clause 6, section 1, Act XIV of 1859). SUJJAD *v.* SAHIT ALI . . . . . **3 Agra, 140**

6. ——— *Order of Collector with reference to rights of parties already determined.*—Where the relative rights of the parties as landlord and tenants were determined by competent authority and the matter referred for decision of the Collector was to commute the rents paid in kind into money rents, and that officer in so doing decided the rights of the parties declaring the tenants sub-proprietors and directing them to pay at the revenue rates with an addition of 5 per cent. allowance to the landlord,—*Held* that the order of the Collector was not an award of the nature contemplated by clause 6, section 1, Act XIV of 1859. BUNSEE *v.* RAMSOOKH **[3 Agra, 384**

7. ——— *Suit to set aside partition.*—A suit to avoid a butwara division by the Collector may be brought within six years; section 1, clause 6 of Act XIV of 1859 does not apply to it. OODOY SINGH *v.* PALUCK SINGH . . **16 W. R., 271**

8. ——— *Suit to vary boundaries in survey award.*—A suit substantially to vary the boundaries laid down in a survey award must be brought within three years from the date of the award. JANKEERAM MOHUNT *v.* HARADHUN BANERJEE **[W. R., 1864, 38**

9. ——— *Act of 1871, art. 44.—Proceedings by settlement officer to decide possession.—Award.—Beng. Reg. VII of 1822.*—*D.* died in 1860 leaving him surviving his first wife *G.*, his second wife *B.*, his mother *R.*, and *M.* his son by a woman to whom he had been married by the "gandharp" form of marriage. On *D.'s* death *G.'s* name was registered in the record-of-rights in respect of his proprietary rights in a certain village. In 1871 *G.* died, and on her death *B.*, *R.*, and *M.* preferred separate claims to have their names registered in respect of such rights. The Assistant Settlement Officer before whom these claims came for decision, professing himself unable to decide which of the claimants was in possession, and observing that it was not shown that possession was joint, referred the case to the Settlement Officer. The Settlement Officer, without making any inquiry, disposed of the case on the evidence taken by the Assistant Settlement Officer, and held that the claimants were in joint possession of such rights, and it was proper that the name of each should be registered in respect

**LIMITATION ACT, 1877, art. 45**—*continued.*

of a one third share of such rights. He at the same time intimated to the parties that, unless they settled their claims in the Civil Court or by arbitration, before the khewat was framed, it would be framed as he had directed. In 1873 *R.* died, and on her death *M.* procured the registration of his name in respect of her one third share. In 1879 *B.* sued *M.* for possession of the one-third share which he had obtained under the proceeding of the Settlement Officer, and of *R.'s* one third share, claiming as heir to her deceased husband *D.*, and alleging that *M.* was not the legitimate son of *D.* and was therefore not entitled to succeed to such rights. *M.* set up as a defence that, as the proceeding of the Settlement Officer was an award under Regulation VII of 1822, and the suit was one to contest such award, and it had not been brought within three years from the date of such award, the suit was barred by limitation. *Held* that the suit was not barred by limitation under No. 44, schedule II of Act IX of 1871, or No. 45, schedule II of Act XV of 1877, as the proceeding of the Settlement Officer was not an award under Regulation VII of 1822. BHAONI *v.* MAHARAJ SINGH . . . **I. L. R., 3 All., 738**

10. ——————— *Application of section.*—Clause 6, section 1, Act XIV of 1859, provides that possessory titles by virtue of awards under the Regulations there mentioned shall become final unless questioned within three years; but that will not enable a person to come in within three years after the date of such awards and recover possession of lands in respect of which his suit has been barred by the other provisions of the Law of Limitation. BEER CHUNDER JOOBRAJ *v.* RAMGUTTY DUTT **[8 W. R., 209**

11. ——————— *Settlement award.—Beng. Reg. VII of 1822.*—On a Collector proceeding to settle a mortgaged estate, both mortgagee and mortgagor appeared before him and contended for the right of settlement. His award under Regulation VII of 1822 was in favour of the mortgagee in possession, on the ground that the period of redemption had expired, and he settled the estate with him. *Held* that, as the mortgagor allowed that award to remain unchallenged for three years, it became binding under clause 6, section 1, Act XIV of 1859. SREECHUND BABOO *v.* MULLICK CHOOLHUN **[9 W. R., 564**

12. ——————— *Act XIII of 1848.—Suit to contest award.—Suit to amend settlement.—Cause of action.*—The limitation declared by Act XIII of 1848, and clause 6, section 1, Act XIV of 1859, applied only to suits for the purpose of contesting the justice of an award as between the contending parties, and not to those the object of which was to amend a settlement and establish the right of persons who were not before the Collector. *Held* that the cause of action to the plaintiff did not accrue from the date of the orders of Government directing to discontinue the payment of malikana, but from that of the Collector's by which it became known to the plaintiff that he would henceforth be deprived of his proprietary title. HIMMUT SINGH *v.* COLLECTOR OF BIJNOUR . . . . . **2 Agra, 258**

**LIMITATION ACT, 1877, art. 45**—*continued.*

13. ——————— *Survey award, Appeal from.—Co-sharers.*—*A.* and *B.* were similarly affected by a survey award. *A.* appealed, but *B.* did not. *Held*, in a suit by *B.* and his co-sharers to set aside the award, that *B.* could not compute the period of limitation from the date of the order on *A.'s* appeal. *Held*, also, that *B.'s* co-sharers, though they did not appear in the proceedings of award, were bound, if they sued at all, to sue within the three years prescribed by the law. TULSIRAM DAS *v.* MOHAMED AFZAL *alias* MIRZA **[1 B. L. R., A. C., 12 : 10 W. R., 48**

14. ——————— *Survey award.—Suit for reversal of, and for possession.*—Where *A.* sued for reversal of a survey award, and for recovery of possession, alleging dispossession subsequent to the date of the award,—*Held* that his suit was not barred by reason of its being brought beyond three years from the date of the award. MOZAFFUR ALLY *v.* GIRISH CHANDRA DAS **[1 B. L. R., A. C., 25 : 10 W. R., 71**

15. ——————— *Order of Board of Revenue under Beng. Reg. VII of 1822.—Suit for possession and declaration of title.*—An order of the Board of Revenue under Regulation VII of 1822, declaring a particular person entitled to a settlement of certain lands, is no ground for declaring a third person who was no party to those settlement of proceedings in any stage, debarred under article 44, schedule II of Act IX of 1871 (corresponding with article 45, schedule II of Act XV of 1877) from bringing a suit to establish his title to, and to recover possession of, the lands after three years and within the general law of limitation. KANTO PROSAD HAZARI *v.* ASAD ALI KHAN . **5 C. L. R., 452**

*See* SHIBO DOORGA CHOWDHRAIN *v.* HOSSEIN ALI CHOWDHRY . . . . **6 W. R., 218**

16. ——————— *Cause of action, Date of.*—*A.* appealed from the award of a survey officer to the Commissioner, who summarily rejected the appeal. The order of the Commissioner was confirmed by the Board of Revenue without entering into the merits. *Held* that the period of limitation ran from the date of the order of the Board of Revenue. KRISHNA CHANDRA DAS *v.* MAHOMED AFZAL **[1 B. L. R., A. C., 11 : 10 W. R., 51**

**——————— art. 46 (1871, art. 45; 1859, s. 1, cl. 6).**

1. ——————— *Order of settlement officer.—Award.*—An order of a settlement officer upon an inquiry made at the instance of the zemindar, and for the purpose of the preparation of the record, in the course of which inquiry information was given both in support of, and against the zemindar's claim to, a cess, was not an award of the nature contemplated by clause 6, section 1, Act XIV of 1859, and the three years' period of limitation was inapplicable to a suit to assert such claim. MAHOMED ALI KHAN *v.* OMRAO SINGH . . . . . **2 N. W., 425**

2. ——————— *Suit for possession.—Boundaries.—Partition.*—In a suit by the purchaser of

**LIMITATION ACT, 1877, art. 46**—*continued.*

one estate to recover certain lands alleged to belong to his estate, which the defendants held as a part of another estate, the plaintiff needlessly prayed that a certain order passed in the cause of the butwarra of the defendant's estate should be set aside. As the defendant failed to show that the Collector, in laying down the boundaries of the estate then under butwara, was proceeding under Regulation VII of 1822,—*Held* that the map made by him in carrying out the butwara of another estate was not an award binding on the defendant, and that the case therefore was not barred by limitation under clause 6, section 1, Act XIV of 1859. RUGHOOBUR SINGH *v.* HURREE PERSHAD . . . . . **6 W. R., 75**

3. ——————— *Survey award.—Suit for possession.—Res judicata.*—In a thakbust map land was demarcated as belonging to *A.* *B.* claimed that it belonged to him jointly with *A.* On 18th November 1858 the map was rectified by demarcating the lands to *A.* and *B.* jointly. *B.* afterwards brought a suit against *A.* in the Munsif's Court to recover the value of some mangoes which grew on two plots of the land in question: and it was decided on 12th December 1864 in favour of *B.*, on the ground that the plots belonged to *A.* and *B.* jointly. On 11th December 1865 *A.* brought his suit against *B.* for a declaration of right and confirmation of possession, to set aside the survey award, and for amendment of the thakbust map. *A.* alleged that he was no party to the thakbust proceedings, and that he had been in possession ever since. *Held* (overruling the decision of the Courts below) that the suit was barred, so far as it asked to have the thakbust map amended, under clause 6 of section 1, Act XIV of 1859; and that a suit by a person in possession to have his title confirmed was not a suit to recover property within clause 6 of section 1, and was not barrred by reason of its not being brought within three years from the date of the award. MAHIMA CHANDRA CHUCKERBUTTY *v.* RAJKUMAR CHUCKERBUTTY **[1 B. L. R., A. C., 1; 10 W. R., 22**

4. ——————— *Award of settlement officer.*—Where a claim to the proprietary rights was preferred by the plaintiffs at the time of settlement, and the settlement officer, on the objection of the defendants, ordered the plaintiffs to be recorded as hereditary cultivators, and referred them to the Civil Court to establish their right,—*Held* that the present suit brought to establish that right not having been instituted within three years from the date of the award of the settlement officer, was barred by limitation. SURDAR KHAN *v.* CHUNDOO . **1 Agra, 228**

5. ——————— *Award of settlement officer.*—*Held* that the plaintiffs' claim to lands awarded to defendant in settlement proceedings was not barred by the period of limitation provided in clause 6, section 1, Act XIV of 1859, as they were no parties to the settlement proceedings and no judicial award or order affecting them was passed by the settlement officer. RAMAISHER SINGH *v.* SHAIVA ZALIM SINGH . . . . . **2 Agra, 8**

6. ——————— *Settlement award.—Beng. Reg. VII of 1822.*—A settlement officer by a certain proceeding recognised the plaintiffs' right to the property in suit, and, declaring them not to be clearly shown to be out of possession of it, ordered their names to be recorded in the proprietary register. The plaintiffs subsequently brought a suit for establishment and declaration of right to partition and possession of the property. *Held* that the proceeding of the settlement officer was undoubtedly an award under Regulation VII of 1822, and that, as the plaintiffs sued for possession, and did not allege that they had been dispossessed since the award, thus raising the presumption that they were not in possession at the time, and as their suit was in substance and effect a suit to recover property comprised in an award, the suit was barred by limitation, not having been instituted within three years. GUNESHEE LALL *v.* TEKAM KOOER . . . . . **5 N. W., 78**

**LIMITATION ACT, 1877, art., 46**—*continued.*

1. ——————— **art. 47 (1871, art. 46; 1859, s. 1, cl. 7).**—*Suit for property respecting which no final award is made.*—A suit to recover property respecting which no final award has been passed under Act IV of 1840 was not barred by limitation, under clause 7, section 1, Act XIV of 1859, but might be brought within twelve years from the date of ouster. DYRAM SAHOO *v.* SOGRAH **[3 W. R., 174**

2. ——————— *Verbal order of Magistrate under Act IV of 1840.—Held* that a verbal order of the Magistrate under Act IV of 1840 cannot be regarded as an order or award within the meaning of the term of clause 7, Act XIV of 1859. GUNGA PERSHAD *v.* MAHOMED KOOTOOB ALUM **2 Agra, 27**

3. ——————— *Order in suit under Act IV of 1840.—Benamidar.*—*N.*, in 1852, purchased from *R.* a putni talook in the name of *H.* In 1854 *N.* died, leaving two sons, one of whom was *K.*, and a widow. The sons allowed the widow to remain in possession. In December 1854 *R* made a complaint before the Magistrate, under Act IV of 1840, against *H.* *K.* and others, stating that they had dispossessed him of the talook on 27th December, and the Magistrate thereupon ordered *H.* and the other defendants except *K.* to put *R.* in possession. On 12th January 1855, *R.* obtained possession and sold the property. On 28th December 1866 *K.* and his brother sued *H.* *R.* and the purchaser to recover possession. *Held* (reversing the decision of the Courts below), that the suit was not barred by section 1, clause 7 of Act XIV of 1859. The mere fact that the Act IV award was passed against *H.*, a benamidar of the plaintiffs, was not sufficient to show that they were bound by that award unless evidence was given that they gave authority to *H.*, express or implied, to act in the matter on their behalf. KHAGENDRONATH MALIK *v.* RAKHAL DAS SIRKAR **[2 B. L. R., S. N., 1**

4. ——————— *Order of Magistrate for attachment.*—Where a Magistrate passed an order for attachment on the finding that neither of the parties then at issue was in possession,—*Held* that it was not an order respecting possession within the meaning of clause 7, section 1, Act XIV of 1859, and

**LIMITATION ACT, 1877, art. 47**—*continued.*

therefore the limitation provided by that clause was not applicable. CHUJ MULL *v.* KHYRATEE [3 Agra, 65

5. ——————— *Order dismissing complaint under Act IV of 1840.*—A Magistrate's order dismissing a complaint under Act IV of 1840, on finding that complainant had not been forcibly dispossessed, was not a binding award to which clause 7, section 1, Act XIV of 1859, would apply. HURRONATH CHOWDHRY *v.* HURRE LALL SHAHA [11 W. R., 477

6. ——————— *Order to record letter settling proceedings.*—Where the result of certain proceedings under Act IV of 1840 was a letter from the Judge directing the Magistrate to leave certain maliks not in possession of a certain dearah in dispute to their civil remedy, and the Magistrate ordered the Judge's letter to be put with the record,—*Held* that such order was not an order in the sense of Act XIV of 1859, section 1, clause 7. MOSAHEB ALI *v.* NUND KISHORE . 20 W. R., 316

7. ——————— *Act XIV of 1859, s. 1, cl. 7.—Order as to possession under Criminal Procedure Code, 1861, s. 318.*—It was held under section 1, clause 7 of the Act of 1859, that that clause did not apply to an order as to possession under the Criminal Procedure Code, section 318. DOORJUN SINGH *v.* SHIBBA . . . . . 3 N. W., 171

GOBIND CHUNDER SHAHA *v.* ASHRUF ALI MEAH. GREGORY *v.* GOURDOSS SHAHA . 8 W. R., 490

UNDHOOB NARAIN *v.* CHUTTURDHAREE SINGH [9 W. R., 480

and the twelve years' limitation was held to apply to such cases, but the Acts of 1871 and 1877 make the articles corresponding to section 1, clause 7, specially applicable to the Criminal Court's order as to possession under the Criminal Procedure Codes.

8. ——————— *Order under Criminal Procedure Code, 1861, s. 319.—Order of attachment.*—The plaintiff sued for the establishment of his proprietary right to, and possession of, a certain ghât, or bathing place. The lower Courts held that the suit was barred by limitation under clause 46, schedule II, Act IX of 1871, the suit not having been brought within three years from the date on which the Magistrate, acting under Chapter XVIII of Act XXV of 1861, passed an order directing that the plaintiff and one of the defendants to the suit should put in personal recognisances of R500 each, and that the tehsildar should warn the parties not to go near the bathing place until a competent Court had settled the quarrel between them: the lower Courts being of opinion that the latter portion of the order amounted to an attachment of the property in dispute under section 319 of Act XXV of 1861. It was held that the order to the tehsildar was not an attachment contemplated by that section. DURGA *v.* MANGAL [7 N. W., 35

9. ——————— *Suit for possession of chur lands re-formed after diluvion.—Order for possession in Criminal Court.*—Certain chur lands, which had been submerged, having re-formed, were claimed by a number of parties. In a proceeding under section 318 of Act XXV of 1861, the Magistrate in January 1871 directed possession to be given to certain persons known as the Roys. In 1872 the present appellants instituted a suit against the Roys to set aside the order of the Magistrate, and on the 16th December 1873 obtained a decree in the High Court, under which possession was given on the 10th July 1874. In 1874, more than three years after the Magistrate's order, the plaintiffs instituted two suits against the Roys and the appellants for possession of the lands made over to the latter under the decree of 1873,—*Held* that these suits were not barred by limitation under article 46, schedule II of the Limitation Act IX of 1871, (cf. Act XV of 1877, schedule II, article 47). That article can only apply between the parties whose possession has been confirmed by the Magistrate, and each one of the parties to that proceeding who claimed against them. It does not apply in favour of one of the parties who has subsequently succeeded by regular suit in ousting the parties put in possession by the Magistrate. *Durgaram Roy* v. *Nursing Deb, 2 B. L. R., A. C., 254;* and *Chintamoni* v. *Iswar Chunder, 3 B. L. R., Ap., 122,* cited. AUKHIL CHUNDER CHOWDHRY *v.* DELAWAR HOSSEIN [6 C. L. R., 93

10. ——————— *Criminal Procedure Code, 1861, Ch. XXII, s. 320.—Order of Criminal Court as to possession.*—A dispute having arisen between plaintiff and defendant as to the ownership of certain landed property, the Magistrate being informed of the dispute held an inquiry under the provisions of Chapter XXII, Act XXV of 1861, and finding himself unable to "determine who was in actual possession of the lands," placed them in charge of the Sub-Magistrate. *Held* that this was not an order respecting "the possession of property" but an attachment proceeding recorded because the Magistrate was unable to determine which party was in possession. The limitation of three years prescribed by the 46th clause of schedule II of Act IX of 1871 was therefore inapplicable. AKILANDAMMAL *v.* PERIASAMI PILLAI . . . I. L. R., 1 Mad., 309

11. ——————— *Possession, Suit for.—Order of Criminal Court for possession.*—In a dispute between *A.* and *B.* concerning the possession of a certain talook, the Criminal Court made an order under section 530 of the Code of Criminal Procedure retaining *B.* in possession; and this order was, in a proceeding under sections 295, 296 of the Code of Criminal Procedure, confirmed by the Court of Session. *Held* that a suit by *A.* for the recovery of the land must be brought within three years from the date of the Magistrate's order, and not from the date of the order passed by the Court of Session. Article 47 of schedule II, Act XV of 1877, refers to immoveable as well as moveable property. KANGALI CHURN SHA *v.* ZOMURRUDONNISSA KHATOON [I. L. R., 6 Calc., 709 : 8 C. L. R., 154

*See* AKILANDAMMAL *v.* PERIASAMI PILLAI [I. L. R., 1 Mad., 309

LIMITATION ACT, 1877, art. 47—*continued.*

12. ——— *Order of Mamlatdar under Bombay Act V of 1864.—Act XVI of 1838.*—An order of the Court of the Mamlatdar under the last clause of section 1 of Bombay Act V of 1864, recognising the possession of a party and enjoining others from disturbing that possession, was not an order under Act XVI of 1838; and the limitation of three years, prescribed in article 7 of section 1 of Act XIV of 1859, did not apply to a suit brought to establish a right against the operation of such an order in the regular Civil Court. BABAJI *v.* ANNA [10 Bom., 479

13. ——— *Order of Mamlatdar under Bom. Act V of 1864.*—*A.* brought a suit in a Mamlatdar's Court, under Bombay Act V of 1864, to recover possession of certain land from *B. C.* joined in the proceedings *proprio motu*, and the Mamlatdar, on the 1st May 1865, made an order awarding possession of the land to *C.* In an action brought by *A.* against *C.* in the Civil Court on the 18th October 1869, *C.* pleaded limitation under section 1, clause 7, Act XIV of 1859, as the action was not filed within three years of the Mamlatdar's order. *Held* that the action was not barred by limitation, as *C.* was not properly a defendant in the Mamlatdar's Court, and that, therefore, the Mamlatdar had no power to make an order regarding him. VISHVANATHRAV KACHESVAR *v.* NARAYAN BIN GOPAL KHAPE . . . . . 9 Bom., 424

14. ——— *Partition suit.—Bom. Act V of 1864.*—Article 46 of schedule II of the Limitation Act IX of 1871 is not applicable to a partition suit. SHIVRAM *v.* NARAYAN [I. L. R., 5 Bom., 27

15. ——— *Partition suit.—Bom. Act V of 1864.*—Plaintiff in 1876 filed a suit to establish his right to, and to recover a fourth share of, certain property which he alleged to be ancestral. He stated his cause of action to have accrued on the 17th May 1871, on which day he had been dispossessed by an order of the Mamlatdar, made under Bombay Act V of 1864. The District Court held that the suit was barred by article 46, schedule II of the Limitation Act IX of 1871. *Held* by the High Court, on special appeal, that article 46 did not apply, and that the suit was not barred. BHAGUJI *v.* ANIABA . . . I. L. R., 5 Bom., 25

——— art. 48 (1871, art. 48).

*See* ART. 120 (1871, ART. 118). [I. L. R., 10 Calc., 860

1. ——— and art. 36.—*Standing crops.—Immoveable property.*—Standing crops are immoveable property within the meaning of the Limitation Act. PANDAH GAZI *v.* JENNUDDI [I. L. R., 4 Calc., 665: 2 C. L. R., 526

2. ——— *Suit for damages for injury to crops.*—Under Act XIV of 1859 it was held that a suit for damages for injury to standing crops was a suit for damages for injury to personal property within the meaning of section 1, clause 2. KASHIDAS GOVINDBHAI *v.* B. B. AND C. I. RAILWAY COMPANY [6 Bom., A. C., 114

LIMITATION ACT, 1877, art. 48—*continued.*

where the crops were cut and stored they were personal property. MUNNOO BEBEE *v.* JHANDAR KHAN . . . . . 3 Agra, 389

3. ——— *Suit for compensation for injury to land and crops.*—A suit for compensation for injury to land resulting in the loss of crops which the land might have produced, but for the illegal act of defendant, is not a suit with respect to personal property RAJ CHUNDER GHOSE *v.* JOY KISHEN MOOKERJEE . . . . 4 W. R., 76

4. ——— *Suit to recover money deposited for a certain purpose.*—*R.* sued *M.* for a certain sum of money on the ground that he had given such sum to *M.* to deliver to his (*R.'s*) family; that *M.* had not delivered the money; and that when this fact became known to *R.*, and he demanded the money, *M.* denied having received the same. *Held* that the limitation law applicable to the suit was that provided by No. 48, schedule II of the Limitation Act, 1877, and the time from which the period of limitation began to run was when *B.* first learnt that *M.* had retained the money in his possession instead of paying it as directed. RAMESHAR CHAUBEY *v.* MATA BHIKH . . . I. L. R., 5 All., 341

——— art. 49 (1871, art. 49).

1. ——— *Injury to personal property.—Taking away personal property.*—Under the Act of 1859 taking away personal property was held to be not included in the words "injury to personal property" in section 1, clause 2. AMRITHAMAL *v.* RANGANADHA PILLAI . . . . . 3 Mad., 165

ANONYMOUS CASE . . W. R., F. B., 126

AHMEDULLAH *v.* HUR CHURN PANDAH [2 W. R., 235

RAMNATH ROY CHOWDRY *v.* HURRI CHUNDER ROY CHOWDHRY . . . 5 W. R., 50

PRAHLAD MAHARUDRA *v.* WATT . 10 Bom., 346

And DHUNPUTTY KOER *v.* LLOYD . 17 W. R., 277

Such cases were held to be governed by the general limitation of six years under clause 16 of section 1. Now, however, such suits would apparently be covered by this article or perhaps by article 36.

2. ——— *Suit to recover ornaments taken with view of borrowing money on them.*—In a suit to recover certain ornaments (or their value) which had been obtained by the defendant from the plaintiffs' ancestor with a view to borrowing money on them, the cause of action was held to arise when the defendant set up an adverse title to them. SHUMBOO CHUNDER MULLICK *v.* PRANKRISTO MULLICK [14 W. R., 322

3. ——— *Sale of moveable and immoveable property.—Refusal to execute conveyance.—Suit for possession.—"Unlawful possession."*—*A.* entered into an agreement with *B.* for the purchase of moveable and immoveable property, and paid a deposit. Under such an agreement, by section 85 of the Contract Act, the ownership of the moveable property would not pass before the transfer of the

**LIMITATION ACT, 1877, art. 49**—*continued.*

immoveable property. *B.*, instead of conveying to *A.* the property agreed to be conveyed to him, conveyed it to *C.* and put him, *C*, in possession. *A.* brought a suit against *C.* and *B.*, and obtained a decree setting aside the conveyance to *C.*, and ordering *B.* specifically to perform his contract and execute a conveyance of the property to himself, *A.* This decree was confirmed on appeal. *B.* refusing to execute the conveyance to *A.*, the conveyance was executed by the Court under the provisions of section 202 of Act VIII of 1859, *C.* still detaining possession of the moveable and immoveable property in question. *A.* brought this suit against him to recover possession of the same. The suit was brought within three years of the final decree of the Court of Appeal in the former suit, ordering a conveyance of the property to be executed to *A.*, but not within three years of the date of the agreement to purchase, and it was contended that as to the moveable property the suit was time barred. *Held* that the suit for the possession of the moveable property was not time-barred, as the right to possession of both the moveable and immoveable property accrued to *A.*, at the earliest, on the date of the final decree for specific performance of the agreement of sale, and it was from that time that the "detainer's possession" first became unlawful under article 49, schedule II of Act XV of 1877. DHONDIBA KRISHNAJI PATEL *v.* RAMCHANDRA BHAGVAT . . . I. L. R., 5 Bom., 554

4. ——— *Suit for specific moveable property.—Suit for a legacy.*—A testator bequeathed certain specific moveable property to *A.* *B.* applied for and obtained a certificate under Act XXVII of 1860 on behalf of the testator's widow, and took possession of the property bequeathed. *A.* appealed, and the case was remanded for re-trial. On the 27th of March 1873, the former order was cancelled and a certificate was granted to *A.* On the 19th of August 1873, *B.* was directed to deliver up the property to *C.*, who had purchased it from *A.* On the 22nd of March 1878, *C.* instituted a suit to recover the property. *Held* that the suit was barred under article 49 of the Limitation Act. Article 123 of the Limitation Act only applies to cases in which the property sought to be recovered is not only a legacy but is also sought to be recovered as such from a person who is bound by law to pay such legacy, either because he is the executor of the will or otherwise represents the estate of the testator. ISSUR CHUNDER DOSS *v.* JUGGUT CHUNDER SHAHA [I. L. R., 9 Calc., 79

5. ——— *Cause of action.—Suit by Mahomedan lady to recover property from husband after divorce.*—In a suit by a Mahomedan lady against her husband after divorce for recovery of property belonging to her which her husband held before divorce, the cause of action to the wife arose at the time of the separation. ABDOOL ALI *alias* SHOAGEEA *v.* KURRUMNISSA . 9 W. R., 153

——— **art. 51 (1871, art. 50).**

The suits referred to in this article were formerly governed by clause 9 of section 1 of the Act of 1859, and this article seems to be founded on the cases decided on that clause.

**LIMITATION ACT, 1877, art. 51**—*continued.*

*See* BOIDONATH SHAH *v.* LAHENISSA BIBEE [7 W. R., 164

TRIPP *v.* KUBEER MUNDUL . 9 W. R., 209

——— **art. 52 (1871, art. 51).**

1. ——— *Act XIV of 1859, s. 1, cl. 8.—Goods sold by wholesale and retail.*—Under Act XIV of 1859, there was a distinction between goods sold by retail and those sold by wholesale, the former being specially mentioned in clause 8 of section 1, and it was a question under that Act whether three years or six years' limitation applied to a sale of goods wholesale; three years being finally held to be the proper period. LAL MOHUN HOLDAR *v.* MAHADEB KATEE . . B. L. R., Sup. Vol., 909 [S. C. 9 W. R., 193

CHUNDEE CHURN PAUL *v.* RAMNARAIN SEN Cor., 8

2. ——— *Act XIV of 1859, s. 1, cl. 8.—Articles sold by retail.*—Goods supplied to a dealer for the purpose of retail sale by him were held to be not "articles sold by retail" within the meaning of clause 8, section 1, Act XIV of 1859. MOTHOORA LALL PAUL *v.* CHRINEBASH DUTT [3 W. R., S. C. C. Ref., 24

GOPAL CHUNDER SHAHA *v.* SINAES . 8 W. R., 4

Cases of articles sold by retail are—

BULDEO DOSS JOHURRY *v.* SEEENAUTH SEIN [1 Ind. Jur., O. S., 114

SHAMA CHURN LALL *v.* COLLECTOR OF TIRHOOT [1 W. R., 308

BUCHA GOPE *v.* COLLECTOR OF TIRHOOT [7 W. R., 102

There is no distinction made in the present Act between sales by wholesale and sales by retail.

3. ——— *Goods supplied on credit and payments made on account from time to time.*—When a tradesman supplies goods from time to time on credit to a customer who makes payments from time to time on account, no fixed period of credit being agreed upon, the cause of action for purpose of limitation must be taken to arise on the date when each item claimed was supplied. SATCOWREE SINGH *v.* KRISTO BANGAL . . . 11 W. R., 529

4. ——— *Suit on contract for the supply of pictures at various times subject to approval of each picture.*—Where the plaintiff, a native artist, agreed to supply, and the defendant agreed to purchase, pictures as ordered from time to time, subject to the approval of each picture by the defendants, the prices to be fixed on delivery and acceptance,—*Held* that a distinct contract became complete in respect of the pictures as they were from time to time delivered and approved of, at the price then fixed, and that the case came within clause 9, section 1, Act XIV of 1859, and not within clause 8 as being a sale of articles by retail. VIRASVAMI NAYAK *v.* SAYAMBABAY SAHIBA . 2 Mad., 6

**LIMITATION ACT, 1877—*continued.***

**——— art. 53 (1871, art. 52).**

This article follows the case of SATCOWREE SINGH *v.* KRISTO BANGAL . **11 W. R., 529**

**——— and art. 52.**—*Suit for price of wood supplied under contract.*—A suit was brought by *P.* against the Elgin Mills Company for recovery of the price of wood supplied under two contracts, each of which contained a clause by which the plaintiff contracted to indemnify the defendants for loss arising by reason of failure on his part to supply the wood as contracted for. No wood was supplied after the 11th November 1879. The suit was brought on the 10th October 1882. In January 1883, the partners of the Elgin Mills Company were, on their own application, brought upon the record as defendants. Defendants claimed a set-off as damages for loss incurred by the plaintiff's failure to supply all the wood contracted for, such loss having arisen on the 25th October 1879 and subsequently. *Held* that article 53, and not article 52, schedule II of the Limitation Act, was applicable to the plaintiff's claim, the intention of the parties having been that the price of wood was not claimable as of right on the date of its being supplied, but rather when the contract was completed by the whole wood being supplied, or when the contract came to an end. PRAGI LAL *v.* MAXWELL **[I. L. R., 7 All., 284**

**——— art. 56 (1871, art. 55).**

1. ——— *Suit for work and labour done.—Cause of action.*—Where no law, special custom, or agreement is shown, making the remuneration on a joint contract for labour to be done payable in advance, the cause of action accrues from the time when the labour was performed. PERLADH SEN *v.* RUNJEET ROY . . **W. R., 1864, 68**

2. ——— *Suit to recover sums expended by zemindar for irrigation.*—In a suit to recover sums expended by the zemindar at the defendant's request for the repair of a tank for the irrigation of lands held by them in common with him, it was contended that the suit, whether viewed as one for contribution or upon a contract, was barred by limitation in respect of all payments made by the zemindar more than three years before the suit. *Held* that the suit being for work and labour done at their request was not barred by limitation, under article 56 of the Limitation Act, which applied to the suit. SUNDARAM *v.* SANKARA . **I. L. R., 9 Mad., 334**

**——— art. 59 (1871, art. 58).**

*See* DEKKAN AGRICULTURISTS ACT, 1879, s. 72 . . **I. L. R., 5 Bom., 647**

Under Act XIV of 1859, cases of money lent or deposited to be repaid on demand were governed by clause 9 or clause 16 of section 1 of that Act, and the decisions as to whether the cause of action arose at the date of the loan or from the date of the demand were conflicting.

*See* BRAMMAMAYI DASI *v.* ABHAI CHARAN CHOWDHRY . **7 B. L. R., 489: 16 W. R., 164**

**LIMITATION ACT, 1877, art. 59—*continued.***

POORNO CHUNDER DUTT *v.* GOPAL CHUNDER DOSS . . . . **17 W. R., 87**

TARINI PRASAD GHOSE *v.* RAM KRISHNA BANERJEE . **6 B. L. R., 160: 14 W. R., 224**

NASIR BIN ABDUL HABIB FAZAL *v.* DAYABHAI ITCHACHAND . . . **10 Bom., 300**

JAFFREE BEGUM *v.* MAHOMED ZAHOOR AHSUN KHAN . . . . **2 N. W., 409**

HEERUN *v.* MARIUN . . **14 W. R., 87**

deciding that it arose on demand.

And PARBATI CHARAN MOOKERJEE *v.* RAMNARAYAN MATILAL **[5 B. L. R., 396: 16 W. R., 164, note**

ABDUL ALI *v.* TARACHAND GHOSE **[6 B. L. R., 292**

S. C. on appeal, TARACHAND GHOSE *v.* ABDUL ALI . **8 B. L. R., 24: 16 W. R., O. C., 1**

HINGUN LALL *v.* DEBEE PERSHAD **[24 W. R., 42**

deciding it arose on the date of the loan or deposit.

Under article 58 of the Act of 1871 the cause of action in cases of money lent on demand arose from the date of the demand, cases of money deposited on demand not being separately provided for. Under article 59 of the present Act the cause of action in cases of money lent on demand arises from the date of the loan; in the case of money deposited on demand from the date of the demand (article 60).

**——— and arts. 60 & 132.**—*Claim against insolvent estate subject to mortgage.—Suit for money.—Demand.*—On the 25th June 1874, *A.*, the father of *B.*, having mortgaged the factory X. to *S. & Co.* to secure repayment of R12,000 advanced, died on the 7th September 1874, leaving a will whereby he appointed his wife *C.* sole executrix, and devised to her factory X. On the 16th September 1876 another mortgage was executed, whereby *C.* further charged X. with the repayment of further advances, and *B.* mortgaged factory X. as a further security, the mortgage containing a stipulation for repayment, within one month after notice, of the balance due in excess of R12 000. *B.* became insolvent in July 1882. No demand was made. On the 5th January 1877, a balance of R27,552 remained due, which with interest up to July 1882 was increased to R42,564. The liquidators of *S. & Co.*, who had in the meantime dissolved partnership, sought to prove against *B.'s* estate for R30,564 after deducting the R12,000 advanced to *A.* *Held* that the claim to prove against the estate was in the nature of a suit, not to enforce payment of money charged on immoveable property under article 132, Act XV of 1877, nor was it within article 60; but it was a suit for money, and was governed by article 59 of the Act. IN THE MATTER OF AGABEG . **12 C. L. R., 165**

**——— art. 60.**

*See* the note and the cases referred to under article 59.

This article (60) is not in accordance with the cases

**LIMITATION ACT, 1877, art. 60**—*continued.*

of PARBATI CHARAN MOOKERJEE *v.* RAMNARYAN MATILAL . 5 B. L. R., 396 : 16 W. R., 164, note

And HINGUN LAL *v.* DEBEE PERSHAD [24 W. R., 42

which were decided under Act XIV of 1859.

——————— *Cause of action.—Deposit.—Demand.*—Where money has been deposited by *A.* at interest with *B.*, repayable on demand, and interest is paid accordingly, the cause of action arises not on the date of the deposit, but on the date of demand. TARINI PRASAD GHOSE *v.* RAM KRISHNA BANERJEE [6 B. L. R., 160 : 14 W. R., 224

1. ——————— *Banker and customer.—Principal and agent.—Cause of action.—Demand.*—*A.* deposited certain moneys with *B.*, a banker, and drew against them, but not to the full extent, the residue was employed on *A.'s* account by *B.* according to an agreement between them. *Held* that, besides the ordinary relation of banker and customer, there subsisted also between them that of principal and agent; that, therefore, the right of action arose at the time of demand. NASIR BIN ABDUL HABIB FAZAL *v.* DAYABHAI ITCHACHAND [10 Bom., 300

2. ——————— *Money deposited.—Demand.—Cause of action.*—Where a mortgagor allows the amount of his loan to remain in the hands of the mortgagee, taking a receipt for it,—*Held* that the transaction should be regarded as a deposit of money with a banker or agent, repayable on demand without interest, and the suit is not barred if brought within three years after demand. A suit to recover the balance of such moneys is in the nature of a suit to recover the amount of deposit. JAFFREE BEGUM *v.* MAHOMED ZAHOOR AHSUN KHAN [2 N. W., 409

3. ——————— *Cause of action.—Demand.*—Plaintiff having received from her brothers a sum as an equivalent for her share in her father's estate, made over the money to one of the brothers (*E.*) to be invested in the common stock for the purposes of trade, it being agreed that she was to receive her proportion of the profits. A few years after this *E.* died, and then a disagreement occurring in the family, resort was had to arbitration. The arbitrators found that certain sums were due to plaintiff and her sisters by the three brothers, but they were unable to settle how much. Plaintiff, being unable to recover her due, brought this suit for principal and profits. *Held* that plaintiff's cause of action arose when she made her demand for the money after the arbitration award, and that limitation would run from no earlier date. HEERUN *v.* MARIUN [14 W. R., 87

4. ——————— *Deposit.—Loan repayable on demand.*—The word "deposit" in the Limitation Act XV of 1877, as distinguished from a loan, refers to cases where money is lodged with another under an express trust, or under circumstances from which a trust can be implied. RAM SUKH BHUNJO *v.* BROHMOYI DASI . . . 6 C. L. R., 470

**LIMITATION ACT, 1877**—*continued.*

——— **art. 61 (1871, art. 59).**

*See* s. 19 (1871, s. 20)—ACKNOWLEDGMENT OF DEBTS . I. L. R., 5 Bom., 688

*See* ART. 120 . I. L. R., 13 Calc., 155

1. ——————— *Money paid at defendant's request.—Hindu family.—Debts of manager.*—In the year 1867 the plaintiff, who was then living jointly with the defendant, who was his brother, executed a bond to secure the repayment of moneys advanced to him, which moneys were applied by him for the joint benefit of himself and the defendant. In the year 1868 the plaintiff executed another bond for the same purpose. In 1870 the plaintiff and defendant separated, and the lender, thereupon, sued the plaintiff upon the bond executed in 1867, and obtained a decree. In 1874 the plaintiff executed a fresh bond in favour of the decree-holder, in order to avoid execution of the decree and to retire the bond of 1868. In 1877 (within three years from the date of the fresh bond), the plaintiff sued his brother to recover a moiety of the sum secured thereby. *Held* that the date upon which money was paid by the plaintiff for the defendant must have been before 1870, and that, therefore, the suit was barred by limitation under Act IX of 1871, schedule II, article 59. *Ramkristo Roy* v. *Muddun Gopal Roy, 12 W. R., 194,* followed. SUNKUR PERSHAD *v.* GOURY PERSHAD [I. L. R., 5 Calc., 321

2. ——————— *Suit to recover balance of payments made on behalf of defendant.—Appropriation of payments.*—In a suit to recover a balance with reference to payments made by plaintiff on account of defendant, where no mutual account or reciprocal demands existed, held that plaintiff could not recover any items due more than three years prior to the date on which the suit was instituted, but that he was entitled to apply all payments even those subsequently made in reduction of so much of his claim as was barred. THAKOOR PERSHAD SINGH *v.* MOHESH LALL . . . . . 24 W. R., 390

——— **art. 62 (1871, art. 60).**

*See* s. 22 (1871, s. 22). [I. L. R., 1 Bom., 295

*See* ART. 120 (1871, ART. 118). [I. L. R., 10 Calc., 860
I. L. R., 3 All., 358
I. L. R., 7 All., 25

Cases now provided for by this article were formerly held to be governed by the general period of limitation for suits not otherwise provided for, which period was six years under clause 16 of section 1 of the Act of 1859.

It was so held in the case of a servant to whom money had been entrusted for a particular purpose, and who did not make the payment he was directed to make. AMJUD ALI *v.* ALI BUKSH . 2 W. R., 122

AHMEDOOLLAH *v.* HUR CHURN PANDAH [2 W. R., 235

1. ——————— *Suit for recovery of salary.—Money had and received.*—The defendant, who was

**LIMITATION ACT, 1877, art. 62**—*continued.*

a butwara ameen employed by the Collector, drew from the public treasury at Backergunge a sum of money to pay the establishment, but failed to pay the plaintiff, who was a mohurrir under him. In a suit against the ameen for recovery of his salary after a lapse of three years from the time when the salary became due,—*Held* that the plaintiff's claim was for money had and received on his account, and, therefore, he might bring his suit within six years from the date of such receipt. ABHAYA CHARAN DUTT *v.* HARO CHANDRA DAS BANIK. . 4 B. L. R., Ap., 68

S. C. OBHOY CHURN DUTT *v.* HURO CHUNDER DOSS BUXEE . . . 13 W. R., 150

2. ——————— *Suit for share of money had and received.*—*A.*, *B.*, and *C.* being joint creditors of *D.*, *A.* and *B.* received, in 1856, a payment on account in respect of their share in the debt. *D.* having made default in payment of the balance, separate suits were brought against him by *A.*, *B.*, and *C.* The Court having held that the payment was a payment to all, *A.* and *B.* recovered more than their share, and *C.* recovered less. A family suit for partition between *A.*, *B.*, and *C.* was, in 1862, compromised, and it was agreed that all claims between the parties should be considered as settled; but it was agreed that if *C.* should, out of an appeal brought by him against *D.*, have any claim against *A.* and *B.*, that should be reserved. *C.'s* appeal was, in 1863, unsuccessful, and in 1864 he brought an action against *A.* and *B.* for his share of the money paid in 1856. *Held* that he was entitled to recover the amount which *A.* and *B.* had recovered against *D.* in excess of their claim, and that the suit was not barred by the law of limitation. LUTF ALI KHAN *v.* AFZALUNISSA BEGUM . . . 9 B. L. R., 348 [S. C. 16 W. R., P. C., 20

reversing case in LOTF ALI KHAN *v.* AFZULOONISSA BEGUM . . . . . 3 W. R., 113

3. ——————— *Suit for money had and received by one of joint decree-holders.*—A decree obtained by *A.* and *B.* was transferred by *B.* to *C.* without the knowledge of *A.* *C.* executed the decree, and *A.* subsequently sued *C.* for his share of the proceeds. *Held* that if *A.* had any cause of action against *C.* it would be for money had and received to *A.'s* use; and the suit would be governed, as to limitation, by Act IX of 1871, schedule II, clause 60. But,—*held A.* had no cause of action against *C.* but only against *B.* WEBOR ALI *v.* GADDAI BEHARI [2 C. L. R., 165

4. ——————— *Suit to recover money obtained by collusion and fraud.*—A suit for the recovery of money obtained by fraud and collusion is a suit for money received by a defendant for the plaintiff's use, and therefore, under article 60 of the second schedule of Act IX of 1871, is barred unless brought within three years of the date when the money was received. RAGHUMONI AUDHICARY *v.* NILMONI SINGH DEO . . . I. L. R., 2 Calc., 393

5. ——————— and art. 147.—*Suit for over-payments under agreement.*—*Deposit.*—Where there was a contract between plaintiff and defendant, that defendant should purchase a dwelling-house benami on account of plaintiff, and reconvey it to plaintiff on his paying up in instalments a certain sum of money with interest; and plaintiff, seven years after his last payment, sued to recover some payments which he had made in excess of his agreement, and the first Court dismissed the suit as being barred by limitation; but the second Court decreed the suit on the plea that the plaintiff's payments were deposits, and fell within article 147 of the schedule of the Law of Limitation,—*Held* by the High Court that article 147 applies to deposits recoverable in specie; that plaintiff's payment in this case was a simple overpayment; and that the recovery of it was barred by limitation under article 60. RADHA NATH BOSE *v.* BAMA CHURN MOOKERJEE . . 25 W. R., 415

6. ——————— and art. 118.—*Suit for money received by defendant to plaintiff's use.*—Certain immoveable property was attached in execution of a money-decree held by *A.*, dated the 22nd August 1871, on the 1st April 1872. The same property was subsequently attached in execution of a decree held by *B.*, dated the 19th August 1871, which directed the sale of the property in satisfaction of a charge declared thereby. The property was sold in execution of this decree. The Munsif directed that the proceeds of the sale should be paid to *B.* *A.*, who claimed them on the ground that he had first attached the property, appealed against this order. The Judge, declaring that *A.* was entitled to the proceeds, reversed the Munsif's order. *A.* then obtained an order from the Munsif directing *B.* to refund the money, which he did, and it was paid to *A.* *B.* sued *A.* to recover the money by establishment of his prior right to the same, and for the cancelment of the Judge's order, alleging that the same was made without jurisdiction. *Held* (by a majority of the Full Bench) that the suit was one for money received by the defendant for the plaintiff's use, and was therefore governed by clause 60, schedule II of the Limitation Act. *Per* STUART, *C. J.*, and SPANKIE, *J.*—That the suit was not such a suit, but was one for which no period of limitation was provided elsewhere than in clause 118 of the schedule, and that it was governed by that clause. RAMKISHAN *v.* BHAWANI DAS . . . . . I. L. R., 1 All., 333

7. ——————— *Suit for damages.*—*Suit for money received to plaintiff's use.*—The holder of a decree for money, which had been sold in the execution of a decree against him, sued the auction-purchaser, the sale having been set aside, for the money he had recovered under the decree. *Held* that the suit was not one for damages but for money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use, to which the period of limitation applicable was three years. BHAWANI KUAR *v.* RIKHI RAM [I. L. R., 2 All., 354

*See* also RAMKISHEN *v.* BHAWANI [I. L. R., 1 All., 333

8. ——————— and art. 120.—*Suit for money received by the defendant for the plaintiff's use.*—*Fraud.*—The plaintiff claimed, as an heir to *N.*,

**LIMITATION ACT, 1877, art. 62**—*continued.*

——— **and art. 120.**——*continued.*

deceased, a moiety of moneys which at the time of *N.'s* death were deposited with a banker and which the defendant, the other heir to *N.*, had received from such banker. *Held* that the suit was one for money received by the defendant for the plaintiff's use, to which the limitation provided in article 62, schedule II of Act XV of 1877, applied, and not one to which the limitation provided in article 120 applied. KUNDUN LAL *v.* BANSI DHAR [I. L. R., 3 All., 170

**9.** ——— *Failure of consideration.*—*Suit for money had and received for the plaintiff's use.*—*Debt.*—Prior to September 1879, pecuniary dealings took place between *D.* and *B.*, resulting in a debt due by the former to the latter of R33,000, for money lent. Negotiations were carried on between the parties as to the mode in which the debt should be liquidated; and, on the 1st September 1879, it was arranged that *D* should execute a sale-deed conveying to *B.* certain immoveable property for R55,000, and that *B.* should pay this amount by giving *D.* credit to the extent of the debt, and paying the balance in cash. In August 1880, *D.* sued *B.* for specific performance of the contract, which, he alleged, had been settled and executed for the sale of the property. *B.* in defence alleged that, although certain terms and conditions as to the sale had been definitely settled for embodiment in a formal sale-deed, it was only subject to these terms and conditions that he had been prepared to complete the transaction, and that, as they had been omitted from the document executed by *D.* on the 1st September 1879, he had never accepted that document. In March 1884, the High Court, on appeal, dismissed the suit, holding that the parties had never been *ad idem* with reference to the contract alleged by *D.*, and that the document of the 1st September 1879 had never been finally accepted so as to be binding and enforceable by law. In September 1884 *B.* sued *D.* for recovery of the sum of R33,000, with interest. He contended that, under the terms of the arrangement made on the 1st September 1879, the debt of R33,000 then owing to him changed its character; that it was no longer merely the old balance due by the defendant, but having been credited in the latter's books, should be treated as a payment by him (the plaintiff) as a deposit on account of the sale; that the suit was therefore one for money had and received by the defendant to the use of the plaintiff; and that the cause of action did not arise until the contract failed, by reason of the decree of the High Court on 14th March 1884, dismissing the suit for specific performance. *Held* that this contention must fail, and the debt must be treated as the old balance due by the defendant to the plaintiff, inasmuch as by the terms of the agreement itself which the plaintiff set up no deposit was payable, and the price was not to be paid till the completion of the contract, and inasmuch as the plaintiff, in demanding payment, after the negotiations had failed, demanded it simply as for the balance of the old debt, and not as for the return of a deposit. *Held*, further, that the 1st September 1879, upon which the contract set up by the plaintiff was alleged to have been completed, was the latest possible date upon which the debt could be said to have become due, and that, inasmuch as the present suit was not brought until the 8th September 1884, it was barred by limitation. DHUM SINGH *v.* GANGA RAM . . . . I. L. R., 8 All., 214

**10.** ——— **and arts. 97, 120.**—*Suit for money paid by a pre-emptor under a decree for pre-emption which has become void.*—*Suit for money had and received for plaintiff's use.*—*Suit for money paid upon an existing consideration which afterwards fails.*—Pending an appeal from a decree for pre-emption in respect of certain property conditional upon payment of R1,595, the pre-emptor decree-holder, in August 1880, applied for possession of the property in execution of the decree, alleging payment of the R1,595 to the judgment-debtors out of Court, and filing a receipt given by them for the money. This application was ultimately struck off. In April 1881, judgment was given in the appeal, increasing the amount to be paid by the decree-holder to R1,994, which was to be deposited in court within a certain time. The decree-holder did not deposit the balance thus directed to be paid, and the decree for possession of the property accordingly became void. In 1882, the decree-holder assigned to *K.* his right to recover from the judgment-debtors the sum of R1,595 which he had paid to them in August 1880. In December 1883, *K.* sued the judgment-debtors for recovery of the R1,595 with interest. *Held* that article 62 of the Limitation Act did not govern the suit, but that article 97, and, if not, article 120, would apply, and the suit was therefore not barred by limitation. KOJI RAM *v.* ISHAR DAS . . I. L. R., 8 All., 273

**11.** ——— **and art. 132.**—*Suit to establish right to hereditary allowance.*—The parties, who were desais of Mohudha in addition to their "desaigiri" allowance, enjoyed an allowance called "amin sukhdi." In 1847 the plaintiff sued the defendant's father and the Collector of Kaira for a share of the allowance; but as the whole of it had been reserved by the Collector to the defendant's father as the officiating desai, the suit was rejected under Act XI of 1843. In 1866 an arrangement was come to under which a sum of R40-2 was to be annually available over and above the remuneration of the officiator. On the 9th July 1867 the defendant received this sum for the first time. In 1873 a new arrangement was effected under which the service was abolished, the Government resuming half of the allowance and giving up the other half freed from service unconditionally to the desais. On 4th October 1878, the plaintiff brought this suit to establish his right to a share of the moiety of the amin sukhdi allowance given to the desais by the Government, and to recover his share of the amount received by the defendant. *Held* that the plaintiff's cause of action in this suit arose on the day when the officiating desai received the surplus of the allowance freed from the condition of service and available for distribution amongst the desais as alleged by the plaintiff, and the suit having been brought within twelve years of that day was not time-barred. That the limitation of three years under article 62 of the Limitation Act XV of 1877, Schedule II, and not that of twelve years under article 132, was applicable

**LIMITATION ACT, 1877, art. 62 and art. 132**—*continued.*

to a claim by one sharer against another to recover arrears of an allowance attached to a hereditary office, and not more than three years' arrears of the amin sukhdi allowance could, therefore, be awarded. DESAI MANEKLAL AMRATLAL *v.* DESAI SHIVLAL BROGILAL . . . **I. L. R., 8 Bom., 426**

**12.** ——————— *Suit by sharer of hak against another sharer.—Desaigiri allowance.*—A suit by one sharer in a vatan against another sharer or alleged sharer who has improperly received the plaintiff's share of the "hak" is a suit for money received by the defendant for the plaintiff's use, and the period of limitation is three years as prescribed by article 60 of the Limitation Act, 1871. HARMUKHGAURI *v.* HARISUKHPRASAD . **I. L. R., 7 Bom., 191**

**13.** ——————— *Suit to recover arrears.—Suit for money had and received.—Deshpande vatan.—Suit by one sharer against other.*—Where a person having previously obtained a decree declaratory of his title sues his co-sharer in a deshpande vatan, who is bound by the decree to recover arrears, his suit is a suit for money had and received by the defendant to the plaintiff's use; and the period of limitation is three years as prescribed by article 62, schedule II of Act XV of 1877. Non-participation of profits by the plaintiff for more than twelve years from the date of the previous decree does not extinguish his title and he can recover arrears for three years preceding the date of his suit to recover them. DULABH VAHUJI *v.* BANSIDHARRAI . . **I. L. R., 9 Bom., 111**

**14.** ——————— *Money received.—Trust for specific purpose.*—*R.* sued his father and brother *A.* for partition of the family estate and obtained a decree by which he was entitled to recover, *inter alia*, one third of a debt due to the family. In May 1878 the debtor, having received no notice of *R.'s* claim, paid the debt to the father. The father died and his estate came into the possession of *A.* *Held*, in a suit brought by *R.* in July 1881 against *A.* for one third of the debt, that the money received by the father was not held in trust for a specific purpose, and that the suit was barred by article 62 of schedule II of the Limitation Act. ARUNACHALA PILLAI *v.* RAMASAMYA PILLAI . . **I. L. R., 6 Mad., 402**

**15.** ——————— **and art. 127.**—*Joint Hindu family.—Separation.—Joint property.*—After the separation of *P.* and *T.*, two members of a joint Hindu family, certain bonds continued to be held by them jointly. Four years after the separation, *P.* obtained a decree in respect of one of these bonds (which had been obtained in his name alone), and realised the amount decreed in the same year. Eight years afterwards, *T.* brought a suit against *P.* claiming to be entitled to a share in the money realised. *Held* that article 62, and not article 127, of schedule II of the Limitation Act was applicable to the suit. THAKUR PRASAD *v.* PARTAB . **I. L. R., 6 All., 442**

**16.** ——————— **and art. 109.**—*Suit for money received by defendant to plaintiff's use.—Vatandars Act, III of 1874, s. 8.*—Under section 8 of the Vatandars (Bombay) Act, III of 1874, the

**LIMITATION ACT, 1877, art. 62 and art. 109**—*continued.*

Collector passed an order, that a contribution should be paid by the holders of a part of the shetsandi vatan towards the annual emolument of the office-holder. As payment was not made, he caused the defaulters' moveable property to be sold on the 18th May 1881 as for an arrear of land revenue, and part of the sale-proceeds to be paid over to the office-holder. The defaulters had, in the meantime, appealed to the Revenue Commissioner, who eventually, on the 17th December 1881, amended the Collector's order by reducing very considerably the amount of contribution to be paid to the office-holder. Thereupon the defaulters filed a suit on the 9th April 1884 to recover from the office-holder the difference between what he had received under the Collector's order and what he ought to have received according to the Revenue Commissioner's order. *Held* that the suit was one for money had and received by the defendant to the plaintiff's use, and, as such, governed by article 62 of schedule II of the Limitation Act (XV of 1877). LADJI NAIK *v.* MUSABI **[I. L. R., 10 Bom., 665**

**17.** ——————— *Suit by deshmukh for deductions by Collector from watan.*—Where a Collector in the year 1854 employed certain karkuns to assist a deshmukh in the performance of his duty, deducting the amount of their pay from the deshmukhi watan, but failed to show that the employment of such karkuns was necessary, it was held that the deshmukh was entitled to recover the amount so deducted from his watan, as money received by the defendant to the use of the plaintiffs and not as an interest in immoveable property; that his cause of action was not barred in 1870, for that a new cause of action in respect of such deductions accrued each year in which the deduction was made, and that six years' arrears of such deductions could be recovered under section 1, clause 16 of Act XIV of 1859. RANGOBA NAIK *v.* COLLECTOR OF RATNAGIRI **[8 Bom., A. C., 107**

**18.** ——————— **and art. 132.**—*Suit for money value of fixed quantities of grain payable by tenant to landlord.—Nature of such claim for purposes of limitation.—Suit to enforce payment of money charged on land.—Immoveable property.—Nibandha.—Money value of goods.*—An inamdar, in a suit against his tenant, established his right to the money value of a fixed quantity of grain to be paid to him yearly by his tenant, and subsequently brought this suit to recover from his tenant the arrears of such payments for ten years at the market rate prevailing in the last month of each of those years. The defendants contended that arrears for only three years were recoverable under the Limitation Act (XV of 1877), and that the rates applicable to ascertain the amount were the Government auction rates. *Held* that the plaintiff's right would, under the Hindu law, be "nibandha," and would under the law rank for many purposes as immoveable property, but that a different principle applied to sums realised and become payable in the hands of him who realised them to the intended recipient. The interest or jural rela-

LIMITATION ACT, 1877, art. 62 and art. 132—*continued.*

tion of right of such recipient was nibandha, but the particular sum due to him was either money received to his use, or payable on a contract, and money which would remain due, though the grant constituting the nibandha were cancelled and had ceased to exist after the realisation of the money. It being thus distinguishable from the original right which produced it, the claim in this suit was barred by limitation after three years. Money value means the market value, that for which the grain would actually sell, not a merely arbitrary value called auction rates. MORBHAT PUROHIT *v.* GANGADHAR KARKARE

[I. L. R., 8 Bom., 234

19. ——————— *Money deposited for repayment on a contingency.*—The period of limitation for a suit to recover money deposited by the plaintiff with the defendant, upon the understanding that it will be returned in a certain event, should be calculated, not under article 115, but under article 62 of schedule II of Act XV of 1877. Such period begins to run on the happening of the event. JOHURI MAHTON *v.* THAKOOR NATH LUKER

[I. L. R., 5 Calc., 830: 6 C. L. R., 355

——————— art. 63 (1871, art. 61; 1859, s. 1, cl. 9).

——————— *Suit for interest.—Suit for money payable on demand.—Suit for money deposited payable on demand.*—The plaintiff in this suit deposited certain money with the defendants, a firm of bankers, on the 30th August 1863. On the 2nd January 1867, an account was stated and a balance found to be due to the plaintiff consisting of the original deposit, and interest on the same calculated at six per cent. per annum. On the 11th February 1876, the defendants having proposed to pay the plaintiff such balance, together with interest on the original deposit, from the 2nd January 1867 to the 15th February 1876, calculated at four per cent. per annum, the plaintiff demanded that she should be paid such interest at the rate of six per cent. per annum. The defendants refused to accede to this demand on the 14th February 1876, and on the 17th of the same month they paid the plaintiff such balance with such interest calculated at the rate they proposed, *viz.*, four per cent. On the 11th February 1879 the plaintiff brought the present suit against the defendants in which she claimed the sum representing the difference between such interest calculated at four per cent. and six per cent.; alleging that her cause of action arose on the 14th February 1876. *Held* that the suit could not be regarded as either one for money lent under an agreement that it should be payable on demand, or one for money deposited under an agreement that it should be payable on demand, but must be regarded as one for a balance of money payable for interest for money due, to which clause 9, section 1 of Act XIV of 1859, article 61, schedule II of Act IX of 1871, and article 63, schedule II of Act XV of 1877, had successively applied, and the suit was barred by limitation. MAKUNDI KUAR *v.* BALKISHEN DAS

[I. L. R., 3 All., 328

LIMITATION ACT, 1877—*continued.*

——————— art. 64 (1871, art. 62).

*See* ART. 85 (1871, ART. 87).

[I. L. R., 5 Calc., 759

*See* GUARDIAN—DUTIES AND POWERS OF GUARDIANS . . 13 C. L. R., 112

1. ——————— *Account stated, Signature to.*—An account stated, within the meaning of article 62, schedule II of Act IX of 1871, need not be signed by the debtor. TARINEY CHURN NUNDY *v.* ABDUR ROHOMAN . . . 2 C. L. R., 348

2. ——————— *Account stated.—Simultaneous verbal agreement.—Simultaneous written agreement.*—A simultaneous verbal agreement cannot extend the ordinary period of limitation for a suit on an account stated. An agreement to extend the period must be in writing, and signed by the defendant or his agent. DAGDUSA *v.* SHAMAD

[I. L. R., 8 Bom., 542

3. ——————— *Suit on account stated.—Acknowledgment in writing.*—It is not necessary, in a suit on an account stated, to entitle the plaintiff to recover items of the debt which became due three years before suit, that the defendant should have acknowledged the accounts in writing. NAND LAL *v.* NAIT RAM . . . . 7 N. W., 105

4. ——————— *Suit on accounts stated orally or in writing.*—The period of limitation for suits on accounts stated is the same whether the accounts are stated verbally or in writing, and is governed by Act XV of 1877, schedule II, clause 64. AKBAR *v.* KHAN . .

[I. L. R., 7 Calc., 256: 8 C. L. R., 533

Under Act XIV of 1859 it was held that unless the original right had been kept alive by a written acknowledgment, or the transaction of adjustment of account amounted to a new and distinct contract, limitation ran from the date of the original debt for the balance of which the suit was brought. KUNHYA LALL *v.* BUNSEE

[Agra, F. B., 94: Ed. 1874, 71

5. ——————— *Verbal admission of correctness of account.*—A mere verbal admission of the correctness of an account, the items of which were barred by the Act, was not sufficient to create a new starting-point. SUBBARAMA *v.* EASTULU MUTTUSAMI . . . . 3 Mad., 378

6. ——————— *Signing and adjustment of account.—Semble,*—That the adjustment and signing of an account by the defendant was held to be a sufficient contract in writing to satisfy the requirements of clause 9 of section 1 of the Act of 1859. UMEDCHAND HUKAMCHAND *v.* BULAKIDAS LALCHAND . . . . 5 Bom., O. C., 16

*See* BROOKE *v.* GIBBON . . 19 W. R., 244

7. ——————— *Settlement of accounts.—Admission of balance.—New contract.*—Where a settlement of accounts is made between a commission agent and his principal, and a sum found and

**LIMITATION ACT, 1877, art. 64**—*continued.*

admitted to be due by one to the other, the date on which this is done might be regarded as that of a new contract to pay within the meaning of Act XIV of 1859, section 1, clause 9, from which limitation could be counted. BISSESSUR GIR *v.* SREE KISHEN SHAHA CHOWDHRY . . . . **24 W. R., 440**

BENARSEE DOSS *v.* KHOOSHAL CHUND. KHOOSHAL CHUND *v.* PALMER **[2 Agra, Pt. II, 170**

8. ——————— *Suit for balance of account on allegation of account stated.—Fresh contract to pay.*—To render an agreement, come to orally for the payment of the balance of an antecedent debt on a settlement of accounts, available in support of a suit brought after the expiration of the period of limitation applicable to such debt, it must be clearly shown to have amounted to a new valid contract to pay the balance, which extinguished the original cause of action. HIRADA KARIBASAPPAH *v.* GADIGI MUDDAPPA . . . . . **6 Mad., 197**

*See* RAMKRISTO PAUL CHOWDHRY *v.* HUREY DASS KOONDOO . **Marsh., 219 : 1 Hay, 569**

9. ——————— *Account settled and balance struck.—New contract.*—Where an endorsement on a bond showed that an account was made up, a balance struck, and that it was agreed to be paid at a future day with interest,—*Held*, in a suit for the amount as due on an acknowledgment made on the bond, that it was not an acknowledgment, but a contract by which time was given for payment, and limitation ran from the date specified for payment. BISSUMBHUR SHI *v.* BUKTO BEDARUL HOSSEIN **[17 W. R., 406**

10. ——————— *Adjustment of accounts.—Demand.*—In order that an unsigned adjustment and settlement of accounts may operate to give a fresh starting-point from which limitation commences to run, there must be cross-demands, the striking of the balance between which constitutes a new consideration for the promise on the part of the person against whom the balance is found to pay the balance so settled. *Mulchand Gulabchand* v. *Girdhar Madhav, 8 Bom., A. C., 6,* followed. HARGOPAL PREMSUKHDAS *v.* ABDUL KHAN HAJI MUHAMMAD **[9 Bom., 429**

In the case there followed it was held that where there had been a running account between the plaintiff and the defendant consisting of advances made by the former, and part-payments by the latter, the plaintiff was entitled to recover only in respect of advances made by him within three years preceding the institution of his suit, but he had a right to appropriate any payments made within that time to the reduction of the general balance, even though the recovery of such balance was barred by time. MULCHAND GULABCHAND *v.* GIRDHAR MADHAV **[8 Bom., A. C., 6**

11. ——————— *Account stated.—Signed balance of account.—Acknowledgment.*—A sum of money was deposited with the defendant's firm in 1857. Three years afterwards interest was paid by the firm, which was debited in the ledger to the creditor against a credit of a like amount. In 1875 a balance was struck, and carried to another account signed by the defendant, and acknowledging the same to be "due for balance of old account." In 1878 the account was again balanced, and the balance again transferred to a fresh account similarly signed. *Held* that the transaction did not amount to an account stated within the meaning of article 62, schedule II of Act IX of 1871, or article 64 of schedule II of Act XV of 1877, and was no more than a mere acknowledgment, which, as the suit had then long been barred by limitation, was of no avail. An account stated, in the true sense of the term, and in the sense employed in the above-mentioned sections of the Limitation Acts of 1871 and 1877, is where several items of claim are brought into account on either side, and being set against one another, a balance is struck, and the consideration for the payment of the balance is the discharge on each side, each party resigning his own rights on the sums he can claim, in consideration of a similar abandonment on the other side, and of an agreement to pay, and to receive in discharge, the balance found due. NAHANIBAI *v.* NATHU BHAU **[I. L. R., 7 Bom., 414**

12. ——————— *Khata, Suit on a.—Limitation.—Acknowledgment.—Construction.*—A khata consisting of one item only on the debit side, and bearing the mark of the debtor, held to be a mere acknowledgment, and not an account stated. TRIBHOVAN GANGARAM *v.* AMINA **[I. L. R., 9 Bom., 516**

13. ——————— *Suit for money on account stated.*—On the 9th October 1875, the book containing the accounts between the plaintiff and the defendant, kept by the plaintiff, was examined by the parties, and a balance was struck in the plaintiff's favour which was orally approved and admitted by the defendant. On the 2nd April 1877 the plaintiff sued the defendant for the amount of this balance "on the basis of the account-book." *Held* that the suit was in effect one on accounts stated falling within article 62, schedule II of Act IX of 1871, and could be brought within three years from the 9th October 1875 for the total balance struck, and being so brought was within time. NAND RAM *v.* RAM PRASAD . . . **I. L. R., 2 All., 641**

14. ——————— *Suit for money due on accounts stated.—"Title" acquired under Act IX of 1871.—Suit for money lent.*—The plaintiff sued the defendant for money due upon accounts stated between them in December 1874 when Act IX of 1871 was in force. Such accounts were not signed by the defendant. The suit was instituted after Act XV of 1877, which repealed Act IX of 1871, had come into force. *Held* that the plaintiff's right to sue upon such accounts within three years from the date the same were stated was not a "title" acquired under Act IX of 1871, within the meaning of section 2 of Act XV of 1877, which, under the provisions of that section, was not affected by the repeal of Act IX of 1871, and the suit was not governed by the provisions

**LIMITATION ACT, 1877, art. 64**—*continued.*

of Act IX of 1871, but by those of Act XV of 1877, and that, therefore, the accounts not being signed by the defendant, the plaintiff could not claim the benefit of article 64 of schedule II of the latter Act, but must be regarded as suing merely for money lent. THAKURYAL *v.* SHEO SINGH RAI

[I. L. R., 2 All., 872

15. ——————— *Statement of account unsigned.—Cause of action.*—The plaintiffs claimed on a statement of account in writing dated the 18th October 1877: this statement of account was not signed by the defendant. The date of the institution of the suit was the 30th September 1880. A Division Bench of the High Court held on the appeal, on the case coming up before them on the 18th October 1877, that the suit was not based upon any express contract made between the parties; and that the transaction which took place on that date did not constitute an implied contract, and that, therefore, these contentions were not open to the plaintiffs, but the Court referred the question whether the plaintiffs' claim, so far as it was based on the statement of account on the 18th October 1877, fell within article 64 of schedule II of Act XV of 1877. *Held*, by MITTER, PRINSEP, and MCDONELL, *JJ.*—That the question referred was a matter of limitation arising in the case which had not been decided in the order of reference, and without such a decision the case could not be disposed of, and as to that point, that the statement of account not being signed by the defendant, did not fall within the terms of article 64 of schedule II of Act XV of 1877. *Held*, by GARTH, *C. J.*, and TOTTENHAM, *J.*—That the Division Bench having held that the transaction afforded no basis for a suit had disposed of the case, and the question referred was therefore immaterial. DUKHI SAHU *v.* MAHOMED BIKHU

[I. L. R., 10 Calc., 284: 13 C. L. R., 445

16. ——————— *Account stated.—Agreement to pay debt by instalments.—Suit for whole amount due.*—*A.* being the holder of a decree against *B.*, *B.*, on the 7th July 1875, entered into a kistibandi and filed it in Court, setting out that he would pay off the debt due under the decree by certain instalments, and that, in default of payment of one instalment, the whole amount of the debt might be recovered by taking out execution of the decree. By the kistbandi certain immoveable property was pledged to secure the debt, but the kistbandi was not registered. *B.* failed to pay the first instalment, which fell due on the 14th August 1875; and *A.*, on the 19th June 1878, applied for execution of his decree, but the application was refused, and *A.* referred to a regular suit. In a suit brought by *A.* on the 29th January 1879 against *B.* for the whole debt due under the decree,—*Held* that, inasmuch as no appeal had been preferred against the order disallowing execution, *A.* was bound by that decision; but that the suit might be taken to be one for an account stated in writing with an agreement for payment at a certain stated period of time as regards the instalments due, which were not barred by limitation; the suit as regards the instalments which had not fallen due being premature, and those previous to the 29th

**LIMITATION ACT, 1877, art. 64**—*continued.*

January 1876 being barred by article 64 of the Limitation Act. BHEKHAN DOBEY *v.* RAJROOP KOOER . . . I. L. R., 8 Calc., 912

17. ——————— *Suit on adjustment of account between landlord and tenant on default in payment of rent.—Beng. Act VIII of 1869.*—Where, in consequence of default in the payment of rent, an adjustment of accounts was entered into between landlord and tenant, and a balance found to be due from the tenant,—*Held* that an action to recover such balance with interest was not a suit for arrears of rent under Bengal Act VIII of 1869; but a suit for the recovery of money on account governed by the provisions of the Limitation Law, schedule II, article 62. DOLEE CHAND *v.* GOOR DYAL SINGH

[24 W. R., 218

18. ——————— *Suit on account stated by guardian as agent of minor.*—A suit on an account stated against a minor cannot succeed unless it be shown that the act of the guardian acting as agent in the matter of the settlement of account is beneficial to the interests of the minor. AZUDDIN HOSSEIN *v.* LLOYD . . 13 C. L. R., 112

——————— **art. 65 (1871, art. 63).**

*See* ART. 95 (1871, ART. 95).

[12 Bom., 238

*See* ART. 116 . I. L. R., 3 All., 712

——————— *Surety on bond undertaking to pay "eventually."*—*A.* verbally became surety upon a bond executed by *B.* for repayment, in May 1872, to the plaintiff, of certain advances, promising, "if *B.* does not pay eventually (shesh projunto) I will." Default was made, and in April 1878 the plaintiff filed a suit against both *B.* and *A.*, the suit being clearly barred as against the latter. *Held* that the words "shesh projunto" could not be taken as limited to the time specified in the bond, and that the lower Court, in order to determine whether the suit was barred against *A.*, must find upon the evidence when a demand was made upon him for payment, and then apply article 65 of Act XV of 1877, schedule II. BISHUMBER DEY PODDAR *v.* HUNGSHESHUR MOOKERJEE . . . . . 4 C. L. R., 34

——————— **art. 66 (1871, art. 65).**

*See* ART. 116 . I. L. R., 3 All., 276

1. ——————— *Claim not based on single bond.*—The limitation provided in article 66 of Act XV of 1877 is not applicable to a suit in which the claim is not based on a single bond, *i.e.*, a bond or written engagement for the payment of money, without a penalty. LACHMAN SINGH *v.* KESRI

[I. L. R., 4 All., 3

2. ——————— *Bond.—Interest payable monthly.—Payment at a specified date.—Limitation Act, 1871, art. 75.*—The defendant executed a bond, which provided that interest should be payable monthly, and that the principal should become due within six months from the date of execution; the bond contained a clause to the effect that if the interest

**LIMITATION ACT, 1877, art. 66**—*continued.*

should not be paid according to the terms of the bond, or if the creditor should feel any doubts as to his being able to realise the principal, he should not be bound to wait until the expiry of the six months in order to bring his suit, but should be at liberty to realise the principal and interest in any manner he might choose,—*Held* that a suit on the bond brought within three years from the date of the day specified therein for payment, was not barred by limitation, as the case fell under article 65 of schedule II of Act IX of 1871, and not under article 75 of schedule II of that Act. NARAIN BABU *v* GOURI PERSHAD BIAS . . . . . **I. L. R., 5 Calc., 21**

**——— art. 67 (1871, art. 66).**

*See* ART. 75 . **I. L. R., 2 All., 322**

*See* DEKKAN AGRICULTURISTS' RELIEF ACT, 1879, s. 72. **[I. L. R., 9 Bom., 461**

**——— art. 68 (1871, art. 67).**

*See* ART. 75 . **I. L. R., 2 All., 322**

**——— art. 69 (1871, art. 68).**

——— *Bill of exchange.—Dishonour of bill.—Suit against acceptor.*—*M.*, on the 12th October 1855, drew a bill of exchange, payable three months after date, in favour of *B.*, which was accepted by *J.* Before the bill became due *B.* endorsed it to *P.*, who again endorsed it for full value to *M. B. & Co.*, of which firm *M. L.* was a partner. *M. D. & Co.* discounted the bill with *G.*, who presented it at maturity to *J.*, who dishonoured it. *G.* thereupon sued *M. L.*, and recovered a decree, which *M. L* satisfied. *M. L.* thereupon brought the present suit, on the 18th February 1865, against *J.* as the acceptor of the bill for the amount he paid under *G.'s* decree. *Held* (confirming the decision of NORMAN, *J.*) that the suit was barred by limitation, the plaintiff's cause of action having accrued when the bill became payable and the acceptor refused to pay. MOHENDRO LALL BOSE *v.* JADUB KISSEN SINGH . . **14 W. R., O. C., 5**

S. C. in the Court below . **Bourke, O. C., 157**

**——— art. 72 (1871, art. 71).**

——— *Promissory note "after six months when demand was made."—Necessity of demand.*—Where a promissory note was made payable "after six months, whenever the payee should demand the same," with interest, it was held that the law of limitation began to run upon the expiration of six months from the date of the note. JEAUNISSA LADLI BEGAM SAHEB *v.* MANIKJI KHARSETJI **[7 Bom., O. C., 36**

*See* MADHAVBHAI SHIVBHAN *v.* FATTESING NUTHABHAI . . . . . **10 Bom., 487**

**——— art. 73 (1871, art. 72).**

*See* s. 2 . . **I. L. R., 2 Mad., 113**

*See* ART. 120 . **I. L. R., 6 Mad., 290**

1. ——— *Promissory note payable on demand.*—Under Act XIV of 1859, the period

**LIMITATION ACT, 1877, art. 73**—*continued.*

of limitation on a promissory note payable on demand commenced to run from the date of the note and not from the date of demand. VINAYAK GOVIND *v.* BABAJI . . . . **I. L. R., 4 Bom., 230**

HEMPANMAL *v.* HANUMAN . . **2 Mad., 472**

TARACHAND GHOSE *v.* ABDUL ALI **[8 B. L. R., 24: 16 W. R., O, C., 1**

S. C. in Court below. ABDUL ALI *v.* TARACHAND GHOSE . . . . **6 B. L. R., 292**

The Act of 1871, however, altered the time from which the cause of action arose in such a case to the date when the demand was made; but under the present Act the law was again altered and now remains as it was held to be under the Act of 1859.

2. ——— *Promissory note payable on demand.—Cause of action.*—The defendant gave the plaintiff a promissory note on the 5th August 1869, payable on demand with interest at 5 per cent. per annum. No sum either in respect of principal or interest was paid on the note, and payment was demanded for the first time in November 1875. Act XIV of 1859 contained no provision as to the date of the accrual of the cause of action in a suit on a promissory note payable on demand, but Act IX of 1871, which repealed Act XIV of 1859, and which applied to suits brought after the 1st April 1873, provided that the cause of action in such a suit shall be taken to arise on the date of the demand. In a suit brought on the note after the demand,—*Held* that the cause of action arose at the date of the note, and as a suit on it would have been barred under Act XIV of 1859 if brought before the 1st April 1873, the subsequent repeal of that Act would not revive the plaintiff's right to sue. NOCOOR CHUNDER BOSE *v.* KALLY COOMAR GHOSE . **I. L. R., 1 Calc., 328**

*See* VENKATA CHELLA MUDALI *v.* SASHAGHERRY RAU . . . . . **7 Mad., 283**

And MOLAKATALLA NAGANNA *v.* PEDDA NARAPPA **[7 Mad., 288**

3. ——— *Act XIV of 1859.—Act IX of 1871.—Promissory note payable on demand.*—On the 12th December 1864 the plaintiff sold seven bars of gold to the defendants, and deposited with them the value thereof, to run at interest, and payable on demand. The defendants entered the amount in their own books, and furnished the plaintiff with a pass-book, which contained this entry: "The account of the amount deposited by *B.* (the plaintiff) with *V.* (the defendants) of the city of Poona. The details of it are as follows: We have debited the amount to ourselves, and will return it whenever you demand it. Shake 1786 (A.D. 1864)." The defendants adjusted the account in the plaintiff's pass-book in July 1865 in these words: "Balance this day, the 1st Jyest vadya, Shake 1787, R1,159-2-0. Interest on this sum will run from 1st Jyest vadya, Shake 1787 (A.D. 1865)." This entry was signed by the defendants. The plaintiff drew several times against this account within the first year, sometimes taking cash and sometimes gold. On the plaintiff's demanding the money in April 1877, the defendants refused

LIMITATION ACT, 1877, art. 73—*continued.*

to pay it. The plaintiff, therefore, filed a suit against them on the 25th June 1877. The defendants pleaded limitation. *Held* that, regarding the entry made by the defendants in the plaintiff's book as a promissory note, the suit was barred by the law of limitation. VINAYAK GOVIND *v.* BABAJI [I. L. R., 4 Bom., 230

These are cases where the suit was, when Act IX of 1871 came into force, already barred under Act XIV of 1859. But in a Madras case the principle was held to be the same where the suit was not barred under that Act at the time Act IX of 1871 came into force.

4. ——— *Suit on promissory note executed while Act XIV of 1859 was in force but not barred under that Act.—Cause of action.*—In a suit brought after the 1st April 1873 on a promissory note for a sum payable on demand, executed while the old Limitation Act (XIV of 1859) was in force, but not barred under that Act at the time the new Limitation Act (IX of 1871) came into force, the period of limitation ought to be computed from the date of the note and not from that of the demand. The new Act merely alters the point of time, as to notes executed after its enactment, from which the period is to be reckoned, and does not make a demand a mode of extending the period of limitation. CHINNASAMI IYENGAR *alias* STEERNIVASSA RAGHAVA CHARYAR *v.* GOPALACHARRY . . 7 Mad., 392

5. ——— *Promissory note.—Novation.*—The holder of a promissory note, payable on demand, dated 14th April 1870, demanded payment on 8th December 1872. The maker then paid interest in advance up to 1st April 1873, upon the condition that the holder should make no demand until that date. *Held* that this transaction amounted to the substitution of a new contract for that contained in the promissory note; that the period of limitation must be reckoned from 1st April 1873; and that, consequently, a suit to recover the balance due on the note, instituted on 27th March 1876, was not barred. NATA HIRA *v.* JANARDAN RAMACHANDRA [I. L. R., 1 Bom., 503

The question was raised under the Act of 1871, whether the bringing of an action to recover the amount due on the note could be regarded as a sufficient demand, but was undecided.

*See* MADHAVBHAI SHIVBHAI *v.* FATTESING NATHUBHAI . . . . . 10 Bom., 487

6. ——— *Promissory note payable on demand.—Cause of action.*—The suit was brought on an instrument in the nature of a promissory note payable on demand. The note was executed on 20th November 1871 and the suit was filed on the 17th November 1875. *Held* that the suit not having been brought until after the date at which section 4 of Act IX of 1871 and its appendix, schedule II, came into operation, the question whether the suit was barred or not by the law of limitation must be determined by schedule II of that enactment, which gives three years from date of demand. *Held*, also, that the suit was not barred, there being no suggestion of any demand having been made before the suit was instituted. MADHAVAN *v.* ACHUDA [I. L. R., 1 Mad., 301

——— art. 74 (1871, art. 74).

Under Act XIV of 1859, the decisions seem to have been in accordance with this article.

*See* MUNNA JHUNNA KOONWAR *v.* LALJEE ROY [1 W. R., 121

ULTAF ALI KHAN *v.* RAM LALL [Agra, F. B., 83: Ed. 1874, 63

——— art. 75 (1871, art. 75).

*See* ART. 66 (1871, ART. 65). [I. L. R., 5 Calc., 21

*See* ART. 179 (1871, ART. 167)—ORDER FOR PAYMENT AT SPECIFIED TIME. [I. L. R., 2 Bom., 356 I. L. R., 4 All., 83

*See* BOND . . I. L. R., 4 Bom., 96 [I. L. R., 3 Mad., 61

1. ——— *Promissory note payable by instalments.*—A promissory note, dated 2nd April 1868, stipulated that the principal amount with interest was to be repaid by half-yearly instalments of R150 each, and that, in the event of any one of these instalments not being punctually paid, the whole amount was to become payable at once. Default was made in payment of the first instalment, which fell due on 2nd October 1868. In an action brought on 19th October 1871 for the recovery of the whole amount,—*Held* that the right to bring the suit under Act XIV of 1859, section 1, clause 10, accrued to the plaintiff on 2nd October 1868, and that, having omitted to bring it for more than three years, he was too late in instituting it on the 19th October 1871. *Held*, also, that the plaintiff's right to the immediate payment of the whole amount was not, under the note, subject to be defeated by any subsequent payment, and that no such subsequent payment (assuming it to have been made) could, in the absence of any fresh agreement, supersede or suspend such right. The proposition laid down in *Ramkrishna Mahadev* v. *Bayaji Santaji, 5 Bom., A. C., 35*,—that, "although the instalments were not paid by the defendants at the times fixed for payment, yet the defendants having paid the money on account of them, and the plaintiff having accepted it, the payments must be considered, as regards both parties, as if made at the times fixed; and the plaintiff cannot take advantage of the stipulation that the sum should become due on failure to pay any instalment, or the defendants rely upon it as making the whole debt due, and fixing the period from which the time of limitation ran,"—overruled, as there was nothing in Act XIV of 1859 to give any such effect to an acceptance of part-payment after the whole debt has become due. GUMNA DAMBERSHET *v.* BHIKU HARIBA . . . . I. L. R., 1 Bom., 125

2. ——— *Money payable by instalments.*—In a suit for recovery of a certain sum of money, the present defendant intervened by a peti-

tion agreeing to pay the whole amount due on the bond if the first instalment was not paid by the debtor on the 16th of December 1863. In this suit, brought on the 11th of April 1867, for recovery of the whole amount,—*Held* that, under clause 10, section 1, Act XIV of 1859, the claim was barred. GAUR HARI DAS *v.* MADAN MOHAN BISWAS

[3 B. L. R., A. C., 16 : 11 W. R., 330

3. ——————— *Promissory note payable by instalments.—Non-payment of instalment.—Payment of subsequent instalments.*—In August 1856 *G. H. W., B. B.*, and *J. W.* (the two latter being sureties, and having been treated as such by the plaintiff), jointly and severally executed a promissory note to *M. T. B.*, payable by instalments, which were irregularly paid till January 1860, when they ceased; the instalment payable on December 10th, 1857, not having been paid till January 5th, 1858, *M. T. B.* instituted an action against *B. B.* for the balance then due, for which a decree was given. On *B. B.'s* moving for a new trial the Judges differed on the questions of limitation and *laches* of the plaintiff, and the case was referred for the opinion of the High Court, which was in favour of the defendant on the point of limitation. *Held* that a cause of action at once arises on, and limitation runs from, the non-payment of an instalment; and that acceptance of subsequent instalments on a note so payable is not a waiver of the limitation which has so commenced to run against a surety. BREEN *v.* BALFOUR

[Bourke, O. C., 120

NARAYANAPPA *v.* BHASKAR PARMAYA

[7 Bom., A. C., 125

RAM KRISHNA MAHADEV *v.* BAYAJI SANTAJI

[5 Bom., A. C., 35

But *see* GUMNA DAMBERSHET *v.* BHIKU HARIBA

[I. L. R., 1 Bom., 125

4. ——————— *Bond payable by instalments.—Stipulation to recover by execution.—Cause of action.*—Where a certain amount of money was recoverable under an instalment bond by the sale of the property hypothecated in it, and it was one of the stipulations of the bond that the whole amount might be recovered by execution of decree, on default of payment occurring at any one of the stipulated periods for the payment of an instalment,—*Held* that, as a separate suit could not be brought for the whole amount on the occasion of any default which occurred before the termination of the last kist, the whole amount could not, for the purposes of the law of limitation, be held to be due on the occasion of any such default. JUGGUT MOHINEE DOSSEE *v.* MONOHUR KOONWAR . . . 25 W. R., 278

5. ——————— *Act, 1871, art. 75.—Bond payable by instalments.—Waiver of default.—Cause of action.*—A suit was brought upon an instalment bond conditioned upon default in payment of any one or more instalments that the whole sum should be exigible. Default was made in payment of several instalments, but subsequently payments were made and accepted by the plaintiff on account of the unpaid instalments. This suit was instituted more than three years after the first default in payment of an instalment, but within three years from the time when the last payment of an instalment had been made. The defendant pleaded limitation. *Held* that limitation ran from the date on which the first default was made in payment of an instalment in respect of which default the benefit of the provision in the 75th clause of second schedule of Act IX of 1871 was not waived. UNCOVENANTED SERVICE BANK *v.* KHETTERMOHUN GHOSE . . 6 N. W., 88

6. ——————— *Bond payable by instalments.—Waiver of default.*—A bond dated the 23rd August 1870, stipulated payment of R39 for principal and R9-12-0 for interest, making in all R48-12, by monthly instalments of R1-8-0, with the conditions, first, that in default of payment of a monthly instalment interest should be paid at 1½ per cent. per mensem till the whole amount was paid, and second, that in default of payment of any two of the monthly instalments, the whole of the principal should become payable at once, exclusive of interest, from the date of the bond. Two instalments being overdue on the 24th October 1870, the whole principal became payable at once. In an action brought by the obligee on the 4th June 1874 for the recovery of the money, —*Held* that the claim was wholly barred, as the first condition amounted only to a proviso that the obligee might exercise a right of waiver and accept payment by instalments instead of suing for the whole, and there was nothing to show that he had exercised such right of waiver. NAVALMAL GAMBHIRMAL *v.* DHONDIBA BIN BHAGVANTRAM . . 11 Bom., 155

7. ——————— *Bond payable by instalments.—Waiver.*—On the 24th May 1866 *H.* gave *A.* a bond payable by instalments which provided that, if default were made in the payment of one instalment, the whole should be due. The first default was made on the 28th June 1866. No payment was made after Act IX of 1871, schedule II, No. 75, came into force. *Held*, in a suit upon such bond, that limitation began to run when the first default was made, and no waiver before Act IX of 1871 came into force could affect it. AHMAD ALI *v.* HAFIZA BIBI . . . I. L. R., 3 All., 514

*See* RADHA PRASAD SINGH *v.* BHAGWAN RAI

[I. L. R., 5 All., 289

8. ——————— *Waiver.—Proof.—Abstention from suit.*—Mere abstinence from suit is not sufficient to prove waiver of a right to enforce a condition whereby, upon default of payment of an instalment, the whole debt becomes due. SETHU *v.* NAYANA . . . . . I. L. R., 7 Mad., 577

9. ——————— *Debt payable by instalments.—Waiver.—Proof.*—Where a bond for the payment of money by instalments contains a condition that the whole sum then remaining due shall become payable on failure to pay any one instalment, the creditor, who seeks to recover instalments which in due course would have been due subsequently to the date on which the recovery of the debt in full has become barred, must prove a waiver of his right to enforce the condition. Waiver is not to be

inferred from mere abstinence to enforce the condition. GOPALA *v.* PARAMMA

[I. L. R., 7 Mad., 583

10. ——————— *Bond.—Waiver.—Cause of action.*—The mere acceptance of instalments after default, by the obligee of a bond payable by instalments, which provides that, in case of failure to pay one or more instalments, the whole amount of the bond due shall become payable, does not constitute a "waiver," within the meaning of article 75, schedule II of Act IX of 1871, of the obligee's right to enforce such provision. In the case of such a bond the cause of action arises on the first default, and limitation runs from the date of such default. MUMFORD *v.* PEAL . . . . I. L. R., 2 All., 857

11. ——————— *Contract to pay by instalments.—Default in paying an instalment of a debt payable by instalments.*—When a debt is made payable by instalments, with a proviso that, on default of payment of any one instalment the whole debt, or so much of it as may then remain unpaid, shall become due, limitation runs, under Act IX of 1871, or Act XV of 1877, from the time of the first default. A subsequent acceptance of the instalment in arrear operates as a waiver, and suspends the operation of the law of limitation; but merely allowing the default to pass unnoticed does not. IN THE MATTER OF CHENI BASH SAHA *v.* KADUM MUNDUL

[I. L. R., 5 Calc., 97

12. ——————— *Decree payable by instalments.—Default.—Waiver.—Estoppel.—Application for execution as provided for in case of default.—Application to recover instalments.*—A decree for the payment of money directed that an amount less than the amount sued for should be paid by instalments, and that if default were made in payment of one instalment, the amount sued for should be payable. Default having been made, the decree-holder, on the 7th May 1877, applied for execution of the decree for the larger amount. It appeared that at this time, although the instalments had not been paid regularly, the decree-holder had received in full all the instalments which had fallen due excepting the instalment falling due in the previous September, that is, September 1876, of which he had received only a part. The application of the 7th May 1877 was struck off the file. The decree-holder subsequently accepted the remaining instalments, which were paid on due dates. On the 28th August 1878 the decree-holder applied for payment of an instalment which had been paid into Court. On the 8th September 1881 the decree-holder applied for execution of the decree for the larger amount payable thereunder in case of default, with reference to the default in respect of the instalment for September 1876. The Court refused to allow execution to issue for such amount, but allowed it to issue for the balance of the instalment for September 1876. *Per* OLDFIELD, *J.*—That the acceptance by the decree-holder of the instalments falling due after September 1876, notwithstanding default had been made in respect of the instalment for September 1876, amounted to a waiver of his right to execute the decree for the larger amount payable thereunder in case of default, and by such waiver he was estopped from recovering such larger amount in execution of the decree. *Mumford* v. *Peal, I. L. R., 2 All., 857,* and *Gyan Chund* v. *Jawahur, 2 N. W., 83,* referred to. RADHA PRASAD SINGH *v.* BHAGWAN RAI

[I. L. R., 5 All., 289

13. ——————— *Construction of decree.—Decree payable by instalments.—Execution of decree.*—A consent-decree for R350 directed payment of the money by fourteen half-yearly instalments of R25 each, in Cheyt and Assin of each year, the first instalment to be paid in the month of Cheyt 1283 (March-April 1877). The decree contained a provision that on default of payment of any one instalment, the execution-creditor should have the option of executing the decree for the whole amount remaining unpaid. Default was made in payment of the first instalment, but the judgment-debtor paid up (not on due date) the instalment which fell due up to and including Assin 1285 (October-November 1878), when he stopped making any payments. On the 26th of November 1881 the decree-holder applied for execution in respect of all sums then remaining unpaid under the decree. The District Judge allowed execution to issue for all sums which had fallen due within three years previously to the date of the application for execution, but refused to allow execution to issue in respect of the instalments not then due. *Held* that the execution-creditor must be considered to have waived his right to execute the decree for the whole amount, but was entitled under the decree to realise any instalments which were still due. NILMADHUB CHUCKERBUTTY *v.* RAMSODOY GHOSE

[I. L. R., 9 Calc., 857

14. ——————— *Verbal contract.—Debt payable by instalments.—A.* entered into a verbal agreement with *B.* to pay a debt due in monthly instalments, *B.* reserving to himself the right to claim payment of the whole sum due on default of three successive instalments. *A.* failed to pay any instalment. Four years after the first instalment was due *B.* sued *A.* to recover the sum due on the various instalments not barred by limitation. *Held* that *B.* was not bound to sue for the whole amount due directly on *A.'s* failure to pay the three successive instalments. *Semble,*—Article 75, schedule II of Act XV of 1877, does not apply according to its strict terms to a suit brought upon a verbal contract. KOYLASH CHUNDER DASS *v.* BOYKOONTO NATH CHUNDRA

[I. L. R., 3 Calc., 619: 2 C. L. R., 167

15. ——————— *Cause of action.—Bond.—Payment by instalments.—Liability for whole amount on failure of payment of instalment.*—On the 20th August 1879 the defendant, being indebted to the plaintiff, gave his bond for R8,000. The bond provided for the payment of monthly instalments of R80 each, the first of such instalments to become due on the 4th September 1879. The bond also contained the following clause: "If the said Arthur Bowles shall—in default of payment of any one of such instalments, or in the event of default being made by him in payment of the premium money

**LIMITATION ACT, 1877, art. 75**—*continued.*

when and as the same shall become due in respect of the said policy, *if so required* by the said Hamantram Sadhuram Pity, his executors, administrators or assigns—pay the whole amount which may then be due under and by virtue of these presents without deduction, then the above written bond or obligation shall be of no effect; otherwise the same shall be and remain in full force and virtue." The defendant paid three of the said monthly instalments, the last of which was paid on the 2nd December 1879, being that which had fallen due on the 4th November 1879. No further instalments were paid, but no demand for payment of the entire sum secured by the bond was made by the plaintiff until the 30th January 1884. The plaintiff filed this suit on the 28th April 1884. The defendant contended that the plaintiff's cause of action arose on the 4th December 1879 when he (the defendant) failed to pay the instalment then due, and pleaded limitation. The plaintiff contended that under the bond the cause of action did not arise until the date of his demand, *viz.*, on the 30th January 1884. *Held* that the suit was not barred. The language of the bond showed that it was the intention of the parties that in case of default being made in payment of one instalment, the whole amount should become due only if a demand for such amount were made. The cause of action did not arise against the defendant until the date of demand, *viz.*, the 30th January 1884. HANMANTRAM SADHURAM *v.* BOWLES

[I. L. R., 8 Bom., 561

16. ——————— *Bond payable by instalments.—Cause of action.—Limitation Act, 1877, arts. 67, 68, and 80.*—*B.* and *S.* executed a bond, dated the 15th August, 1874, in favour of plaintiff in consideration of a loan of R15,000, agreeing to repay the same within three years from the above date, and covenanting to pay every half-year interest on the same, at the rate of 8 per cent. per annum; and also to pay the premia on certain policies of insurance made over to plaintiff by way of collateral security. In the event of failure in payment on due date of interest and premia, the obligors made themselves liable to pay the full amount of the bond debt. The bond also contained the stipulation that it should be optional with the obligee to claim and if necessary to sue for the full amount of the bond on the failure of any one or more stipulated payment, or on the full expiry of the period of three years. *Held* that the bond was not an instalment bond, and therefore article 75, schedule II of Act XV of 1877, was inapplicable. *Held*, by STUART, *C.J.*, that limitation commenced after the expiration of the three years allowed by the bond for payment of the debt. *Held*, by SPANKIE, *J.*—Article 80, schedule of Act XV of 1877, applies to the suit, and limitation would run from the date when the bond became due; that according to the stipulation in the bond it would become due on failure in payment on due date of both the interest and premia, and not on failure in payment of either of them only. *Held*, further, that articles 67 and 68, schedule II of Act XV of 1877, were not applicable to the suit. BALL *v.* STOWELL . I. L. R., 2 All., 322

——————— **art. 80 (1871, art. 80).**

*See* ART. 75 . I. L. R., 2 All., 322

**LIMITATION ACT, 1877**—*continued.*

——————— **art. 81 (1871, art. 82).**

*See* ART. 144 (1871, ART. 145)—INTEREST IN IMMOVEABLE PROPERTY.

[I. L. R., 5 Calc., 363

——————— *Suit by surety of lessee for refund of rent paid to wrongful heir of deceased lessor.*—In a suit by the surety of a lessee for the refund of rent paid to the wrongful heir of the deceased lessor, the cause of action as against the wrong-doers dates from the time when they were declared by a competent Court to have paid to a party without title, and the cause of action as against the lessee dates from the time when the surety was made to pay the rent to the rightful heir on default of the lessee. ROY HUREE KISHEN *v.* ASMEDH KOONWAR

[W. R., 1864, 57

——————— **art. 82 (1871, art. 83).**

——————— *Suit for contribution.—Cause of action.*—A surety who had discharged the amount of a bill guaranteed by him and another as co-surety, sued his co-surety for contribution. *Held* that the cause of action in the suit being the right to contribution, that right accrued, not when the bill in question was dishonoured, but when the surety took it up and paid it. CONSTANTINE *v.* DREW

[1 N. W., Pt. II, p. 42: Ed. 1873, 100

——————— **art. 83 (1871, art. 84).**

*See* ART. 95 . . 12 Bom., 238

1. ——————— *Contract of indemnity.*—In 1864 a lease of a house was granted to *A.* for a term of ten years. The lease contained a covenant to repair. *A.* died, and *B.*, his administrator, assigned the lease to another, and it ultimately became vested in the plaintiff. In 1872 the plaintiff assigned the lease to the defendants, "under and subject to the covenants" therein contained. The defendants failed to repair, and after the term had expired, *C.*, the representative of the lessor, sued *B.* for arrears of rent and damages for non-repair. *B.* defended the suit, but *C.* obtained a decree against him for R6,167-3 and costs, amounting in all to R8,328-3. His own costs amounted to R1,491-1. In 1876 *B.* paid *C.* the R8,328-6. In 1877 *B.* sued the plaintiff for the amount which he had been compelled to pay *C.*, and for the amount of his own costs. The plaintiff gave notice to the defendants to intervene and defend if they desired; but they did not reply, and the plaintiff consented to a decree for R6,932-12-11 with costs. Thereupon the plaintiff instituted the present suit to recover from the defendants the sum recovered from him by *B.*, together with his own costs of defence. *Held* that the suit was not barred under Act XV of 1877, schedule II, article 83—which provides a period of three years' limitation for a suit upon any contract of indemnity other than those specifically provided for, from the time "when the plaintiff is actually damnified"—as the time when the plaintiff was actually damnified was when *B.* recovered against him. PEPIN *v.* CHUNDER SEEKUR MOOKERJEE

[I. L. R., 5 Calc., 811: 6 C. L. R., 167

**LIMITATION ACT, 1877, art. 83**—*continued.*

2. ——————— *Contract of indemnity.—Set-off.*—A suit was brought by *P.* against the Elgin Mills Company for recovery of the price of wood supplied under two contracts, each of which contained a clause by which the plaintiff contracted to indemnify the defendants for loss arising by reason of failure on his part to supply the wood as contracted for. No wood was supplied after the 11th November 1879. The suit was brought on the 10th October 1882. Defendants claimed a set-off as damages for loss incurred by the plaintiff's failure to supply all the wood contracted for, such loss having arisen on the 25th October 1879 and subsequently. *Held* that the law of limitation applicable to the set-off was article 83, schedule II of the Limitation Act; that limitation would run from the time when the plaintiff was actually damnified, and should be reckoned to the date of the institution of the suit, and not to that of claiming the set-off, which was after the defendants' names were brought on the record; and that the set-off was therefore in time. *Walker* v. *Clements, 15 Q. B., 1046,* referred to. PRAGI LAL *v.* MAXWELL [I. L. R., 7 All., 284

——————— **art. 84 (1871, art. 85).**

1. ——————— *Act XIV of 1859, s. 1, cl. 9.—Beng. Reg. XX of 1812, s. 5.—Suit for fees due to pleader.*—A suit brought to recover fees due to plaintiff as pleader in three suits was held to be barred by limitation as instituted after three years, that being the period of limitation in one case in which the defendants had agreed to pay the fees according to law, such agreement being an obligation for the payment of money within the meaning of section 5, Regulation XX of 1812, and that being also the limitation applicable under clause 9, section 1, Act XIV of 1859, in the other cases in which there was no written engagement to pay the fees. RASH MOHUN GOSWAMY *v.* ISSUR CHUNDER MOOKERJEE [9 W. R., 113

2. ——————— *Suit for pleader's fees not under written contract.*—A suit for pleader's fees upon a vakalutnamah which is in the form of a mere power of attorney, and is not a written contract, is barred by limitation if not brought within three years. In the absence of evidence of any express agreement as to when the fees are to be paid, the implied agreement must be taken to be for payment at the time when the case is decided. KASHINATH ROY CHOWDHRY *v.* ISSUR CHUNDER MOOKERJEE [5 W. R., 297

DWARKANATH MOITRO *v.* KENNY [5 W. R., S. C. C. Ref., 1

CARRUTHERS *v.* MENZIES . . . Cor., 40

3. ——————— *Act XIV of 1859, s. 1, cls. 9 and 10.—Suit by vakeel for fees.—Cause of action.*—The defendants retained the plaintiff as their pleader in original suit No. 2 of 1863, on the file of the Civil Court of Cuddapah, and executed a vakalutnamah to him in July 1863, but no special agreement regarding fees was made. The plaintiff conducted that suit for the defendants as their vakeel until decree, which was made in September 1864.

**LIMITATION ACT, 1877, art. 84**—*continued.*

The present suit was instituted in December 1866. *Held,* reversing the decree of the lower Appellate Court, that as there was no special agreement, the plaintiff's right of suit did not arise until he had completely discharged his duty in the conduct of the suit, which he had done in 1864. Consequently, the present suit, having been brought within three years from that date, was not barred. BUCKAPATNAM THATHACHARLU *v.* KAJAMIYA . 6 Mad., 265

4. ——————— *"Suit."—Attorney and client.—Taxation of bill of costs.—Application by attorney for payment or attachment.—Rule 149, Com. Law Rules of Bombay Supreme Court.*—An application (under Rule 149 of the Common Law Rules of the Supreme Court of Bombay) by an attorney that his client should show cause why he should not pay the balance shown by the Taxing Master's *allocatur* to be due in respect of his bill of costs, and why, in default of such payment, attachment should not issue against the person and property of the client, is not a "suit" within the meaning of the Limitation Act, IX of 1871. Such an application as the above is not barred by any law of limitation now in force in British India. ABBA HAJI ISHMAIL *v.* ABBA THARA [I. L. R., 1 Bom., 253

5. ——————— *Attorney and client.—Bill of costs.—Civil Procedure Code, s. 206.—Compromise of suit without knowledge of attorney.*—A solicitor was retained in July 1871 to execute a decree. In November 1871 a prohibitory order was made in the cause, after which the solicitor did nothing more in the matter. In June 1872 the decree-holder and judgment-debtor settled the matters in dispute between them without the knowledge of the solicitor; but this compromise was not made through, or certified to, the Court which passed the decree. In a suit brought in December 1875 by the solicitor against the decree-holder to recover the amount of his bill of costs,—*Held* that the plaintiff's claim was not barred by article 85 of schedule II to Act IX of 1871. HEARN *v.* BAPU SAJU NAIKIN . . . . I. L. R., 1 Bom., 505

6. ——————— *Suit by vakeel.—Termination of suit.*—The termination of the suit mentioned in acticle 84 of schedule II of the Limitation Act, XV of 1877, means the date when judgment is given. BALKRISHNA PANDURANG *v.* GOVIND SAIVAJI [I. L. R., 7 Bom., 578

7. ——————— *Solicitor and client.—Termination of suit.—Decree.—Taxation of costs.*—A solicitor for a party to an appeal received a notice after the date of the decree that the costs of the other side would be taxed on a certain date, and, having informed his client, received instructions not to appear on taxation. *Held* that, until the costs were taxed and inserted in the decree and the decree had issued, the suit had not terminated within the meaning of article 84 of schedule II of the Limitation Act, 1877. NARAYANA CHETTI *v.* CHAMPION [I. L. R., 7 Mad., 1

LIMITATION ACT, 1877—*continued.*

——— art. 85 (1871, art. 87; 1859, s. 8).

Under section 8 of Act XIV of 1859 it was necessary that the persons who had the mutual dealings mentioned in the section should be "merchants or traders." The following cases were held not to be within the section:—

Repaying a debt contractor. PEARY MOHUN BOSE *v.* GOBIND CHUNDER ADDY . 10 W. R., 56

Acting as *del credere* agent, and as such receiving commission for effecting sales of cotton for the principal and guaranteeing payment by the purchasers. OKOOR PERSAUD BUSTOOREE *v.* FOOL COOMAREE DABEE
[10 B. L. R., 15: 16 W. R., P. C., 35: 14 Moore's I. A., 134

Affirming the decision of the Court below in PHOOL KOOMAREE BEEBEE *v.* OONKURPERSHAD BOISTOBEE
[2 Ind. Jur., N., S., 50
S. C. 7 W. R., 67

Suit for balance of arutdari account and for commission and interest. MEHER CHAND SAHOO *v.* MORCOLYRAM . . . . . 14 W. R., O. C., 7

Suit for balance of accounts between ryots and an indigo factory. DOYLE *v.* EDOO GAZEE
[3 W. R., S. C. C. Ref., 13

DOYLE *v.* KHOOSEEAL KHAN
[3 W. R., S. C. C. Ref., 1

DOYLE *v.* ALLUM BISWAS
[4 W. R., S. C. C. Ref., 1

NOBIN CHUNDER SHAHOO *v.* SUROOP CHUNDER DOSS . . . . . 6 W. R., 328

Suit for balance of account framed as if in the nature of a partnership demand. MCCORKINDALE *v.* YOUNG . . . . . 18 W. R., 466

YOUNG *v.* MCCORKINDALE . 19 W. R., 159

Suit by one co-sharer against another where the co-sharers collect their rents separately, for recovery of surplus collections realised by collecting more than his share. AHMED REZA *v.* ENAYET HOSSEIN
[W. R., 1864, 235

Suit by commission agent against his principal. BISSESSUR GIR *v.* SREEKRISHEN SHAHA CHOWDHRY
[24 W. R., 440

The following decisions were given under the Act of 1859:—

1. ——— *Mutual dealings.—Balance of accounts.*—The test of whether dealings are mutual within section 8 of Act XIV of 1859 or not seems to be were they such that the balance was sometimes in favour of one party and sometimes of the other. It is not necessary that there should have been such a buying or selling by each of the parties, so as to constitute him a trader within the strict meaning of the term. GHASSEERAM *v.* MONOHUR DOSS
[2 Ind. Jur., N. S., 241

2. ——— *Mutual dealings.—Mutual payment and receipt of money.*—Where each party paid money to the other, and received from the other an equivalent in bills, they were held to have had mutual dealings. LUCHMEE NARAIN *v.* CHOOMUN MEAH . . . . . 14 W. R., 184

3. ——— *Mutual dealings.—Balance of account, Suit for.*—In a suit for the balance of an account with interest the Court was of opinion that the three years' limitation did not apply, but that the case was one of mutual dealings between the parties, and was governed by section 8, Act XIV of 1859. FERNANDES *v.* VASUDEV SHANBOG
[3 Bom., A. C., 82

4. ——— *Mutual dealings.—Co-sharers accounting for rents.*—The rule that mutual accounts, if they contain some item or items within twelve years, will not be barred by limitation, though the rest of the items be beyond time, is confined to accounts between two parties which show a reciprocity of dealings; or, in other words, to transactions in which there is a mutual credit founded on a subsisting debt, or an express or implied agreement for a set-off of mutual debts. AHMED REZA *v.* ENAYET HOSSEIN . . . . . W. R., 1864, 235

5. ——— *Account between principal and agent.—Mutual accounts.*—An agreement between a principal and his agent commenced with an admitted balance, and clearly contemplated the existence of an account current containing mutual items of credit and debit. The agreement contained a stipulation that on the adjustment of the accounts the principal should be bound to pay such balance as might be found due from him. The account was kept accordingly as a continuous account, and contained several items which brought down the mutual dealings to March 1868. The agent sued in February 1871 to recover the balance due to him on the account. *Held* that the case fell within section 8 of Act XIV of 1859, and was not barred by limitation even as to the items which were dated more than three years before the institution of the suit. WATSON *v.* AGA MEHEDEE SHERAZEE
[L. R., 1 I. A., 346

6. ——— *Mutual dealings.—Item showing continuance of account.*—The effect of section 8, Act XIV of 1859, is, that nothing in an account of mutual dealings between merchants and traders is to be barred, provided that there is an item indicating the continuance of such dealings proved to have occurred within the period of limitation. HIRADA BASAPPA *v.* GADIGI MUDDAPA . 6 Mad., 142

7. ——— *Mutual dealings.—Year.—Balance of account.*—The defendant, in 1865 and 1866, indented on the plaintiffs for large quantities of merchandise, which were shipped to Calcutta from time to time by the plaintiffs' agent in London, who drew bills on the defendant for each shipment, forwarding such bills and the shipping documents to the plaintiffs in Calcutta. The bills were presented to the defendant by the plaintiffs and accepted by him. In the course of the transactions several of the acceptances were dishonoured by the defendant, and the plaintiffs, at his request, allowed him to renew

**LIMITATION ACT, 1877, art. 85**—*continued.*

the bills. Some renewals took place in August and September 1866. In March, May, and July 1866, the defendant made purchases from the plaintiffs, and the plaintiffs made purchases from the defendant. The plaintiffs were in the habit of closing their accounts on 30th June in each year. In an action for balance of account brought on 24th February 1870,—*Held* that the parties were merchants and traders having mutual dealings under section 8 of Act XIV of 1859. The year mentioned in section 8 of Act XIV of 1859 is intended to be reckoned from the time when the balance of accounts is struck. In this case that was the 30th June 1867; the suit, therefore, was not barred. *Quære,*—What would be the operation of the section in those cases in which the merchant or trader balances his accounts at the lapse of a period of less than one year? SRINATH DAS *v.* PARK PITTAR

**[5 B. L. R., 550; 14 W. R., O. C., 41**

**8.** ——————— *Mutual accounts.—Suit for balance of account.*—Article 85, schedule II of Act XV of 1877, is intended to apply to cases where an account has been going on between two parties, and balances have been struck from time to time, showing the amount due from one of such parties to the other; and the suit to which that article is intended to apply is a suit brought by one of those parties against the other for the balance found to be due on that account. LALJEE SAHOO *v.* ROGHOONUNDUN LALL . . . **I. L. R., 6 Calc., 447**

**9.** ——————— *Balance of account.—Mutual dealings.*—Plaintiff had an account with a banking firm of which the defendant was a member. On the dissolution of this firm, plaintiff made up his accounts debiting the defendant with a share of the amount due to him from the firm, and afterwards he carried on business with the plaintiff separately. It did not appear that any settlement had been made between the parties from the time of the dissolution of the firm down to the filing of the plaint, or that the defendant had assented to a portion of the firm's debt being carried to his separate account. *Held* that the plaintiff could not recover this sum with interest, as an item of a mutual, open, and current account, where there had been cross-demands between the parties. (*See* Limitation Act, XV of 1877, schedule II, clause 85.) ROY DHUNPUT SING BAHADOOR *v.* LEKRAJ ROY . . . . **1 C. L. R., 525**

**10.** ——————— *Mutual accounts.—Adjustment.—Admitted item within period of limitation.*—A mutual open and current account, which was kept according to the Sumbut year, having been adjusted in Assin Sudi 1931 S., corresponding with October 25th, 1874, the date of the last admitted item, a suit was subsequently, on the 6th December 1877, filed for the balance due upon such adjustment. *Held* that, even assuming that on the date of adjustment the account ceased to be mutual, open, and current, article 85 of schedule II of the Limitation Act (XV of 1877) was applicable, and that accordingly limitation ran from the close of the year 1931 S., *i.e.*, the 20th April 1875. GONESH LALL *v.* SHEO GOLAM SINGH . . **5 C. L. R., 211**

**LIMITATION ACT, 1877, art. 85**—*continued.*

**11.** ——————— *Mutual current accounts.—Limitation Act, 1871, art. 62.*—The manager of *A.*, the proprietress of an indigo factory, on the 20th December 1869, paid into the kothi or bank of *B.*, a banker, the sum of R1,200 to the credit of *A.*, and from that time onwards sums of money were drawn by *A.'s* manager out of *B.'s* bank, and applied to the purposes of *A.'s* factory: the balance, though generally against *A.*, fluctuated, *A.'s* account being usually overdrawn, but there being sometimes a balance in her favour, created by payments made on her account into *B.'s* bank. The 2nd of July 1872 was the last occasion that any balance was due from *B.* to *A.* Payments continued to be made on behalf of *A.* into *B.'s* bank up to the 12th of June 1873, when a sum of R1,083-8 was paid into her account; but, notwithstanding this payment, the balance of account was on that date against her. After the 12th of June 1873, *B.* continued to make payments on behalf of *A.*, and also to render monthly accounts in which he charged *A.* with such payments, and also with the principal of, and interest upon, the balance due on previously-rendered accounts. This continued till the month of January 1874, when *B.* for the last time rendered a monthly account to *A.*, the last item in which was a payment made on the 6th January 1874. On the 23rd December 1876, *B.* instituted a suit against *A.* to recover the balance of principal and interest due to him on the footing of the last account rendered by him to *A.* *Held* that the account between *A.* and *B.* was not, and never had been, a mutual, open, and current account, and that the suit was, therefore, barred by limitation; and that the payments made by *B.* on behalf of *A.* within the period of limitation, even if authorised, did not have the effect of keeping alive his previous claim against her. *Held*, also, that even if the dealings and transactions between *A.* and *B.* could be so construed as to show that there had been at any time a mutual, open, and current account between them, that mutual relation terminated on the 2nd July 1872, or if not, then on the 12th June 1873, when the last payment was made on *A.'s* account into *B.'s* bank. MAHOMED *v.* ASHRUFOONNISSA

**[I. L. R., 5 Calc., 759**

S. C. ASKERY KHAN *v.* ASHRUFUNNISSA

**[6 C. L. R., 112**

**12.** ——————— *Mutual accounts.—Reciprocal demands.*—From the month of September 1873 until the month of May 1874 the plaintiffs at Bombay and the defendant at Karachi had dealings with one another. It was the practice for the defendant at Karachi to draw hundis upon the plaintiffs at Bombay, which the plaintiffs duly accepted and paid at Bombay; and, in order to put the plaintiffs in funds, the defendant was in the habit of drawing hundis upon other firms in Bombay in favour of the plaintiffs, the amount of which hundis the plaintiffs realised from time to time at Bombay. Until the 8th January 1874 the balance of the account was sometimes in favour of the plaintiffs and sometimes in favour of the defendant. After that date the balance of the account was always in favour of the plaintiffs, who continued to make advances

**LIMITATION ACT, 1877, art. 85**—*continued.*

up to the 10th May 1874. The last payment made by the defendant was on the 27th April 1874. The last advance made by the plaintiffs was on the 10th May 1874. On the 10th May 1874 the total balance due by the defendant was R8,514-12-2. The plaintiffs calculated interest on this sum up to the 9th April 1877, and on the 19th April 1877 filed the plaint in this suit to recover the said amount. The defendant pleaded limitation. The plaintiffs contended that the account between them and the defendant was a mutual account, and that, under clause 87 of schedule II of the Limitation Act, IX of 1871, the period of limitation dated from the day of the last advance made by them to the defendant,—*viz.*, 10th May 1874. *Held*, on the authority of *Ghaseeram* v. *Munohur Doss, 2 Ind. Jur., N. S., 241*, that the account between the plaintiffs and the defendant was a mutual, current, and open account within the meaning of clause 87, and that the suit was not barred. Literally construed, clause 87 would apply only to those cases in which both parties have in the course of their dealings made actual demands on one another. The more reasonable and more probable intention of the framers of the clause appears to have been that it should apply to cases where the course of business has been of such a nature as to give rise to reciprocal demands between the parties; in other words, where the dealings between the parties are such that sometimes the balance may be in favour of one party and sometimes of the other. NARRANDAS HEMRAJ *v.* VISSANDAS HEMRAJ . **I. L. R., 6 Bom., 134**

13. ——————— *Limitation Act, 1877, s. 19.—Acknowledgment of debt contained in unregistered document.—Admissibility of document as evidence of acknowledgment.*—The nature of the pecuniary transactions between *B.* and *G.* were such that sometimes a balance was due to the one and sometimes to the other. On the 1st October 1875 there was a balance due to *B.* During the ensuing year, as computed in the account, *G.* made payments to *B.* exceeding such balance. On the 19th November 1876 a balance of R3,500 was found to be due from *G.* to *B.* On the 11th December 1876 *G.* executed a conveyance of certain land to *B.*, for which such debt was partly the consideration. In such conveyance *G.* acknowledged his liability in respect of such debt. He died before such conveyance was registered and it did not operate. On the 18th November 1879 *B.* sued *G.'s* widow for such debt. *Held* that such conveyance was admissible as evidence of the acknowledgment by *G.* of his liability for such debt, notwithstanding such conveyance was not registered; that, applying article 85, schedule II of Act XV of 1867, such debt was not barred by limitation when such acknowledgment was made; and that, if that article was not applicable, but the period of limitation began to run from the time each item composing such debt became a debt, still such debt would not have been barred when such acknowledgment was made, as the debt with which the year computed from the 1st October 1875 opened was extinguished by payments made by *G.* in the course of that year. KHUSHALO *v.* BEHARI LAL **[I. L. R., 3 All., 523**

**LIMITATION ACT, 1877**—*continued.*

——————— **art. 86 (1871, art. 88).**—*Suit to recover amount due on policy of insurance.—Cause of action.—Notice of loss.*—A suit for the recovery of the amount due on a policy of marine insurance fell under clause 10 of section 1 of Act XIV of 1859. In such cases the limitation (in the absence of a custom allowing a certain time of grace) begins to run from the date when the defendant has notice of the loss, and refuses or neglects to pay. NAROTAMDAS BHAGTANDAS *v.* DAYABHAI ICHHACHAND . . . . **6 Bom., A. C., 34**

——————— **art. 89 (1871, art. 90).**

*See* ART. 116 . . **I. L. R., 12 Calc., 357**

*See* ART. 120 . . **I. L. R., 7 All., 25**

*See* ART. 144—ADVERSE POSSESSION. **[I. L. R., 5 Calc., 692**

1. ——————— *Cause of action.—Balance of account.*—The representatives of a gomasta, who had, for the last four years of his life, taken the moneys of his employers in advance for the purpose of the business, were sued for the balance of account of such moneys after giving credit for the amount of the gomasta's annual salary. *Held* that the cause of action arose at the date of the gomasta's death, and the suit, having been brought within the period of limitation from that date, was not barred. KALIKRISHNA PAUL CHOWDHRY *v.* JAGATTARA **[2 B. L. R., A. C., 139 : 11 W. R., 76**

Reversing, on appeal, KALEE KISHEN PAUL CHOWDHRY *v.* JUGUT TARA . . **9 W. R., 334**

*See* RADHANATH DUTT *v.* GOBIND CHUNDER CHATTERJEE . **4 W. R., S. C. C. Ref., 19**

2. ——————— *Suit against agent for an account.—Mooktear.*—An account of his receipts and disbursements having been demanded from a mooktear, he, on the 3rd of August 1872, wrote a letter in which he promised to render full accounts during the ensuing vacation. This he neglected, though he did not refuse, to do. *Held* that the limitation for a suit to compel an adjustment of account ran from the time when the defendant's promise to render accounts was broken, and was governed by Act IX of 1871, schedule II, article 90. (*See* Act XV of 1877, schedule II, article 89.) HORI NARAIN GHOSE *v.* ADMINISTRATOR GENERAL OF BENGAL . . . . . **3 C. L. R., 446**

3. ——————— *Suit for an account between principal and agent.*—Where a plaint alleged a continued agency in the defendant and prayed for relief on the ground that there was a specific balance against him, and prayed for the recovery of such sum or any larger sum that might be proved to be payable,—*Held* that such suit was essentially one for an account, and that limitation ran from the date on which the agency ceased. HURRONATH ROY *v.* KRISHNA COOMAR BUKSHI **[L. R., 13 I. A., 123 : I. L. R., 14 Calc., 147**

——————— **art. 90 (1871, art. 91).**

*See* ART. 116 . **I. L. R., 12 Calc., 357**

**LIMITATION ACT, 1877, art. 90**—*continued.*

*See* ART. 144—ADVERSE POSSESSION. [I. L. R., 5 Calc., 692

——————— *Suits governed by.*—What suits are governed by article 91 of the Limitation Act, 1871, pointed out. TORAB ALI *v.* MAHOMED AMEER HOSSEIN . . . 3 C. L. R., 105

——— **art. 91 (1871, art. 92).**

*See* ART. 138 . I. L. R., 6 All., 75

*See* ART. 144—INTEREST IN IMMOVEABLE PROPERTY . I. L. R., 6 All., 260

1. ——————— *Suit to set aside sale deed.*—A suit of the kind mentioned in this article was under Act XIV of 1859 governed by the six years' limitation. THAKOOR PATTUCK *v.* RAM SOOMRUN LAL . . . . . 2 N. W., 433

2. ——————— *Suit to cancel instrument.*—*K.*, to whom *B.* had given a usufructuary mortgage of certain land, promising to put him in possession, sued *B.* for the mortgage-money, *B.* having failed to put him in possession. This suit was instituted on the 22nd November 1875. On the 25th of the same month, *K.*, learning that *B.* was about to dispose of his property, caused a notice to issue to him directing him not to transfer any of his property. This notice was served on *B.* on the 29th November. On the 1st December 1875 *B.* transferred certain land to *T.* by way of sale. *K.'s* suit was dismissed by the lower Courts, but the High Court, on the 7th August 1876, gave him a decree. Certain property belonging to *B.* was sold in execution of this decree, but the sale-proceeds were not sufficient to satisfy the amount due on the decree. *K.*, thereupon, on the 1st July 1879, sued *T.* to cancel the conveyance to him by *B.* on the ground that it was fraudulent and without consideration. *Held* that the words in article 91, schedule II, Act XV of 1877, "when the facts entitling the plaintiff to have the instrument cancelled or set aside became known to him," must be construed to mean "when, having knowledge of such facts, a cause of action has accrued to him, and he is in a position to maintain a suit," and consequently the period of limitation for *K.'s* suit began to run, not merely when he had knowledge of the fraudulent character of the conveyance to *T.*, but when, having such knowledge, it had become apparent to him that there was no other property than that conveyed to *T.* available for the realisation of the unsatisfied balance of his decree, and the suit was within time. TAWANGAR ALI *v.* KURA MAL . . . . I. L. R., 3 All., 394

3. ——————— **and art. 114.**—*Suit to cancel instrument.*—*Suit for the rescission of a contract.*—*Time from which limitation runs.*—*Equitable estoppel.*—*B.*, *P.*, and *G.* sued to cancel a lease of certain land on the ground that the lessor was not competent to grant the same, the defendants being the lessor and the lessee. The lessee's defence to the suit was that the lease had been executed with *B.'s* knowledge, who caused it to be attested and registered; that it was recognised and adopted by *P.* and *G.*, who allowed the lessee to take possession of

**LIMITATION ACT, 1877, art. 91**—*continued.*

——————— **and art. 114**—*continued.*

such land and accepted rent from him in respect thereof; that under these circumstances the plaintiffs were estopped from denying the lessor's competency to grant the lease; and that the suit was barred by limitation, as more than three years had elapsed from the date of the lease. The lower Appellate Court affirmed the decree of the Court of first instance in favour of the plaintiffs on the ground that the lessee was aware that the lessor was not competent to grant the lease. *Held*, on second appeal by the lessee, that the limitation applicable to the suit was to be found in No. 91, schedule II of Act XV of 1877, and not No. 114, that last article referring to the rescission of contracts as between promisors and promisees, and not to suits by third parties to have an instrument cancelled or set aside; and that, as regards *B.*, inasmuch as the existence of the lease became known to him at the time of its execution, and three years from that time had expired, the suit was barred by limitation. The proper issues as between *P.* and *G.* and the lessee were framed and remitted for trial. BHAWANI PRASAD SINGH *v.* BISHESHAR PRASAD MISR [I. L. R., 3 All., 846

4. ——————— *Suit for cancellation of instrument.*—*Mahomedan law.*—*Gift.*—*Suit for possession of immoveable property.*—One of the heirs of a deceased Mahomedan sued for her share under the Mahomedan law of the estate of the deceased, and to set aside a gift of his estate by the deceased, as invalid under that law, by reason that possession of the property transferred by the gift had not been delivered by the donor to the donee. *Held* that, because the suit was not brought within three years from the date of the gift, it did not necessarily follow that the suit was barred by article 91 of the Limitation Act, 1877, inasmuch as the plaintiff's title to impeach the gift could only accrue from the moment when, by receipt of possession, the gift had become operative by law. MEDA BIBI *v.* IMAMAN BIBI . . . I. L. R., 6 All., 207

5. ——————— *Suit for cancellation of instrument.*—*Specific Relief Act (I of 1877), s. 39.*—*Suit for declaratory decree.*—The plaintiff, alleging that he was the proprietor of certain land, that defendant No. 2 had wrongfully and fraudulently mortgaged it to defendant No. 1, and that defendant No. 1 had applied for foreclosure of the mortgage, and notice of foreclosure had issued, claimed "that, the mortgage deed being set aside, the land be protected from the illegal foreclosure, by cancelment of the foreclosure proceedings." *Held* that the suit was not strictly one for the cancelment or setting aside of an instrument to which the limitation in No. 91, schedule II of the Limitation Act, 1877, would apply (which relates to suits of the nature of those referred to in section 39 of the Specific Relief Act), but rather one for a declaratory decree. SOBHA PANDEY *v.* SAHODRA BIBI . I. L. R., 5 All., 322

6. ——————— **and art. 144.**—*Suit to cancel instrument.*—*Champerty.*—The plaintiffs sued for possession of certain immoveable property "by

**LIMITATION ACT, 1877, art. 91 and art. 144—*continued.***

avoidance of a spurious deed of gift" executed by one *N.*, deceased, in favour of the defendant. *Per* STRAIGHT, *J.*—That the suit was governed by article 144, and not article 91, schedule II of the Limitation Act, 1877. *Per* STUART, *C. J.*—That the suit was governed by article 91, and not article 144, schedule II of that Act. *Sikher Chand* v. *Dulputty Singh, I. L. R., 5 Calc., 363,* distinguished. HAZARI LAL v. JADAUN SINGH . . **I. L. R., 5 All., 76**

7. ——— *Suit to set aside fraudulent deed.—Minority.—Fraud.*—Where a deed of sale is found to be a forgery executed in fraud of a person during his minority, the date from which to compute his knowledge of the fraud practised on him, in the absence of proof that he had before majority the knowledge required, is the date on which he attained majority. KULYAN CHURN MOOKERJEE v. BIPRO CHURN PURAIL . . **6 W. R., 321**

**——— art. 92 (1871, art. 93).**

*See* ART. 144 (1871, ART. 145)—INTEREST IN IMMOVEABLE PROPERTY . **2 C. L. R., 10**

1. ——— *Suit to set aside will.—Fraud—Cause of action.*—Where no fraud is alleged, the three years' limitation in clause 93 of the second schedule to the Limitation Act of 1871 will run from any attempt to enforce the instrument, although that attempt might not have been known to the person who brings the suit to declare it a forgery. Plaintiff and defendant were the widows of two joint uterine brothers. Defendant alleged that plaintiff's husband had left his share by will to the husband of defendant. Plaintiff alleged that the will was a forgery, and brought a suit for a declaration of her right to her husband's share after setting aside the will. *Held* that the substance of the claim being for a declaration of right, and not to set aside the will, the suit was not governed by the three years' limitation provided by clause 93, schedule II, Act IX of 1871. NISTARINY DASSEE v. ANUNDMOYE DASSEE **[2 C. L. R., 561**

2. ——— *Attempt to enforce deed.*—In a suit in which the plaintiff had obtained a decree, and the defendant had appealed to Her Majesty in Council, a third party applied to be added as a respondent, on the ground that, by registered deed, the plaintiff had conveyed to him a share of the property decreed. The defendant objected that the deed was a forgery; but an order was made that the applicant should be joined as a respondent, without deciding whether the deed was or was not genuine, and "without prejudice," in the words of the order, "to any action or proceeding by the defendant." *Held* that the setting up the deed and insisting upon it for this purpose constituted "an attempt to enforce" it, and that a suit brought more than three years after the making of that order, by the appellant against the party so joined as a respondent, to have the deed set aside as being false and fabricated, was barred by limitation under Act IX of 1871, schedule II, clause 93. FAKHARUDDIN MAHOMED AHSAN v. OFFICIAL TRUSTEE OF BENGAL . **I. L. R., 8 Calc., 178 [10 C. L. R., 176**

**LIMITATION ACT, 1877, art. 92—*continued.***

S. C. FAKHARUDDIN MAHOMED AHSAN CHOWDHRY v. OFFICIAL TRUSTEE OF BENGAL. ALIMUNISSA KHATOON v. OFFICIAL TRUSTEE OF BENGAL. SHA SUFI SUFILA v. OFFICIAL TRUSTEE OF BENGAL . . **L. R., 8 I. A., 197**

Affirming on appeal the decision of the High Court, where it was held that a suit to declare the forgery of an instrument issued or registered or attempted to be enforced is required by article 93 of schedule II, Act IX of 1871, to be brought within three years of the date of the issue, registration, or attempted enforcement of the document, whichever may first happen; and if a document has once been used, or attempted to be used, a party having notice of such use or attempted use cannot, after the expiration of three years from such use or attempted use, bring a suit to have it declared a forgery by reason of any further attempt to make use of it. FAKHAROODDEEN MAHOMED AHSAN v. POGOSE **[I. L. R., 4 Calc., 209 2 C. L. R., 573**

**——— art. 95 (1871, art. 95; 1859, s. 10).**

*See* ART. 138. . **I. L. R., 6 All., 75**

Suits to set aside decrees obtained by fraud were, under Act XIV of 1859, governed by clause 16 of section 1. AMEEN CHAND v. OOMEID SINGH **[1 Agra, 114**

1. ——— *Fraud.—A.* sold a decree obtained by him under Regulation VII of 1799 to *B.*, but after the sale realised the decree from the judgment-debtor. On application by *B.* for execution, on 2nd January 1862, the fraud was discovered, and *B.* was referred by the Collector to the Civil Court. On 2nd October 1866 *B.* brought his suit for recovery of the purchase-money from *A.* *Held* that the period of limitation ran from the discovery of the fraud. The suit was not barred. GOPAL CHANDRA DEY v. PEMU BIBI **[1 B. L. R., A. C., 77: 10 W. R., 104**

*See* RADHANATH DAS v. ELLIOTT **[6 B. L. R., 530 14 Moore's I. A., 1**

S. C. RADHANATH DOSS v. GISBORNE & Co. **[15 W. R., P. C., 24**

2. ——— *Fraud.—Suit to recover purchase-money and costs.*—In a suit to recover from the defendant the amount of purchase-money paid by the plaintiff upon a sale to him of certain lands by the defendant's father and the costs incurred by the plaintiff in defending his title to the property against a prior purchaser for the same land from the defendant's father,—*Held* that the cause of action arose on the discovery of the fraud upon the plaintiff, and that there was knowledge of the fraud at all events in October 1859, the date of the judgment of the Civil Court affirming the title of the prior purchaser, notwithstanding the presentation of an appeal from that decision, and notwithstanding that the plaintiff remained in possession of the land until 1861. The present suit, having been brought more than six years after the judgment of the Civil Court,

**LIMITATION ACT, 1877, art. 95**—*continued.*

was held to be barred. RAMASWAMY MUDALI *v.* VALAYUDA MUDALI *alias* AIYATHORAY MUDALI [4 Mad., 266

3. ——————— *Act XIV of 1859, s. 10.—Fraud by failure to pay share of revenue.*—Section 10 of the Act of 1859 was held not to apply to a case where one of two co-owners of a putni fraudulently failed to pay his share of the rent and permitted the putni to be sold by the zemindar for arrears, but the cause of action in a suit against him by the other sharer was held to have accrued at the date of the sale. BHUGWAN CHUNDER ROY *v.* RAJ CHUNDER ROY . . . 9 W. R., 553

4. ——————— *Extension of time on account of fraud.*—Article 95, schedule II of the Limitation Law, provides a period of limitation in extension of the period which, in the absence of fraudulent concealment, would, under some other article, apply to a suit, and not a period less than that which under ordinary circumstances would be allowed for a suit of the same nature. OPENDER NARAIN MOOKERJEE *v.* GUDADHUR DEY . . . 25 W. R., 476

5. ——————— *Fraud.—Suit for possession of immoveable property.*—Article 95 of the second schedule to Act IX of 1871 was not intended to apply to suits for possession of immoveable property when fraud is merely a part of the machinery by which the defendant has kept the plaintiff out of possession. That article has reference to cases where a party has been fraudulently induced to enter into some transaction, execute some deed, or do some other act, and desires to be relieved from the consequence of such act. CHUNDER NATH CHOWDHRY *v.* TIRTHANUND THAKOOR [I. L. R., 3 Calc., 504: 2 C. L. R., 147

6. ——————— *Suit to set aside decree obtained by fraud.—Suit against express trustee.*—Certain of the grantees of lands, granted for the maintenance of the grantees and the support of a mosque and other religious purposes, sued for the removal of the superintendent of the property from his office. The parties to this suit entered into a compromise, which made certain arrangements for the management of the property, and a decree was made in accordance with the compromise. The grantees who were not parties to this suit then sued the grantees who were, to set aside the compromise and decree on the ground of fraud. *Held* that the suit fell within the terms of No. 95, schedule II of the Limitation Act, 1877, and there was nothing about it which made the exemption of section 10 of that Act applicable to it. MUHAMMAD BAKHSH *v.* MUHAMMAD ALI . I. L. R., 5 All., 294

7. ——————— and arts. 12 and 144.—*Suit for relief on the ground of fraud.—Suit to set aside execution sale.—Suit for possession of immoveable property.*—*Z.* and his three minor sons were joint owners of a village. This *Z.* hypothecated by deed of simple mortgage to *J.* Subsequently *Z.* executed another deed of mortgage to *J.*, part of the consideration whereof was the cancellation of the former bond, which was paid off and extinguished accordingly. *J.*, however, fraudulently caused it

**LIMITATION ACT, 1877, art. 95 and arts. 12 and 144**—*continued.*

to appear from the novating document that the former mortgage was still alive, and after the death of *Z.*, put the bond in suit against *Z.'s* widow, who, being ignorant of the fraud, confessed judgment as guardian of her minor sons. The entire rights and interest of *Z.'s* heirs were sold in execution of the decree so obtained by *J.* Subsequently the fraud was discovered, and *Z.'s* sons brought a suit to set aside the execution sale and to recover possession of the property first mortgaged. In regard to three fourths of this property, they prayed that "possession might be awarded to them by establishment of their right and share, by amendment of the revenue papers." In regard to the remaining one fourth, they prayed for possession "by right of inheritance to *Z.*," by cancelment of the execution sale and of the fraudulent decree. They further alleged that they had first become aware of the fraud upon the day when they obtained from the registration office a copy of the novating instrument in which the fraudulent entries were contained. *Held* that the law of limitation applicable to the case was not that contained in article 12, nor in article 144, but that contained in article 95 of schedule II of the Limitation Act, inasmuch as fraud vitiates all things, and prevents the application of any other law of limitation than that specially provided for relief from its consequences. *Held*, further, that the knowledge predicated by the terms of article 95 of schedule II of the Limitation Act is not mere suspicion, but such definite knowledge as enables the person defrauded to seek his remedy in Court. *Held*, under the circumstances of the present case, that the burden of proving such knowledge on the part of the plaintiffs, prior to the date alleged by them, lay upon the defendants. NATHA SINGH *v.* JODHA SINGH . . I. L. R., 6 All., 406

8. ——————— and arts. 63 and 84.—*Suit on indemnity bond.—Fraud.—Cause of action.*—On the 27th July 1868 plaintiff received from defendant an indemnity bond, promising to indemnify plaintiff against the misbehaviour of a third person. On the 4th June 1870 the third person committed an act of embezzlement. In an action brought by plaintiff on the 28th June 1873 on the indemnity bond, the first Court held the claim barred under clauses 63 and 84 of schedule II, Act IX of 1871. On appeal that decree was reversed, and the claim allowed under clause 95 of the same schedule. The High Court, on special appeal, held that clauses 63 and 84, and not clause 95, applied to the case, as the suit was one, not for relief on the ground of fraud, but for breach of a contract to indemnify against fraud. SHAPURJI JAHANGIRJI *v.* SUPERINTENDENT OF THE POONA CITY JAIL . . . 12 Bom., 238

9. ——————— *Fraud.—Sale for arrears of revenue.—Act XI of 1859, s. 33.—Act IX of 1871, sch. II, art. 14.*—When one of several co-sharers fraudulently contrived to have an estate brought to sale for arrears under Act XI of 1859, and purchased it in the benami of his son,—*Held* that another co-sharer aggrieved by the sale could maintain a suit to have the property reconveyed, though the period

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**LIMITATION ACT, 1877, art. 95**—*continued.*

limited by section 33 of Act XI of 1859, and article 14 of the second schedule to Act IX of 1871, for a suit to set aside the sale, had expired. The article which applies to such a suit is article 95 of the latter Act. BHOOBUN CHUNDER SEN *v.* RAM SOONDER SURMA MOZOOMDAR . . . I. L. R., 3 Calc., 300

10. ——— *Suit to set aside fraudulent revenue sale.*—Suit to set aside a sale of land, sold as if for arrears of revenue under Act II of 1864 (Madras), on the ground of fraud, and to recover possession of the land from the purchaser, who was alleged to be party to the fraud. *Held* that the suit was governed by article 95 of schedule II of the Limitation Act, 1877. VENKATAPATHI *v.* SUBRAMANYA . . . . I. L. R., 9 Mad., 457

11. ——— **and art. 96.**—*Suit for money paid under Land Acquisition Act.—Fraud or mistake, knowledge of.*—In 1876 *K.* sued *M.* on a bond, dated 25th December 1869, for R5,000, by which certain land in the district of South Tanjore was hypothecated as security for the debt, and obtained a decree on the 6th of April 1876 for the sale of the lands, which he purchased on the 17th August 1876 for R6,000. *K.* then discovered that part of the land hypothecated, situated within the jurisdiction of the Subordinate Court at Kumbakonam, had been acquired by a railway company under the Land Acquisition Act in 1874, and that the compensation, R460 (claimed by *M.'s* mother, who sold the land to the company), was lodged in the treasury of Kumbakonam in the name of *M.'s* mother. *K.* having applied to the Subordinate Court for an order for payment out of this sum, the Court, by order dated 28th February 1880, directed that the question of title to the money should be decided by suit. *K.* then sued *M.* as the sole heir of his deceased mother in the District Munsif's Court of Tiruvadi (where *M.* resided) for a declaration of right to, and to recover, the said sum of R460. The suit was filed on the 4th September 1880. On the 16th April 1880 *M.* assigned his interest in the money sued for to *V.*, who was made defendant in the suit on his own application and pleaded that the suit was barred by limitation, inasmuch as more than three years had elapsed since the money was paid by the railway company. *Held* that the suit was not barred by limitation, as the compensation was awarded to *M.'s* mother either through fraud on her part or mistake on the part of the Collector, and *K.* did not become aware of the fraud or mistake until within six years of the suit (articles 95, 96, of schedule II of the Limitation Act). VENKATA VIRARAGAVAYYANGAR *v.* KRISHNASAMI AYYANGAR . . . . I. L. R., 6 Mad., 344

——— **art. 96 (1871, art. 97).**

*See* ART. 95 . I. L. R., 6 Mad., 344

——— *Bengal Act VIII of 1869, s. 27.*—*Suit for money paid in excess of road cess.*—In a suit to recover money alleged to have been paid by the plaintiffs to the defendants in excess of the sum demandable by the latter from the former on account of road cess,—*Held* (reversing the decisions of the Courts below) that the suit was governed, not

**LIMITATION ACT, 1877, art. 96**—*continued.*

by the special law of limitation contained in section 27, Bengal Act VIII of 1869, but by article 96, schedule II of the Limitation Act, XV of 1877. MATHURA NATH KUNDU *v.* STEEL [I. L. R., 12 Calc., 533

——— **art. 97 (1871, art. 98).**

*See* ART. 62 . I. L. R., 8 All., 273

1. ——— *Accrual of cause of action.*—In a suit brought on the 29th July 1867, to recover back a deposit of purchase-money paid in September 1863, it appeared that the vendor had re-sold the estate, and that the plaintiff thereupon sued for and obtained a decree for specific performance against the vendor and the purchaser at the re-sale. On appeal by the purchaser at the re-sale this decree was reversed on the 29th August 1865. *Held* that the suit to recover back the deposit was not barred, since the cause of action for its recovery did not accrue till 29th August 1865. RAMJAY DEY *v.* SEINATH SINGH . 2 B. L. R., A. C., 170: 11 W. R., 24

2. ——— *Suit to recover money paid on consideration which has failed.*—*R.* had entered into a contract with *S.* to grant him a "zur-i-peshgi" lease, and in consideration of an advance of R400 agreed to execute the same within one month from the date of the agreement, the 30th of April 1869. *S.* sued to enforce the agreement on the 22nd of July 1870, but the suit was dismissed on the ground that *S.* had committed a breach of contract in failing to pay the consideration for the lease. On the 30th of July 1874 *S.* instituted a suit to recover the R400 advanced to *R.* It was held that the suit was barred by limitation under the provisions of Act IX of 1871, second schedule, 98. RAMPHAL LAL *v.* JAFIR ALI . . . . . 7 N. W., 199

——— **art. 98 (1871, art. 99).**

*See* S. 10 . . I. L. R., 9 Bom., 373

——— *Suit to recover money paid for tenure cancelled by sale for arrears of rent.*—A suit to recover consideration-money paid for a dur-putni cancelled by the sale of the putni for arrears of rent was governed by the general rules of limitation under Act XIV of 1859. JUDOONATH BHUTTACHARJEE *v.* NOBO KRISTO MOOKERJEE [3 W. R., S. C. C. Ref., 2

——— **art. 99 (1871, art. 100).**

Under Act XIV of 1859 the period of limitation was six years for the suits mentioned in the first part of this article,—*viz.*, suits by one who had paid the whole amount of a joint decree. JUMEELUN *v.* WALLEE AHMED . . . 10 W. R., 31

DOORGAMONEE DOSSEE *v.* DOORGA BHUNJ [2 W. R., 266

NOBO KRISTO BHUNJ *v.* RAJBULLUB BHUNJ [3 W. R., 134

1. ——— *Suit for contribution.*—*Cause of action.*—Under article 100 in schedule

**LIMITATION ACT, 1877, art. 99**—*continued.*

II of Act IX of 1871, when a person has paid more than his own share of a joint decree, limitation runs against a suit for contribution from the time that the excess payment is actually made to the decree-holder. RADHA KRISTO BALO *v.* RUP CHUNDER NUNDY . . . . . 3 C. L. R., 480

2. ——————— *Suit for contribution.—Joint liability under decree.—Quære,*—Whether, in a suit for contribution, on the ground that the plaintiff and defendants were jointly liable under a decree, in execution of which the plaintiff's property alone was sold, the limitation prescribed by article 100, schedule II of Act IX of 1871, is applicable, or that prescribed by article 118, schedule II of the same Act. FUCKORUDDEEN MAHOMED AHSAN *v.* MOHIMA CHUNDER CHOWDHRY [I. L. R., 4 Calc., 529

The period of limitation for suits mentioned in the second part of this article,—*viz.*, suit by a sharer in a joint estate who has paid the whole revenue,—was also six years under the Act of 1859. SHADEE LAL *v.* BHAWANEE . . . . . 2 N. W., 52

CHOHAGUR *v.* THAKOOREE SINGH . 1 Agra, 123

And the cause of action in such a suit was held to arise from the same time as is now expressly enacted. BUNWAREE MOHUN SAHA *v.* PRANNATH SAHA . . . . . 2 W. R., 159

KALLY SUNKUR SUNDYAL *v.* HURO SUNKUR SUNDYAL . . . . . 7 W. R., 29

——————— **art. 102.**

Suits for wages other than those specified in clause 2 of section 1 of Act XIV of 1859 were governed by clause 9 or 10 of that Act. JUMNA PERSHAD *v.* BHEEM SEIN . . . 1 Agra, Mis., 8

NITTO GOPAL GHOSE *v.* MACKINTOSH [6 W. R., Civ. Ref., 11

——————— *Suit for wages.—Cause of action, Accrual of.*—Wages due to an employé leaving his employer's service would be due on the date when he left the service, and any suit for those wages must, in the absence of any subsequent account stated and settled between the parties, be brought within three years from such date. YOUNG *v.* MACCORKINDALE . . . . . 19 W. R., 159

Upholding on review, MACCORKINDALE *v.* YOUNG [18 W. R., 466

——————— **arts. 103, 104 (1871, arts. 103, 104).**

These articles give the result of, and adopt the decisions under, the Act of 1859. As to prompt dower (article 103). KHAJARANNISSA *v.* RISANNISSA BEGUM . 5 B. L. R., 84: 13 W. R., 371

MULLEEKA *v.* JUMEELA . 11 B. L. R., 375 [L. R., I. A., Sup. Vol., 135

KHAJURANNISSA *v.* SAIFOOLLA KHAN [15 B. L. R., 306

NATHU *v.* DAUD . 2 Bom., 309: 2nd Ed., 293

S. C. DAUD *v.* NATHU . 1 Ind. Jur., N. S., 112

**LIMITATION ACT, 1877, arts. 103, 104**—*continued.*

1. ——————— *Demand of portion of dower.—Cause of action.*—Where a wife demanded only a portion of her denmohr or dower from her husband, limitation as to her claim to the remainder will count from the date of her husband's death, and not from the date of her former demand. BEGOO JAUN *v.* GASHEE BEBEE . 6 W. R., Civ. Ref., 19

As to deferred dower (article 104). MAHAR ALI *v.* AMANI . . 2 B. L. R., A. C., 306

MEHRAN *v.* KUBIRAN . 6 B. L. R., 60, note

KHAJARANNISSA *v.* RISANNISSA BEGUM [5 B. L. R., 84: 13 W. R., 371

MULLEEKA *v.* JUMEELA . 11 B. L. R., 375 [L. R., I. A., Sup. Vol., 135

2. ——————— *Suit for dower.—Wrongful possession.*—In a suit to recover the balance of dower-money, it appeared that the plaintiff's husband died in 1845, and the suit was instituted in 1867; and that the plaintiff had been in possession of her husband's estate in lieu of dower up to 1861, and had continued in possession, under a compromise with the heirs, till 1866. It appeared, however, that in another suit she had been declared not entitled to possession. *Held*, her suit was barred. KALSUMNISSA *v.* WAHIDUNNISSA [3 B. L. R., A. C., 176, note

MAHOMED FAEZ *v.* OOMDAH BEGUM [6 W. R., 111

Under the Act of 1859 the six and not the twelve years' period of limitation was held to apply to suits for dower, as the right was held not to constitute an interest in immoveable property. MAHABU BIBI *v.* AMNIA . . . . . 10 Bom., 430

WAFEAH *v.* SAHEEBA . . 8 W. R., 307

Unless it was sought to charge it on immoveable property by establishing a lien thereon. JANEE KHANUM *v.* AMATOOL FATIMA KHATOON [8 W. R., 51

S. C. on appeal, WOOMATOOL FATIMA BEGUM *v.* MEERUNMUNNISSA KHANUM . 9 W. R., 318

WAFEAH *v.* SAHEEBA . . 8 W. R., 307

In the latter case,—that is, where it is sought to make the dower a charge on immoveable property,—the suit would now probably come under article 132 of the Limitation Act.

3. ——————— *Contract to hold money on loan.—Repayment to be made by husband in case of divorce.—Dower.*—In the case of an advance of money on a contract that it should be held on loan by the husband (a Mopla following the Mahomedan law) without liability to interest, the repayment to be made by the husband in the event of a divorce taking place, or out of his effects at his death,—*Held* that the Mahomedan law of dower was not applicable to the suit, and that the period of limitation was three years from the date of the divorce or the death of the husband. ANONYMOUS CASE [5 Mad., 280

**LIMITATION ACT, 1877—*continued.***

**——— art. 105 (1871, art. 105).**

Under the Act of 1859, the six years' period of limitation was applicable to suits of the nature described in this article (suits by a mortgagor after a mortgage is satisfied for surplus collections received by the mortgagee).

*See* LALL DOSS *v.* JAMAL ALI
[B. L. R., Sup. Vol., 901 : 9 W. R., 187

**——— art. 106 (1871, art. 106).**

*See* ART. 120 . I. L. R., 4 All., 437

To suits of the nature described in article 106 (suits for an account and share of the profits of a dissolved partnership), the six years' period of limitation applied under the Act of 1859. JWALA PERSHAD *v.* KEDAR NATH . . . 3 Agra, 175

NURSINGH DOSS *v.* NARAIN DOSS . 3 N. W., 217

BHUTOO RAM *v.* PUHUL CHOWDHRY
[7 W. R., 36

KALEE KRISTO CHOWDHRY *v.* HARAN CHUNDER DEY . . . . . 19 W. R., 217

1. ——— *Suit in nature of partnership demand.*—Plaintiff was in the service of the principal defendant (*C.*), who was carrying on a partnership business with another as founders and engineers. During such service, plaintiff, *C.*, and a third party entered into a joint adventure or partnership, with respect to the purchase, employment, and sale of a steam tug, the profit or loss to be shared equally,—it being arranged that *C.* should retain in his hands plaintiff's monthly salary and appropriate so much as might be necessary to plaintiff's share of the expenses. After sale of the tug, the account was made up, showing a separate loss to each partner of R2,341, and was allowed and approved by each some time prior to 29th July 1868. On the date last mentioned plaintiff signed an account between himself and *C.*, in which a balance was struck in plaintiff's favour, and immediately reduced by payment of a part to R4,054. On the same date, *C.* instructed his clerk to write to plaintiff claiming to deduct board and lodging expenses, and on 30th July 1868 plaintiff replied refusing to allow the deduction. A further portion of the balance was afterwards paid by *C.* On the 31st July 1871, plaintiff instituted a suit against *C.* and the third partner, framing his claim as if it were in the nature of a partnership demand. *Held* that, on the 29th July 1868, when plaintiff signed the account, and a balance had been struck, all partnership transactions had ceased between the parties, and that he was entitled to sue *C.* for the balance of all salary and moneys in *C.'s* hands; but that his claim was not a partnership demand. MACCORKINDALE *v.* YOUNG
[18 W. R., 466

S. C. affirmed on review. YOUNG *v.* MACCORKINDALE . . . . . 19 W. R., 159

**——— art. 107 (1871, art. 107).**

Under Act XIV of 1859, six years was the period of limitation for the suits mentioned in this article (suits by the manager of a joint estate of an undivided family for contribution in respect of a payment made by him on account of the estate). As to the cause of action, the decisions were in accordance with this article.

**LIMITATION ACT, 1877, art. 107—*continued.***

*See* RAM KRISHNA ROY *v.* MADAN GOPAL ROY
[6 B. L. R., Ap. 103 : 12 W. R., 194

BIMALA DEBI *v.* TARASUNDARI DEBI
[6 B. L. R., Ap., 101 : 14 W. R., 480

**——— art. 109 (1871, art. 109).**

1. ——— *Act XIV of 1859, s. 1, cl. 16.—Suits for mesne profits.*—Six years was the period of limitation for suits for mesne profits, under clause 16, section 1 of Act XIV of 1859. LALLA GOBIND SUHAYE *v.* MUNOHUR MISSER
[1 W. R., 65

RAM SURUN SINGH *v.* GOOROO DYAL SINGH
[1 W. R., 83

PRATAP CHANDRA BURUA *v.* SWARNAMAYI
[3 B. L. R., Ap., 81

ISSUREENUND DUTT JHA *v.* PARBUTTY CHURN JHA . . . . . 3 W. R., 13

RAMAPUT SINGH *v.* FURLONG . 3 W. R., 38

LUCHMUN SINGH *v.* MIRIAM . 5 W. R., 219

MUNEERAM ACHARJEE *v.* TURUNGO
[7 W. R., 173

BALUM BHUTT *alias* RAM BHUTH *v.* BHOOBUN LALL . . . . . 6 W. R., 78

NAWAB NAZIM OF BENGAL *v.* RAJ COOMAREE DEBEE . . . . . 6 W. R., 113

KATTAMA NACHIAR *v.* SUBRARAMA AIYAN. ZEMINDAR OF SHIVAGUNGA *v.* SUBRARAMA AIYAN
[4 Mad., 302

HUREEHUR MOOKERJEE *v* MOLLAH ABDOOLBUR
[17 W. R., 209

JUGGUT CHUNDER BHADOORY *v.* SHIB CHUNDER BHADOORY . . . . 22 W. R., 255

*See* also MODHOOSOODUN SANDYAL *v.* SUROOP CHUNDER SIRCAR CHOWDHRY
[7 W. R., P. C., 73 : 4 Moore's I. A., 431

2. ——— *Cause of action.—Suit for mesne profits.*—In calculating the six years' mesne profits which the decree-holder was entitled to recover in this case, the cause of action was held to have arisen at the end of the year in which the ouster took place. THAKOOR DOSS ACHARJEE CHUCKERBUTTY *v.* SHOSHEE BHOOSUN CHATTERJEE
[17 W. R., 208

RAM CHUNDRA ROY *v.* AMBICA DOSSEA
[7 W. R., 161

3. ——— *Cause of action.—Date of ascertainment of amount.*—Where the amount of mesne profits cannot be ascertained till after the end of the year, the cause of action was held not to arise until the end of the year. BYJNATH PERSHAD *v.* BADHOO SINGH . . . . 10 W. R., 486

**LIMITATION ACT, 1877, art. 109**—*continued.*

THAKOOR DASS ROY CHOWDHRY *v.* NOBIN KRISTO GHOSE . . . . **22 W. R., 126**

Or in cases of dispossession, the date of dispossession is the date when the cause of action arises in suits for mesne profits. EKBAL ALI KHAN *v.* KALEE PERSHAD . . . . . **3 W. R., 68**

4. ——— *Dispossession under decree subsequently reversed by Privy Council.*—Where a plaintiff had been dispossessed of lands under a decree of the Sudder Court, subsequently reversed by the Privy Council on appeal, limitation as to his right to mesne profits during his dispossession ran from the date of the decree of the Privy Council. MASHOOK ALI KHAN *v.* JOWALA BUKSH . **2 N. W., 290**

JOYKURUN LALL *v.* ASMUDH KOOER **[5 W. R., 125**

5. ——— *Cause of action.—Dispossession.*—The cause of action in respect to mesne profits accrues on the date on which, but for the fact of dispossession, the plaintiff would have been entitled to receive them. LAKHI KANT DAS CHOWDRY *v.* RAM DYAL DAS . **5 B. L. R., Ap., 61**

S. C. LUCKHEE KANT DOSS *v.* DEEN DYAL DOSS **[14 W. R., 82**

6. ——— *Default caused by act of another party.—Assam.—Suit for partition.*—Where a purchaser of a four-anna share was kept out of possession of a portion of the property sold, and having recovered judgment in a suit brought for possession and mesne profits against the vendor, an arrangement was come to pending appeal, that within a year the parties should appoint an arbitrator to fix on the shares and make a division, and in default of such appointment an application should be made to the Hakim; but that if no such application was made within the year, and a suit should be subsequently brought, the party suing should lose his right to mesne profits,—*Held* that, under the circumstances, the defendant having prevented the plaintiff from making the necessary application within the year, and proceedings having gone on for years to carry out the partition, the plaintiff was, on the termination of those proceedings, entitled to sue for mesne profits. Where proceedings were going on to effect a partition, the right to particular properties being in dispute,—*Held* that the right to mesne profits accrued at the termination of those proceedings, and that the party improperly kept out of possession was entitled to sue for all mesne profits during the period of his non-possession, subject to any grounds which the defendant could show which would entitle a Court of Equity to deprive the plaintiff of his rights. In a suit brought in January 1862, respecting property situated in Assam, mesne profits for twenty-eight years prior to 1854 were decreed, subject to any equitable claims for deducting any portion, Act XIV of 1859 not applying to Assam previous to July 1862. NILKAMAL LAHURI *v.* GUNOMANI DEBI **[7 B. L. R., 113: 15 W. R., P. C., 38**

7. ——— *Period when due.—Time for making up accounts.*—Where the accounts of an estate are made up at the end of the ordinary year, mesne profits are rightly treated as due at the end of each year, and interest may be added by way of damages. CHOWDHRY WAHED ALI *v.* JUMAYE **[19 W. R., 87**

8. ——— *Suit for, by person restored to possession under decree of Privy Council.*—The right of action to a person who is restored to possession under a decree of the Privy Council does not accrue before the decision of the Privy Council; and he is entitled to interest on mesne profits from the time of his ejectment up to one year after the decision of the Privy Council, that being held to be a reasonable time to be allowed to him for commencing his suit. ASMUDH KOOER *v.* JOYKURUN LALL. JOYKURUN LALL *v.* ASMUDH KOOER **[5 W. R., 125**

9. ——— *Suit for possession.*—In a suit instituted after Act XIV of 1859 came into force, mesne profits can only be recovered for the six years next preceding the institution of the suit. A regular suit for mesne profits will lie after a suit for possession, if in the latter suit no question of mesne profits was raised or decided. PRATAP CHANDRA BURUA *v.* SWARNAMAYI **[3 B. L. R., Ap., 81: 12 W. R., 5**

10. ——— *Suit for mesne profits.*—A claim for mesne profits during a period preceding the three years next before the filing of the plaint is barred by Act XV of 1877, schedule II, article 109. KRISHNANAND *v.* PARTAB NARAIN SINGH **[I. L. R., 10 Calc., 792: L. R., 11 I. A., 88**

11. ——— and art. 40.—*Mesne profits misappropriated.—Suit for value of crops.*—The defendant obtained a decree in a suit brought against the plaintiff for arrears of rent and for ejectment, in execution of which he evicted the plaintiff from his holding, and, after getting possession thereof, carried away certain crops which were then standing on the land. The plaintiff appealed from the decree obtained by the defendant, and on appeal it was set aside, on the plaintiff depositing the rent due, and the plaintiff recovered possession of his tenure. *Held* that such a suit was a suit "for profits of immoveable property belonging to the plaintiff wrongfully received by the defendant" within the meaning of Act IX of 1871, section 109, and not a suit for "compensation for any wrong, malfeasance, nonfeasance, or misfeasance, independent of contract," within the meaning of article 36 of the same Act. SHURNOMOYEE *v.* PATTARRI SIRKAR **[I. L. R., 4 Calc., 625**

12. ——— *Suit for damages to personal property.*—Plaintiff brought a suit to establish his right to a fishery, which was finally decided in his favour. After the final determination of the suit in which his title to the fishery was tried, he brought the present suit to recover damages, and the Small Cause Court decided that the suit being for damages to personal property ought to have been brought within a year from the time of the injury having been

**LIMITATION ACT, 1877, art. 109**—*continued.*

committed. *Held* that the suit was not one for damages for injury to personal property, but for mesne profits, and that the six years' limitation was applicable to it. ELAHEE BUKSH *v.* SHEO NARAIN SINGH . . . . . **17 W. R., 360**

**——— art. 110 (1871, art. 110; 1859, s. 1, cl. 8).**

1. ——— *Suits for arrears of rent.*—Suits for arrears of rent were under Act XIV of 1859 to be instituted within three years from the last day of the Bengal (or other) year in which the arrears claimed shall have become due. GOBIND KUMAR CHOWDHRY *v.* HARGOPAL NAG **[3 B. L. R., Ap., 72 : 11 W. R., 537**

2. ——— *Suit for arrears of rent.*—Where a part-proprietor of a certain talook, who was also a co-sharer in a fractional portion thereof, brought suits against his co-talookdars in the Revenue Court for arrears of rent without allowing any deduction on account of his share, which suits were dismissed for want of jurisdiction, and afterwards brought a suit for the rent for the same period in the Civil Court,—*Held* that the suit was not one for the recovery of arrears of rent within the meaning of section 29, Bengal Act VIII of 1869, but was governed by the provisions of Act XIV of 1859. The suit was one for rent of land, and fell within the scope of clause 8, section 1 of that Act. GOBINDO COOMAR CHOWDHRY *v.* MANSON . **10 B. L. R., 56 : 23 W. R., 152**

3. ——— *Suit for compensation in shape of rent for land.*—A suit to make the defendant liable for compensation in the shape of rent for the land which he held in the name of his servant, was held to be not a suit for rent under Bengal Act VIII of 1869, and was subject to the six years' limitation prescribed by clause 16, section 1, Act XIV of 1859. KISHENBUTTY MISRAIN *v.* ROBERTS **[16 W. R., 287**

4. ——— *Suit for compensation for use and occupation of land.*—Where a contract of lease was found to be a benami transaction, and the lessor, though he had all along received the rent from the ostensible lessees, was held to be entitled, when the tenure passed by sale in execution to a third party, to claim the rent due from the beneficial lessees,—*Held* it was not a suit for rent, but for compensation for use and occupation of the lands demised, and clause 16 of section 1 of Act XIV of 1859 was applicable to it. DEBNATH ROY CHOWDHRY *v.* GUDADHUR DEY. PITAMBUR SEN *v.* DEBNATH ROY CHOWDHRY **[18 W. R., 132**

As to section 1, clause 8 of the Act of 1859, *see* POULSON *v.* CHOWDHRY . . **2 W. R., 21**

UNNODA PERSAUD MOOKERJEE *v.* KRISTO COOMAR MOITRO . **15 B. L. R., 60, note : 19 W. R., 5**

And HUREE KISHORE ROY *v.* HUR KISHORE ADHIKAREE . . . **23 W. R., 134**

5. ——— *Act XIV of 1859, s. 1, cl. 8.—Suit for rent under benami lease.—Use and occupation.*—Plaintiff, who was the zemindar, having obtained a decree against the auction-purchaser of a putni tenure held under his zemindari for the rents of the years 1279, 1280, and 1281, and being unable to realise the whole amount due under the same, subsequently learned that *A.*, who had purchased a share in the putni from *B.*, who derived his title from the original defendant, had been in possession during these years. He then sued *A.* for the balance due under the first decree. This suit was filed on the 21st Baisack 1285. *Held* that the second suit, whether it was governed by Bengal Act VIII of 1869, or by the general law of limitation, was barred, inasmuch as it was a suit for rent and brought more than three years after the arrears became due. *Pitambur Sen* v. *Debnath Roy Chowdhry, 18 W. R., 132,* cited and distinguished. RAM RUNJUN CHUCKERBUTTY *v.* RAM LALL MUKHOPADHYA . . . . **5 C. L. R., 62**

**——— art. 113 (1871, art. 113).**

*See* ART 144 (1871, ART. 145)—INTEREST IN IMMOVEABLE PROPERTY. **[25 W. R., 521 I. L. R., 2 All., 718**

*See* SPECIFIC PERFORMANCE — SPECIFIC PERFORMANCE ALLOWED. **[I. L. R., 3 Mad., 87**

1. ——— *Sale at fair valuation.—Ascertainment of price.*—In a suit for the specific performance of an agreement entered into in 1858 to grant a pottah when required, it appeared that the plaintiffs applied to the defendants for a pottah in 1874, and in March 1875 the defendants finally refused to make the grant, and the plaintiffs thereupon instituted their suit for specific performance. *Held* that they were not barred by limitation, as under Act IX of 1871, schedule II, article 113, they had three years within which to bring their suit from the time when they had notice that their right was denied. NEW BEERBHOOM COAL COMPANY *v.* BULORAM MAHATA **[I. L. R., 5 Calc., 175 : 2 C. L. R., 268**

S. C. on appeal to Privy Council, where, however, this point was not dealt with. **[I. L. R., 5 Calc., 932 : L. R., 7 I. A., 107**

2. ——— *Specific performance.—Trust.—Laches.*—In 1860, certain shares in a company then formed were allotted to *S.*, on the understanding, as the plaintiffs alleged, that 120 of such shares should, on the amount thereof being paid to *S.*, be transferred to and registered in the books of the company in the names of the plaintiffs. In 1862 the plaintiffs completed the payment to *S.* in respect of the shares, and during his lifetime received dividends in respect of the said shares. *S.* died in 1870, leaving a will, probate of which was granted to the defendant as his executor. In a suit brought by the plaintiffs after demand of the shares from the defendant, and refusal by him to deliver them, to compel the defendant to transfer the shares to the plaintiffs, and register the same in their names, the plaintiffs'

**LIMITATION ACT, 1877, art. 113**—*continued.*

case was that the shares had been held in trust for them, and that, consequently, their suit was not barred by lapse of time. *Held* that the transaction between S. and the plaintiffs did not amount to "a trust for any specific purpose" within the meaning of section 10 of the Limitation Act, or to a trust at all, but to an agreement of which the plaintiffs were entitled to specific performance; and the limitation applicable was that provided by clause 113 of schedule II, Act IX of 1871, and therefore the suit was not barred. Nor were the plaintiffs disentitled to relief by reason of any *laches* or delay in bringing the suit. AHMED MAHOMED' PATTEL *v.* ADJEIN DOOPLY [I. L. R., 2 Calc., 323

3. ——— *Suit for specific performance of contract.—Suit on award.—Act I of 1877 (Specific Relief Act), s. 30.*—A suit for money, based on an award, which directs its payment by the defendant to the plaintiff, is virtually a suit to have the award specifically enforced; and as by section 30 of the Specific Relief Act, 1877, awards are placed on the same footing as contracts, No. 113, schedule II of the Limitation Act, 1877, is applicable to such a suit. SUKHO BIBI *v.* RAM SUKH DAS [I. L. R., 5 All., 263

4. ——— and art 144.—*Vendor and purchaser.—Contract of sale.—Suit for specific performance of contract.—Suit for possession of immoveable property.*—A contract was made for the sale of certain immoveable property, in the event of the vendor obtaining a decree establishing his title to the property, in a suit which had been brought for that purpose. The vendor obtained such decree in that suit. The purchaser subsequently brought a suit "to have a sale-deed executed and completed," and for possession of the property. It was contended that the limitation applicable to the suit was that provided by article 144 of the Limitation Act, 1877, and not article 113. *Held* that the suit was essentially one for specific performance of contract, and the limitation applicable was article 113. The contention that, so far as the suit was for possession of immoveable property it should be governed by article 144, was invalid. The right to possession sprang out of the contract of sale, and the relief by giving possession was comprised in the relief by specific performance of the contract of sale, and could not be governed in this suit by any but article 113. But assuming the suit might, so far as limitation was concerned, be entertained, still, as the right to possession was dependent on the contract of sale, if the suit could not be maintained for specific performance of the contract, it could not be maintained for possession of the property sold under the contract. MUHI-UD-DIN AHMAD KHAN *v.* MAJLIS RAI [I. L. R., 6 All., 213

5. ——— *Breach of contract.—Suit for specific performance.*—In a suit to enforce the performance of an agreement alleged to have been entered into between the plaintiffs and the principal defendants whereby the latter, in consideration of an undertaking subsequently carried out, was to admit the former, who were his uterine brothers, to a share of the property of his adopting father, which included an interest in land,—*Held* that the defendant was in a position to fulfil that contract on the deaths of his adoptive parents respectively, and that plaintiff's suit, not having been brought within three years of the dates of those deaths, was barred by limitation. MOHADEO LALL *v.* NUNDUN LALL . 12 W. R., 22

**——— art. 114 (1871, art. 114).**

*See* ART. 91 . I. L. R., 3 All., 846

**——— art. 115 (1871, art. 115).**

*See* ART. 62 . I. L. R., 5 Calc., 830

1. ——— *Suit for breach of contract.*—In a suit to recover a sum of money (principal and interest) on account of rent paid for a certain mouzah which had been farmed out to the plaintiff by defendant No. 1, but of which the plaintiff could not get possession,—*Held* that the cause of action as laid in the plaint was a breach of contract on the part of the principal defendant, and the action was one for damages falling under section 1 of Act XIV of 1859, within the meaning of clause 9 if the contract of lease was verbal, and within clause 10 if it was in writing. The case was not that of a suit for breach of an implied contract as distinguished from a contract of actual agreement, and the obligation of the defendant to make good the loss caused to the plaintiff was not one merely which the law raises upon a state of circumstances independently of any actual agreement. BROOKE *v.* GIBBON [19 W. R., 244

Upheld on review . . . 21 W. R., 47

2. ——— *Implied contract.—Contract to do repairs.*—Where the defendant employed the plaintiff to repair a bungalow, but no express agreement was come to as to the payment for the repairs, it was held that on the performance of the repairs an implied contract to pay their fair value arose, for which the period of limitation was six years, as ruled in *Umedchand Hukamchand* v. *Bulakidas Lalchand, 5 Bom., O. C., 16.* NARO GANESH DATAR *v.* MUHAMMAD KHAN . . . 9 Bom., 280

3. ——— *Contract between doctor and patient as to fees.*—Where a doctor is engaged to treat a patient without any arrangement being made at the time as to his fees, there is an implied contract, an action for breach of which was governed by the three years' limitation under section 1, clause 9 of Act XIV of 1859. HURISH CHUNDER SURMAH *v.* BROJONATH CHUCKERBUTTY . 13 W. R., 96

4. ——— *Suit for money received by vakeel and paid to agents of client.—Cause of action.*—A vakeel received money for his clients, and gave it to their agent for delivery to them; the agent did not deliver it accordingly, and the vakeel was compelled by the Civil Court to pay it over again. The vakeel thereupon sued the agent for the money. *Held* that the case fell under section 1, clause 16, of the Act of

**LIMITATION ACT, 1877, art. 115**—*continued.*

Limitation, 1859. *Held*, also, that, treating the case as one of implied contract, the cause of action arose when the plaintiff was compelled to pay money which the defendant was legally bound to pay; and, thirdly, that, if the defendant was in truth the plaintiff's agent, but had induced the plaintiff to make him so by the fraudulent representation that he was the agent of the clients, the cause of action would have arisen at the discovery of the fraud. PENUBALLI SUBHARAMAREDDI *v.* BHIMARAJU RAMAYA

[2 Mad., 21

5. ——————— *Contract to supply goods.—Suit for balance due.*—In a suit to recover a balance due for articles supplied to defendant on account current between the parties, where an oral contract existed to the effect that, on defendant's giving chittis as security, articles of food for daily consumption would be supplied to him from plaintiff's shop, the chittis to be returned to defendant at intervals after payment on presentation, it was found that plaintiff last, on the 1st Assar 1276, returned to defendant the unpaid chittis then on hand; but defendant did not pay their amount. Subsequently, on different dates, he paid a portion. In a suit for what remained due,—*Held* that the breach of contract on which the suit was brought occurred when the defendant failed to pay, on presentation of the chittis, the amount then due and payable. RAM DOYAL KOONDOO *v.* GOOROO DASS SEN

[18 W. R., 450

6. ——————— *Breach of contract in not satisfying decree.—Cause of action.*—Where *S.*, for a valuable consideration, promised *K.* to satisfy a decree outstanding against him, and, instead of carrying out his agreement, purchased the decree, applied for its execution, and brought *K.'s* property to sale, *K.'s* right of action accrued from the date of the application, not from the date of the sale. MAHOMED HADEE *v.* SHEO SEVUK DOOBEY . 6 N. W., 95

7. ——————— *Suit for trees on land after ejectment.—Cause of action.—A.* having been in possession of garden land from 1850 as tenant of *B.* under a two years' lease, continued to occupy as yearly tenant till 1860, when he was ejected in a suit brought against him by *B.* In 1864 *A.* sued on a clause in the lease which he contended gave him a right to remove certain trees planted on the land. *Held* that the breach of contract (if any) took place when *B.* took possession of the land together with the trees in execution of his decree in the ejectment suit, and that *A.'s* claim was barred by clause 10, section 1 of Act XIV of 1859. SAYAJI *v.* UMAJI

[3 Bom., A. C., 27

8. ——————— *Suit on agreement to pay rent to creditor.—Cause of action.*—Plaintiff executed a zur-i-peshgi lease to defendant for a term of years, and arranged with him contemporaneously that he (the lessee) was to make an annual payment (out of the rents payable to plaintiff) to a creditor of the plaintiff, with a view to clear off a debt. These payments, though made punctually for a time, were withheld while a balance of the debt still remained due, to recover which the creditor sued the lessor (plaintiff) and obtained a decree. *Held* that plaintiff's (lessor's) cause of action against the defendant (lessee) arose from the date of the latter's breach of contract,—*i.e.*, the date on which he failed to pay. ZOOLFEE BEGUM *v.* RAM SURUN ROY

[10 W. R., 80

9. ——————— *Suit for abatement of rent founded on agreement for measurement.—Payment of same rent.—Abandonment.*—In a suit for abatement of rent founded on an agreement that, at a certain time, the land should be measured, and if found less than the quantity named in the agreement, there should be an abatement of the rent, it was found that the plaintiff had never required abatement, but had continued to pay the rent six years. *Held* that the suit was barred by limitation, the cause of action having arisen when the zemindar continued to take rent according to the quantity of land named in the agreement. *Semble*,—There might be ground for saying that the agreement was abandoned by the parties. PROSUNNO MOYEE DOSSEE *v.* DOYA MOYEE DOSSEE

[22 W. R., 275

10 ——————— *Sale of goods on credit.—Breach of contract.*—Where there was a clause in a partnership agreement by which the defendants, the working partners, undertook to be liable for any outstandings in respect of goods sold on credit, the sale of goods on credit was held not to be any breach of contract, and not to bring the suit under clause 9 of section 1 of Act XIV of 1859. KALEE KRISTO ROY CHOWDHRY *v.* HARAN CHUNDER DEY

[19 W. R., 277

11. ——————— *Contract for manufactured indigo.—Breach of contract.*—Certain factories, already sown with indigo, were given in lease by the Court of Wards; and the lessees agreed to take over all contracts and pay all expenses which had been incurred for that season's cultivation, depositing the amount of outlay incurred. The lease having been set aside by superior authority, the lessees agreed to give up the factories and all the indigo manufactured by them while in possession, on condition of being repaid the amount deposited by them. In a suit to recover the value of the indigo not delivered,—*Held* the suit was one for breach of contract and governed by clause 9, section 1, Act XIV of 1859. BAMA SOONDURY DEBIA *v.* JARDINE, SKINNER, & CO.

[9 W. R., 367

12. ——————— *Suit for breach of contract to deliver goods.*—The defendants were owners of a fleet of steamers plying periodically along the coast of British India by which they undertook to convey for freight parcels of goods indifferently from and to specified ports. In a suit for compensation for value of goods short delivered,—*Held* that the suit was one for breach of contract to deliver, and was governed by article 115 of the Limitation Act, 1877. BRITISH INDIA STEAM NAVIGATION CO. *v.* MAHOMED ESACK & CO. . . I. L. R., 3 Mad., 107

**LIMITATION ACT, 1877, art. 115**—*continued.*

13. ——————— **and art. 120.**—*Re-marriage of Hindu widow.—Custom.—Breach of contract.*—The plaintiff sued the defendant, who had married the plaintiff's deceased brother's widow, to recover, by way of compensation, the money expended by his deceased brother's family on his marriage, founding his claim upon a custom prevailing among the Jats of Ajmere, whereby a member of that community marrying a widow was bound to recoup the expenses incurred by her deceased husband's family on his marriage. *Held* that the suit was one of the character described in No. 115, schedule II of Act XV of 1877, and not in No. 120 of that schedule, and the period of limitation was therefore three and not six years. MADDA *v.* SHEO BAKSH **[I. L. R., 3 All., 385**

14. ——————— **and art. 30.**—*Suit by consignee against railway company for non-delivery.*—Where a suit is brought against a railway company by the consignee of goods (not sent on sample or for approval) for compensation for non-delivery, the period of limitation is not two years (article 30), but three years (article 115, schedule II of the Limitation Act, 1877), inasmuch as the consignor contracts with the company as agent for the consignee, and the property in the goods passes to the consignee on delivery to the company. HASSAJI *v.* EAST INDIAN RAILWAY COMPANY **[I. L. R., 5 Mad., 388**

15. ——————— **and art. 30.**—*Bill of lading.—Contract, Breach of, for delivery of goods.—Onus of proof of loss of goods.*—Where a plaintiff brings a suit for breach of contract for non-delivery of goods under a bill of lading, it is not open to the defendant, after having denied receipt of the goods, to set up, or for the Court, after finding that the goods had been shipped but not delivered, to assume, without evidence, that the goods were lost, in order to bring the case within article 30, schedule II of the Limitation Act of 1877. *Per* GARTH, *C. J.*—*Semble,*—Where a plaintiff sues for breach of contract and proves his case, the three years' limitation would be applicable, although the defendants were to prove that the breach occurred in consequence of some wrongful act of theirs, to which the shorter limitation would apply. *Mohansing Chawan* v. *Conder, I. L. R., 7 Bom., 478;* and *British India Steam Navigation Company* v. *Mahomed Esack, I. L. R., 3 Mad., 107,* approved. DANMULL *v.* BRITISH INDIA STEAM NAVIGATION COMPANY **[I. L. R., 12 Calc., 477**

16. ——————— *Loan on verbal agreement to repay at a specified date.*—A suit to recover money lent with interest upon a verbal agreement that the loan should be repaid with interest one year from the date of the loan, is governed by article 115 of schedule II of Act XV of 1877, which virtually provides for all contracts, which are not in writing, registered, and not otherwise specifically provided for. RAMESHWAR MANDAL *v.* RAM CHAND ROY . . . **I. L. R., 10 Calc., 1033**

**LIMITATION ACT, 1877, art. 115**—*continued.*

17. ——————— *Breach of contract.—Cause of action.—Damages.*—In a suit for breach of a contract to be performed at different times, the period of limitation must be calculated from each breach of contract as it arises. Where there is a contract for performing certain duties in each of several years, each breach of the contract is a complete cause of action, and damages are recoverable for each breach separately. MAHI SAHU *v.* FORBES **[B. L. R., Sup. Vol., 500: 6 W. R., Act X, 61**

*See* the decision of the case by the Division Bench after the ruling of the Full Bench. MOTEE SAHOO *v.* FORBES . . . . . **6 W. R., 278**

On this clause *see* also LUKHINARAIN MITTER *v.* KHETTRO PAL SING ROY **[13 B. L. R., P. C., 146: 20 W. R., 380**

18. ——————— *Continuing breach.—Contract.*—*A.* agreed with *B.* to refund to *N.* the price of certain property sold by *A.* to *N.*, and of which a share belonged to *B.* *A.* having died without fulfilling the agreement, *N.* obtained against *B.* a decree for possession of part of the property. Five years subsequent to *N.'s* suit, *B.'s* heirs sued *A.'s* heirs for damages for breach of the agreement. *Held* that such breach of the agreement was a continuing breach, and had not even yet ceased, and that therefore the present suit was not barred by article 115, schedule II of the Limitation Act. IMDAD ALI *v.* NIJABAT ALI . . **I. L. R., 6 All., 457**

——————— **art. 116.**

*See* DEKKAN AGRICULTURISTS' RELIEF ACT, 1879, s. 72 . **I. L. R., 9 Bom., 320**

1. ——————— *Contract or engagement in writing.*—Where a writing signed by the defendant was in these terms: "*S.* (defendant) holds R475, which sum is the property of *L.* (the plaintiff),"—*Held* that the document could not be considered a written contract or engagement. LAKSHMANAIYAN *v.* SIVASAMY ROW . . . . **4 Mad., 216**

2. ——————— *Contract or engagement in writing.—Suit on promissory note by indorsee against payee.*—The defendant, the payee of a promissory note, endorsed it to the plaintiff. The endorsement was, "Pay to *K. M.* (plaintiff) or his order." The promissory note had been registered previous to the endorsement to plaintiff. A suit was brought by the plaintiff three years after the date of the endorsement to recover the amount of the note from the defendant. *Held* that the suit was barred by the law of limitation. KYLASANADA MOODELLY *v.* ARMUGUM MOODELLY . . . . . **4 Mad., 366**

*See* SHUMBO CHUNDER SHAHA *v.* BARODA SOONDUREE DEBIA . . . . **5 W. R., 45**

3. ——————— *Mode of registration.—Registration before cazee.*—The registration must be under one of the Registration Acts or Regulations. Attestation before a cazee was held not to be registration within clause 10, section 1 of Act XIV of 1859. DOYA MOYEE DABEE *v.* NOBONEE DABEE **[1 W. R., 89**

**LIMITATION ACT, 1877, art. 116**—*continued.*

4. ——————— *Registered bond.—Held* that article 116, schedule II of Act XV of 1877 is applicable to a suit on a registered bond for the payment of money. HUSAIN ALI KHAN *v.* HAFIZ ALI KHAN [I. L. R., 3 All., 600

5. ——————— *Registered bond.—Compensation for breach of contract.*—A suit to recover a specific sum of money due upon a registered bond or other written contract is a suit for compensation for breach of contract in writing registered, within the meaning of article 116 of schedule II of Act XV of 1877, and may be brought within six years from the time when the period of limitation would begin to run against a suit brought on a similar contract which is not registered. GANESH KRISHNA *v.* MADHAVRAO RAVJI . . . . I. L. R., 6 Bom., 75

6. ——————— *Registered bond for the payment of money.—Suit for compensation for the breach of a contract in writing registered.*—The defendant having borrowed money from the plaintiff, gave him a bond, dated 4th July 1872, for the payment of such money, with interest, within two years, or on certain contingencies contemplated and defined in such bond. Such bond did not specify a day for payment. It was duly registered. On the 30th June 1880, the plaintiff sued the defendant, stating in his plaint that he had lent the defendant such money; that it was payable on the 4th July 1874; that on that day he had demanded payment; that the cause of action arose on that day, as the defendant did not pay; and that he claimed such money accordingly. The plaint did not make any mention of such bond. *Held* that the suit was not one which fell within the scope of article 66 of schedule II of Act XV of 1877, but one to which article 116 of that schedule was applicable and it might proceed on the plaint without any amendment thereof. GAURI SHANKAR *v.* SURJU . . I. L. R., 3 All., 276

7. ——————— *Suit to recover money due on registered bond.—Compensation for breach of contract.*—A suit to recover money due upon a registered bond is a suit for compensation for breach of contract in writing registered, within the meaning of article 116 of schedule II to Act XV of 1877, and must be brought within six years from the time when the period of limitation would begin to run against a suit brought on a similar contract not registered. NOBOCOOMAR MOOKHOPADHAYA *v.* SIRU MULLICK . . . . I. L. R., 6 Calc., 94

8. ——————— *Registered bond for the payment of money.—Held,* following *Husain Ali Khan* v. *Hafiz Ali Khan, I. L. R., 3 All., 600,* that a suit on a registered bond for the payment of money, which has not been paid on the due date, is a suit for compensation for the breach of a contract in writing registered, and therefore the limitation applicable to such a suit is that provided by article 116, schedule II of the Limitation Act. The principle on which the ruling that a suit on a bond which has not been paid on the due date is a suit for compensation explained by STUART, *C. J.,* and *Nobocoomar Mookhopadhaya* v. *Siru Mullick, I. L. R., 6 Calc., 94,* referred to. KHUNNI *v.* NASIR-UD-DIN AHMAD [I. L. R., 4 All., 255

9. ——————— *Suit for money due on registered bond.*—A suit to recover money due upon a registered bond is a suit for compensation for breach of contract within the meaning of article 116, schedule II of Act XV of 1877. *Nobo Coomar Mookopadhaya* v. *Siru Mullick, I. L. R., 6 Cal., 94: 6 C. L. R., 579. See Gauri Sunkur* v. *Surju, I. L. R., 3 All., 276; Ganesh Krishna* v. *Madhavrav, I. L. R., 6 Bom., 75; Vythilinga Pillai* v. *Thetchanamurti Pillai, I. L. R., 3 Mad., 76.* KALUT RAM *v.* LALA DHANUKDHARI SAHAI . . 11 C. L. R., 361

10. ——————— *Suit on a registered bond, and for misappropriation by executor de son tort.*—In a suit on a registered bond payable in eleven yearly instalments to recover instalments 5 to 10 from the representatives of two deceased co-debtors (who as managing members of an undivided Hindu family had contracted the debt for family purposes), the plaintiff added as defendants *G.,* the son-in-law of one of the deceased co-debtors, and his two brothers, on the ground that they, in collusion with the widow of such deceased, co-debtor, had as volunteers intermeddled with and possessed themselves of substantially the whole property of the family of the deceased co-debtor. The bond was dated 26th March 1870. The earliest instalment sued for fell due on 13th March 1874. *Held* that, as the bond was a registered bond, and the property had been misappropriated within three years of the date of the suit, the suit was not barred by limitation. MAGALURI GURUDIAH *v.* NARYANA RUNGIAH . . I. L. R., 3 Mad., 359

11. ——————— *Suit to recover arrears of rent on registered contract.—Compensation.—Contract Act, s. 73.*—A suit to recover arrears of rent upon a registered contract is governed by article 116, schedule, II, Act XV of 1877. Compensation is used in the same sense in that article as in the Contract Act, section 73. VYTHILINGA PILLAI *v.* THETCHANAMURTI PILLAI . . I. L. R., 3 Mad., 76

12. ——————— and art. 65.—*Vendor and purchaser.—Agreement by purchaser to refund purchase-money in case land sold proved deficient in quantity.—Suit for refund.—Suit for compensation for breach of contract.*—The vendor of certain land agreed in the conveyance, which was registered, that in case the land actually conveyed proved to be less than that purporting to be conveyed, he should make a refund to the purchaser of the purchase money in proportion to the value of the quantity of land deficient. The land actually conveyed having proved to be less than than purporting to be conveyed, and the vendor having failed to make a refund of the purchase-money in proportion to the value of the quantity of land deficient, the purchaser sued the vendor for the value of the quantity of land deficient. *Held* by SPANKIE, *J.,* that the suit was one of the nature described in article 65, schedule II of Act XV of 1877, to which, the agreement being in writing registered, the limitation provided by article 116, schedule II of that Act, was

**LIMITATION ACT, 1877, art. 116**—*continued.*

——————— **and art. 65**—*continued.*

applicable. *Held* by OLDFIELD, *J.*, that article 116, schedule II of Act XV of 1877, was applicable to the suit. KISHEN LAL *v.* KINLOCH

[I. L. R., 3 All., 712

**13.** ——————— **and arts. 89 and 90.**—*Principal and agent.—Breach of contract.—Account.—Registered agreement.—Contract Act, s. 73.—Compensation.*—A suit to recover from the representatives of a deceased agent certain sums of money which had been received by such agent in the course of his duties and misappropriated by him, will be governed by the limitation prescribed by article 116, schedule II, Act XV of 1877, when the contract under which the agent was employed is contained in a duly registered instrument. In a suit for compensation for breach of a contract in writing and registered, whether such compensation be for a liquidated or unliquidated sum, the limitation applicable is six years as prescribed by article 116, schedule II, Act XV of 1877. In article 116, schedule II of Act XV of 1877, the word "compensation" seems to be used in the sense in which it appears in section 73 of the Contract Act, IX of 1872. In April 1875, *A.* entered into an agreement in writing with *B.*, whereby he agreed to act as the manager of *B.'s* zemindaries and other landed properties for three years, on certain terms therein mentioned. The agreement was duly registered. On the 15th of June 1882, *B.* sued the Administrator General of Bengal, as administrator of *A.'s* estate, to recover certain sums of money, set forth in detail in the plaint, as having been received by *A.* and not accounted for, stating that they had been misappropriated by *A.* *Held* that in respect of such sums as were received by *A.* in virtue of his position as manager under the registered agreement, the limitation of six years applied; but that in respect of the sums received by him in the course of transactions which did not come within the scope of the registered agreement, the limitation of three years applied. HARENDER KISHORE SINGH *v.* ADMINISTRATOR GENERAL OF BENGAL . I. L. R., 12 Calc., 357

——————— **arts. 118, 119 (1871, art. 129).**

*See* s. 7 (1871, s. 7).

[15 B. L. R., 1, 9, note

*See* ART. 141 . I. L. R., 8 All., 644

*See* DECLARATORY DECREE, SUIT FOR—ADOPTIONS . I. L. R., 1 Bom., 248

Under the Act of 1859 a suit simply to set aside an adoption was governed by clause 16 of section 1, and in some cases the cause of action was held to arise at the date of the adoption.

*See* MEINMOYEE DABEE *v.* BHOOBUNMOYEE DABEE . 15 B. L. R., 1: 23 W. R., 43

And KALOVA KOM BHUJANGRAV *v.* PADAPA WALAD BHUJANGRAV . I. L. R., 1 Bom., 248

In another case the cause of action was held to accrue on the death of the adoptive mother, and not

**LIMITATION ACT, 1877, arts. 118 and 119**—*continued.*

at the date of the adoption. TARINI CHURN CHOWDHRY *v.* SARODA SUNDARI DASI

[3 B. L. R., A. C., 145: 11 W. R., 468

Where the suit was combined with one for possession of property, the suit was governed by clause 12 of section 1, and a period of 12 years' limitation was allowed. TARINI CHARAN CHOWDHRY *v.* SARODA SUNDARI DASI

[3 B. L. R., A. C., 145: 11 W. R., 468

ISWAR CHANDRA MITTER *v.* SHAMA SUNDARI DASI . . 3 B. L. R., A. C., 150, note

RADHA KISSOREE DOSSEE *v.* GUTHEE KISSEN SIRCAR . . . W. R., 1864, 272

In HURONATH CHOWDHRY *v.* HURRE LALL SHAHA . . . . . 11 W. R., 477

it was held that a mere notice that an adoption has taken place is not of itself a cause of action from which limitation would run to bar a reversioner,—a ruling which seems to be set aside by the present Act.

**1.** ——————— *Suit to set aside adoption.—Ignorance of adoption or its validity.—Cause of action.*—In a suit to set aside an adoption, the period of limitation is not to be reckoned from the date of the adoption if the members of the family who seek to set it aside have by their declaration or conduct subsequently shown that they did not know of the adoption or did not regard it as valid: it should be reckoned from the time when there was distinct knowledge of the validity of the adoption SOOBURNOMONEE DABEA *v.* PETUMBER DOBEY

[Marsh., 221: 1 Hay, 497

*See contra*, RADHAKISSEN MAHAPATTER *v.* SREEKISSEN MAHAPATTER . . 1 W. R., 62

**2.** ——————— *Act IX of 1871, sch. II, art. 129.—Suit to establish or set aside adoption.*—The provision in the schedule to the Limitation Act, 1871, wherein it is enacted that with respect to a suit to establish or set aside an adoption the time when the period of limitation begins to run is "the date of the adoption, or (at the option of the plaintiff) the date of the death of the adoptive father," does not interfere with the right which, but for it, a plaintiff has of bringing a suit to recover possession of real property within 12 years from the time when the right accrued. RAJ BAHADUR SINGH *v.* ACHUMBIT LAL

[L. R., 6 I. A., 110: 6 C. L. R., 12

**3.** ——————— *Suit to set aside adoption.*—Plaintiff sued in 1877 to set aside an adoption which was alleged to have taken place twenty years before, and, as heir of the husband of the last Adhikar, who died in 1282, to obtain possession of a certain temple and properties attached thereto which the defendant claimed under the said adoption. *Held*, on the authority of *Raj Bahadur Singh* v. *Achumbit Lal, L. R., 6 I. A., 110: 6 Calc., L. R., 12*, that the suit was not barred by article 129, schedule II of Act IX of 1871. PURNA NARAIN AUDHIKAR *v.* HEMOKANT AUDHIKAR . 6 C. L. R., 46

**LIMITATION ACT, 1877, arts. 118 and 119**—*continued.*

4. ——————— *Suit to obtain a declaration that an alleged adoption is invalid or never took place.—Suit for possession of immoveable property.—Act XV of 1877, sch. II, art. 141.*—Article 118 of the Limitation Act applies only to suits where the relief claimed is purely for a declaration that an alleged adoption is invalid or never in fact took place. Such a suit is distinct from a suit for possession of property, and the latter kind of suit cannot be held to be barred as a suit brought under article 118, merely by reason of its raising a question of the validity of an adoption, but is separately provided for by article 141. It is discretionary in a Court to grant relief by a declaration of a right, and consequently the fact that a person has not sued for a declaration should not be a bar to a suit for possession of property on any ground of limitation prescribed for the former. BASDEO *v.* GOPAL . . . . . I. L. R., 8 All., 644

5. ——————— *Act IX of 1871, art. 129.—Meaning of "suit to set aside adoption."*—Article 129 of schedule II of Act IX of 1871, the Indian Limitation Act of that year, using the expression "suit to set aside an adoption," denoted a suit bringing the validity of an adoption into question; and the rule of limitation given by that article applied to all suits in which the suitor could not succeed without displacing an apparent adoption, in virtue of which the opposite party was in possession. The plaintiffs, as collateral heirs of a childless Hindu, questioned the adoptions purporting to have been made by his widows in pursuance of authority from him; such adoptions having been followed by continuous possession, and having been recognised in formal instruments, proceedings, and decrees to which the plaintiffs were parties. *Held*, on the ground that the adoptions were brought into question more than twelve years after their date, though less than twelve years after the plaintiffs' titles (if any) had accrued at the death of the surviving widow, that the suits were barred under article 129 of schedule II of Act IX of 1871. Part of the language of the judgment in *Raja Bahadur Singh* v. *Achumbit Lall, L. R., 6 I. A., 110*, referred to, and that case, in which the plaintiffs' claim was not affected by the widow's adoption, distinguished from the present. JAGADAMBA CHAODHRANI *v.* DAKHINA MOHUN ROY CHAODHRI. SARODA MOHUN ROY CHAODHRI *v.* DAKHINA MOHUN ROY CHAODHRI . I. L. R., 13 Calc., 308 [L. R., 13 I. A., 84

6. ——————— and art. 125.—*Suit by reversioner to declare adoption invalid, and set aside alienation.*—Where a plaintiff, as reversioner, prayed for a declaration that an adoption alleged to have been made by a Hindu widow eighteen years before suit was invalid, and that the sale of certain property made by the widow and the adopted son two years before suit was not binding upon him, *Held* that the suit, being substantially brought to declare the invalidity of the sale so as to enable plaintiff to recover as reversioner on the death of the widow and adopted son, and the declaration as to the adoption being ancillary to that claim, was not barred by limitation. SRINIVASA *v.* VENKATRAMANA [I. L. R., 5 Mad., 121

**LIMITATION ACT, 1877**—*continued.*

——————— **art. 120 (1871, art. 118; 1859, s. 1, cl. 16).**

*See* ART. 62 (1871, ART. 60). [I. L. R., 1 All., 333 I. L. R., 8 All., 273

*See* ART. 99 (1871, ART. 100). [I. L. R., 4 Calc., 529

*See* ART. 144 (1871, ART. 145)—INTEREST IN IMMOVEABLE PROPERTY. [I. L. R., 3 All., 40

The general period of limitation of six years under clause 16 of section 1 of the Act of 1859 was necessarily much wider in its application than is article 120 of the present Act, so many more suits being now specially provided for. There was under the Act of 1859 a difference of three years in the period of limitation applicable to contracts registered and that applicable to unregistered contracts which could have been registered, the period being six years for the former, and three years for the latter. Suits on contracts which could not have been registered were considered as cases not specially provided for, and held to be governed by the general limitation of six years.

*See* ALI SAIB *v.* SANIYASIRAZ PEDDA BALAIYA RASIMHULU . . . . 2 Mad., 401

VELLIAPPEN CHETTY *v.* NOOTOO THEEVAN [2 Ind. Jur., O. S., 11

GURIVI CHETTY *v.* AIYAPPA NAIDU [2 Mad., 329

BOISTUB CHURN DOSS *v.* PREM CHAND MITTER [4 W. R., 98

CHUNDER SEIN *v* GUJADHUR LALL [1 N. W., 148: Ed. 1873, 230

LESLIE *v.* PANCHANAN MITTER [6 B. L. R., 668: 15 W. R., O. C., 1

PYARI CHAND MITTER *v.* FRAZER [6 B. L. R., Ap., 60

S. C. OFFICIAL ASSIGNEE *v.* FRAZER [14 W. R., O. C., 51

In the present Act the distinction is between "contracts not in writing registered" (article 115) and "contracts in writing registered" (article 116).

1. ——————— *Contract to cultivate indigo, Suit for damages for breach of.—Act X of 1836, s. 3.*—A contract to sow and cultivate indigo provided for liquidated damages payable in a lump sum in the first year in which a breach of contract took place. *Held* that a suit for damages to the extent of the injury sustained brought under section 3, Act X of 1836, against a party for prevailing upon ryots, who had entered into a lawful contract with the plaintiff, to break that contract, was governed by the six years, limitation provided by clause 16, section 1, Act XIV of 1859. MAHOMED KAZEM CHOWDHRY *v.* FORBES [5 W. R., 277

**LIMITATION ACT, 1877, art. 120**—*continued.*

MAHOMED KAZEM *v.* FORBES . **8 W. R., 257**
FORBES *v.* PERTAB SINGH DOOGUR **[7 W. R., 401**

2. ——————— *Suits for declaratory decrees*—The general period of six years extended to suits in which a declaratory decree and nothing more was sought—*Per* Melvill, *J.* MORU BIN PATLAJI *v.* GOPAL BIN SATU . . **I. L. R., 2 Bom., 120**

NANABAI HARIDAS, *J.*, in the same case decided, however, that it would not apply where the declaration sought was of a right in immoveable property.

*See* also DOOLHUN JANKEE KOER *v.* LALL BEHAREE ROY . . . . **19 W. R., 32**

It was also held not to apply to a suit for a declaratory decree as to the erroneousness of a Magistrate's order as to possession under the Criminal Procedure Code. MEGHRAJ SINGH *v.* RASHDHAREE SINGH . . . . **17 W. R., 281**

UNDHOOB SINGH *v.* CHUTTERDHAREE SINGH **[9 W. R., 480**

3. ——————— *Suit for declaration of title.—Possession.*—Limitation will not apply to a claim for a declaration of title, where the plaintiff is in possession of the land regarding which the declaration is required. PUREE JAN KHATOON *v.* BYKUNT CHUNDER CHUCKERBUTTY . . **7 W. R., 96**

The general limitation of six years was held under the Act of 1859 not to apply to divorce suits. HAY *v.* GORDON . **10 B. L. R., 301: 18 W. R., 480**

4. ——————— *Suit for abatement of rent.—Suit for apportionment of rent.—Beng. Act VIII of 1869, s. 19.*—In 1877 certain butwara proceedings were terminated, and the amount of land held by the plaintiff in the portion of the estate allotted to the defendant was ascertained. The rent payable was admitted to be at the rate of R4 per beegah. In 1881 the defendants sued the plaintiff for rent of a larger amount than the plaintiff admitted to be due, and obtained a decree on the 31st May 1881. On the 20th September 1881, the plaintiff instituted a suit nominally under the provisions of section 19 of Bengal Act VIII of 1869 for abatement of rent, upon the ground that the defendants were seeking to charge him rent upon a larger amount of land than he actually held. The defendants pleaded that the suit was barred by limitation as being brought more than one year after the cause of action accrued. The Court found that the amount of land held by the plaintiff was the amount stated by him in his plaint, and not that alleged by the defendants. *Held* that the suit was rather one for the apportionment of rent after the butwara proceedings, and not one for abatement of rent, and that it was not barred by limitation, inasmuch as the period allowed for such suit must be taken to be six years and not one year. DOORGA PERSHAD *v.* GHOSITA GORIA **[I. L. R., 11 Calc., 284**

**LIMITATION ACT, 1877, art. 120**—*continued.*

5. ——————— *Breach of covenant in lease.*—The defendant took certain land from the plaintiff under a registered lease, which contained a clause prohibiting the defendant from digging a tank on the land without the plaintiff's permission. The defendant having, nevertheless, constructed a tank without such permission, the plaintiff brought a suit to compel him to fill up the tank, or, in case he should fail to do so, for compensation. *Held* that the period of limitation applicable to such a suit was article 120 of schedule II of the Limitation Act. KEDARNATH NAG *v.* KHETTURPAUL SRITIBUTNO **[I. L. R., 6 Calc., 34: 6 C. L. R., 569**

6. ——————— *Suit to recover compensation-money wrongfully drawn out of Collectorate.*—*A.*, a Hindu widow, granted, without legal necessity, a mokurrari lease of certain mouzahs, portion of her husband's estate, to *B.* During *B.'s* possession part of the lands comprised in the granted mouzahs were taken up by Government, and the compensation-money was lodged in the Collectorate. *A.* having afterwards died, the next heirs of *A.'s* husband, on the 7th October 1871, sued *B.* to recover possession of the mouzahs, but not being aware of the facts, did not in that suit claim the compensation-money lying in the Collectorate. While this suit was still pending, *B.*, in March 1872, drew the compensation-money out of the Collectorate. The heirs, after obtaining a decree against *B.* for possession of the mouzahs, on the 13th September 1875 instituted a fresh suit against him to recover the compensation-money wrongfully drawn out by him from the Collectorate. *Held* that it was not barred by limitation, although more than three years had elapsed since the money had been drawn out by *B*,—article 118, and not article 60, of schedule II of the Limitation Act IX of 1871, applying to the case. NUND LALL BOSE *v.* ABOO MAHOMED **[I. L. R., 5 Calc., 597: 5 C. L. R., 45**

7. ——————— *Recovery of money deposited in Government treasury.*—The period of limitation for recovery of moneys deposited in a Government treasury, the equivalent whereof was to be returned, does not exceed six years. SHEORAJ SINGH *v.* COLLECTOR OF MORADABAD . . **2 N. W., 379**

8. ——————— *Suit to recover deposit*—Where *A.* made a deposit as security for the discharge of his duties as manager of an estate under the Court of Wards, which deposit was liable for all sums not accounted for by *A*; and a suit was, after his dismissal from his appointment, brought for the recovery of the deposit,—*Held* that the period of limitation allowed was certainly not less than six years, and began to run, not from the date of his dismissal, but from the time when the account of charges due against the deposit was made and sent in to him. UPENDRA LAL MUKHOPADHYA *v.* COLLECTOR OF RAJSHAHYE . . **I. L. R., 12 Calc., 113**

9. ——————— *Suit to recover deductions from deposit of revenue to prevent sale.*—The six years' period of limitation applies to a suit to recover deductions made on account of revenue by the Collector from a deposit made by a sharer of a joint

**LIMITATION ACT, 1877, art. 120**—*continued.*

estate in order to protect his share from sale by reason of the default of his co-sharer. BOYKUNT NATH BHOOYA *v.* RAM NATH BHOOYA [4 W. R., S. C. C. Ref., 9

10. ——————— *Suit on mortgage bond to recover amount by sale of property.—Personal liability of mortgagor.—Cause of action.*—By a mortgage bond, dated the 28th Magh 1281 B. S. (9th February 1875), it was provided that if the mortgagors should fail to pay the money secured thereby according to the terms thereof, the mortgagees should immediately institute a suit and realise the amount due by sale of the mortgaged property, and that if the proceeds of such sale should not be sufficient to liquidate the debt, the mortgagees should realise the balance from the persons and other properties of the mortgagors. It was further agreed that the principal and interest secured by the bond should be repaid in the month of Magh 1282 (January—February 1876). In a suit instituted on the 9th October 1882 upon the mortgage to recover the amount due by the sale of the mortgaged property, and the balance, if any, from the persons of the mortgagors,—*Held* that the bond in question provided for two remedies in one suit, and did not contemplate a second suit being instituted to recover the balance from the persons of the mortgagors in the event of the first remedy against the mortgaged property proving insufficient to pay the debt in full, and consequently that the cause of action against the persons of the mortgagors accrued upon the date on which the mortgage-money became due; and as the suit was instituted more than six years after that date, the plaintiff's claim was barred by limitation, so far as the personal liability of the mortgagors was concerned. MILLER *v.* RUNGA NATH MOULICK . . I. L. R., 12 Calc., 389

11. ——————— *Suit to recover non-hereditary office.—Karnam.*—The plaintiff's adoptive father was dismissed from the office of karnam on the 4th of April 1862, and the plaintiff was appointed in his stead on the 29th April 1865. On the 25th September 1865 the plaintiff was dismissed and the second defendant appointed. The present suit for recovery of the office and land attached was filed on 21st September 1877. *Held*, on the authority of *Tammirazu Ramazogi* v. *Pantina Narsiah, 6 Mad., 301*, that the suit was barred, not having been brought within six years from the 25th September 1865. *Fattehsangji Jaswatsangji* v. *Dessai Kallianraiji Hekumutraiji, L. R., 1 I. A., 34*, discussed. VENKATASUBBARAMAYYA *v.* SURAYYA [I. L. R., 2 Mad., 283

12. ——————— *Time from which period of limitation begins to run.—Mortgage by conditional sale.*—A mortgagee under a deed of mortgage by conditional sale obtained a final order for foreclosure under Regulation XVII of 1806 in December 1875. He then sued to have the conditional sale declared absolute and for possession of the mortgaged property, obtaining a decree for the relief sought in April 1881. In a suit for pre-emption in respect of the mortgage,—*Held*, with reference to article 120, schedule II of the Limitation Act, which was applicable to the case, that the pre-emptor's full right to impeach the sale had not accrued until the mortgagee had obtained the decree of April 1881, declaring the conditional sale absolute and giving him possession. *Rasik Lal* v. *Gajraj Singh, I. L. R., 4 All., 414*; and *Prag Chaubey* v. *Bhajan Chaudhri, I. L. R., 4 All., 291*, referred to. UDIT SINGH *v.* PADARATH SINGH [I. L. R., 8 All., 54

13. ——————— *Share of undivided mehal.—Conditional sale.*—The limitation applicable to a suit to enforce a right of pre-emption in respect of a conditional sale of a share of an undivided mehal is that contained in article 120, schedule II of Act XV of 1877, *viz.*, six years. NATH PRASAD *v.* RAM PALTAN RAM . . I. L. R., 4 All., 218

ASHIK ALI *v.* MATHURA KANDU [I. L. R., 5 All., 187

14. ——————— *Mortgage by conditional sale.—Right to sue.*—The limitation for a suit to enforce a right of pre-emption in respect of a mortgage by conditional sale is that provided by No. 120, schedule II of Act XV of 1877,—that is to say, six years (*Nath Prasad* v. *Ram Paltan Ram, I. L. R., 4 All., 218*, followed); and where the mortgagee by conditional sale is not in possession under the mortgage, and after foreclosure has to sue for possession, the right to sue to enforce a right of pre-emption accrues when he obtains a decree for possession. RASIK LAL *v.* GAJRAJ SINGH . I. L. R., 4 All., 414

15. ——————— *Suit for pre-emption.—Rival pre-emptor impleaded as defendant.*—Two suits to enforce the right of pre-emption in respect of a particular sale having been instituted, the plaintiff in the one first instituted was added as a defendant to the other. *Held* that, as regards him, the second suit constituted a claim by one pre-emptor against another for determination of the question whether the plaintiff or the defendant had the better right to pre-empt the property, which was a claim essentially declaratory in its nature; and there being no specific provision for such a claim in the Limitation Act, it was governed by article 120 of that Act, and the right to sue accrued when the first suit was instituted. DURGA *v.* HAIDAR ALI . . I. L. R., 7 All., 167

16. ——————— and art. 73.—*Promissory note.—Special agreement.—Held* that a suit brought in March 1881 upon a promissory note, dated the 12th of September 1875, payable at any time within six years upon demand, was not barred by limitation, being governed, not by article 73, but by article 120 of schedule II of the Limitation Act, 1877. SANJIVI *v.* ERRAPA . . . I. L. R., 6 Mad., 290

17. ——————— *Suit for refund of money paid on decree afterwards reversed.*—*A.* got a decree against *B.* for rent at an enhanced rate, on the 29th of June 1863, which decree was affirmed both in regular and special appeal, but was reversed by the Privy Council on the 5th of May 1873. Between the two dates just mentioned *A.* got sixteen other de-

**LIMITATION ACT, 1877, art. 120**—*continued.*

crees for rent at the enhanced rate, based on the original one of the 29th of June 1863. A Full Bench having ruled that a suit for a refund of the excess rent would lie,—*Held* that such a suit must be brought within six years, under Act IX of 1871, schedule II, clause 118 (Act XV of 1877, schedule II, clause 120). KALI CHURUN DUTT *v.* JOGESH CHUNDER DUTT . .. . **2 C. L. R., 354**

**18.** ——————— *Suit for recovery of instalment of professional tax.—Towns Improvement Act, Madras (III of 1871).*—A suit for recovery of instalments of profession tax under the provisions of the Madras Towns Improvement Act, 1871, is governed by article 120, schedule II of the Limitation Act. PRESIDENT OF THE MUNICIPAL COMMISSION, GUNTUR, *v.* SRIKAKULAPU PADMARAZU **[I. L. R., 3 Mad., 124**

**19.** ——————— *Claim to compel tenant to remove trees.*—Article 120, Act XV of 1877, applies to an alternative claim put forward in a suit for ejectment to compel the defendant to remove trees from lands leased to him for agricultural purposes. GONESH DOSS *v.* GONDOUR KOOEMI **[I. L. R., 9 Calc., 147: 12 C. L. R., 418**

**20.** ——————— *Suit for exclusive right to worship.*—A suit for an exclusive right to worship an idol is governed by article 118 of Act IX of 1871. ESHAN CHUNDER ROY *v.* MONMOHINI DASSI **[I. L. R., 4 Calc., 683**

**21.** ——————— **and art. 11.**—*Order disallowing claim.—Civil Procedure Codes (Act VIII of 1859), s. 246, and (Act X of 1877), ss. 97-371.*—The defendants attached certain property, which the plaintiffs alleged belonged to them. The plaintiffs preferred a claim to the property under section 246 of Act VIII of 1859: this claim was disallowed on the 15th August 1877. In June 1878 the plaintiffs brought a suit to establish their title to the property attached, and for confirmation of possession. Pending this suit, the principal defendant died, and the plaintiffs applied for an order to substitute certain persons as defendants. The Court thereupon directed the issue of a summons on the defendants proposed by the plaintiffs to appear and defend the suit; but the plaintiffs failing to pay the costs of the service of this summons, the suit was dismissed on the 14th March 1879. On the 4th March 1880 the plaintiffs again brought a suit to establish their title to the same property, and for confirmation of possession. *Held* that the order of the 15th August 1877 not being an order passed under section 283 of Act X of 1877, article 11 of schedule II of Act XV of 1877 did not apply, but that article 120 of schedule II was applicable. BISSESSUR BHUGUT *v.* MURLI SAHU **[I. L. R., 9 Calc., 163: 11 C. L. R., 409**

*See* GOPAL CHUNDER MITTER *v.* MOHESH CHUNDER BORAL **[I. L. R., 9 Calc., 230: 12 C. L. R., 139**

**22.** ——————— *Suit after release from attachment.*—*A.* and *B.*, in execution of a decree obtained on the 16th January 1877 by them against *C.* for rent, obtained possession of certain property. *D.*, whose husband was originally tenant of the property, had sold her interest in it, obtained a mortgage from her vendee upon it, and subsequently, in execution of a decree, dated 12th January 1877, on the mortgage, attached the property, but the attachment was released on the 14th April 1877 at the instance of *A.* and *B.* *D.* thereupon transferred her decree to the plaintiff, who again attached the property, but the attachment was again refused. The plaintiff then sued on the 18th March 1880 to have it declared that the decree of the 14th January 1877 was collusive, and that he was entitled to sell the property under the mortgage decree of 12th January 1877. *Held* that the suit was governed, not by article 11, but by article 120, of schedule II of the Limitation Act, and that the suit was not barred. BROJO MOHUN BHUTTO *v.* RADHIKA PROSUNNO CHUNDER **[13 C. L. R., 139**

**23.** ——————— **and art. 61.**—*Money which plaintiff was obliged to pay in consequence of acts of defendants.*—On the 29th May 1873 one *T.* drew from the hands of a shroff a sum of money which had been deposited by him in the name and to the credit of a third person. On the death of such third person his heirs sued the shroff to recover the sum deposited, and on the 30th January 1878 obtained a decree, in satisfaction of which the shroff paid the decretal money into Court on the 15th January 1883. On the 5th February 1884 the shroff sued *T.*, the heirs of the third party and another person (who owned to having received some of the money from *T.*), to recover the sum he had been compelled to pay under the decree of 1878. *Held* that the plaintiff's cause of action arose at the time when he actually paid down the money on the 15th January 1883, and that the suit, therefore, was not barred by limitation. TOHAB ALI KHAN *v.* NILRUTTUN LAL . . **I. L. R., 13 Calc., 155**

**24.** ——————— *Express trust.—Administration suit.—Executor.—Suit for an account against an executor or his representative.*—*R.* died in 1865, leaving a will, of which his nephews *P.* and *S.* were the executors. His will provided that after payment of all debts, &c., the residue of his property should remain in the hands of the executors, who were "to maintain the family in the same manner as I used to maintain the family in my house." After the death of both the executors, the residue was to be apportioned among the children of his nephews in equal shares. On the death of the testator, *P.* took possession of the estate, and died on the 10th January 1876. *S.* remained passive until the 27th August 1884, when he took out probate of *R.'s* will. On the 23rd January 1885, he filed the present suit against the defendant as widow and administratrix of *P.*, praying for an account of the estate of *R.* that had come to the hands of *P.*, and also for an account of the estate of *P.* The plaintiff contended that *R.'s* estate came into the hands of *P.* as a trustee; that the suit was to recover the property for the purposes of the trust, and that section 10 of the Limitation Act (XV of 1877) applied. The defend-

**LIMITATION ACT, 1877, art. 120**—*continued.*

ant alleged that all the moneys belonging to *R.'s* estate, which had come into the hands of *P.*, had been expended in paying *R.'s* debts, and that there was no residue left for the purposes of the trusts of the will, and she contended that the suit was barred by limitation. *Held* that the suit was barred by article 120 of schedule II of the Limitation Act, XV of 1877, being primarily not a suit to follow trust property in the hands of a representative of a trustee, but really to ascertain whether any trust remained to be administered after the testator's debts and funeral expenses had been paid. No breach of trust was alleged. The suit was merely for an account against the executor or his representative. To such a suit section 10 of the Limitation Act does not apply. SHAPURJI NOWROJI POCHAJI *v.* BHIKAIJI

**[I. L. R., 10 Bom., 242**

**24. ——————** *Company, Winding up.—Liquidator.—Suit by liquidator for calls.—Period of limitation applicable to suit by liquidator for calls different from that applicable to suit by company itself.*—The directors of the *P.* company made a call of R100 per share upon its shareholders on the 1st October 1882. On the 8th March 1886, the company was ordered to be wound up by the Court, and an official liquidator was appointed. On the 17th March 1886, the official liquidator filed this suit against the defendant, who was a holder of twenty-one shares in the company, to recover (along with other calls) the amount of the said call of 1st October 1882. As to this part of the claim, the defendant pleaded limitation. *Held* that the suit being brought, not by the company, but by the liquidator, article 120 of the Limitation Act, XV of 1877, applied, and that the claim was, therefore, not barred. PARELL SPINNING AND WEAVING COMPANY *v.* MANEK HAJI

**[I. L. R., 10 Bom., 483**

**25. —————— and arts. 48 and 60.**—*Suit for right to follow goods in hands of agent made liable for conversion.*—The defendant, as an agent, sold goods entrusted to him by his principal, who died after a decree had been made against him for their conversion; and, as agent for the representative of the deceased, retained the proceeds, which the decree-holder had an equitable right to follow in the agent's hands. *Held* that neither article 48 of schedule II of Act IX of 1871, fixing the limitation of three years to suits for moveable property acquired by dishonest misappropriation or conversion, nor article 60 of the same schedule, fixing the limitation of three years to suits for "money payable by the defendant to the plaintiff," and to suits "for money received to the plaintiffs' use," were applicable to the present suit; but that as a suit for which no period of limitation was provided elsewhere, it fell within article 118 of the same schedule, fixing for such suits the limitation of six years. GURUDAS PYNE *v.* RAM NARAIN SAHU

**[I. L. R., 10 Calc., 860: L. R., 11 I. A., 59**

**26. —————— and arts. 62 and 89.**—*Suit against trustee for possession of share, and for account and recovery of profits.*—*M.* and *S.* purchased certain property jointly in 1865, and had equal interests in it till 1868, when *M.'s* interest was reduced to one third. *S.* paid the entire purchase-money in the first instance, and incurred expenses in conducting suits for possession of the property, and for registration of the deed, and ultimately obtained possession in 1869 or 1870, and took the profits from that date. *M.* did not pay any part of the money up to 1870, and it was not till 1871 that the whole of his share of it was subscribed, and he paid little or nothing towards the expenses. Subsequently he sued *S.* for possession of his share, to have an account taken of the profits, and to recover his share of them with future mesne profits and costs. *Held* that article 89 of schedule II of the Limitation Act did not apply to the suit; and that article 62 did not meet a claim like the present, relating to an equitable claim against a trustee liable to account, in which the relief sought was to have an account taken of the trust property and to recover what might be due. *Guru Das Pyne* v. *Ram Narain Sahu, L. R., 11 I. A., 59: I. L. R., 10 Calc., 860,* referred to. *Held,* also, that article 120 of schedule II of the Limitation Act applied to the suit, as it was one for which no period of limitation was provided elsewhere in the schedule. MUHAMAMED HABIBULLA KHAN *v.* SAFDAR HUSAIN KHAN

**[I. L. R., 7 All., 25**

**27. —————— and arts. 62 & 132.**—*Suit for "haq-i-chaharam" based on custom.*—*C.*, the proprietor of a certain mohalla, sued *K.*, who had purchased a house situated in the mohalla at a sale in the execution of his own decree, for one fourth of the purchase-money, founding his claim upon an ancient custom obtaining in the mohalla, under which the proprietor thereof received one fourth of the purchase-money of a house situated therein, whether sold privately or in the execution of a decree. *Held* that the period of limitation applicable to such a suit was that prescribed by article 120, schedule II of Act XV of 1877, and not by article 62 or by article 132 of that schedule. KIRATH CHAND *v.* GANESH PRASAD . . . . . **I. L. R., 2 All., 358**

**28. —————— and art. 106.**—*Suit to wind up partnership.*—*T.*, *B.*, *R.*, and *W.*, the owners of a certain estate in equal shares, in 1863 entered into a partnership for "the cultivation of tea and other products" upon such estate. In 1864, *H.*, *E.*, and *?.* joined the firm. In 1870 *H.* died, and in 1871 *P.* purchased his share and those of *E.* and *L.*, and in 1873 that of *R.* In 1875 *T.* gave the Delhi and London Bank a mortgage, on which they afterwards obtained a decree against him personally, in execution of which his right and interest in the estate were put up for sale on 20th June 1877, and purchased by the Bank, who obtained possession in August 1877. In August 1879, *B.* and *W.'s* executor sued *T.* and the Bank claiming a declaration that they had been partners with *T.* in the estate; that if the partnership should be held to be subsisting it might be dissolved, or that if it had ceased to exist, the date of its termination

**LIMITATION ACT, 1877, art. 120**—*continued.*

——————— **and art. 106**—*continued.*

might be fixed, and that in either case a liquidator might be appointed. *Held* that the period of limitation applicable to the suit was that provided in article 120, and not article 106, Act XV of 1877, but that in either case the suit was within time, as the partnership was dissolved, and consequently time began to run, not from the death of *H.* or the purchase by *T.* of the shares of *E.* and *I.* in 1871, or of *R.* in 1873, but in August 1877, when the defendant Bank took possession of the partnership property. HARRISON *v.* DELHI AND LONDON BANK . **I. L. R., 4 All., 437**

**29.** ——————— **and arts. 131, 144.**—*Adverse possession.—Suit for declaration of right to malikana and to set aside order refusing to register names.*—Previous to 1825, dearah X. accreted to mouzah Y., and some time before 1860 the malik of Y. executed two conveyances in favour of *A.* and *B.* respectively. In 1860 *A.* sued *B.* in the Munsif's Court for possession of a share in X. which *B.* claimed under his conveyance. In that suit *A.* succeeded on the ground that *B.'s* conveyance did not cover the share claimed by him in X., but merely covered the share in the mouzah itself, whereas by his conveyance *A.* had acquired the right to the share in X. which he claimed. In 1866 the Collector refused to recognise *B.'s* right to malikana payable in respect of the share in X. which had been the subject of the suit in 1860, or to register his name in respect thereof, but acknowledged *A.'s* right thereto, relying on the decision of the Civil Court in the suit between *A.* and *B.* Subsequently *B.'s* representatives, *C.* and *D.*, in 1876, sought to have their names registered in respect of the same malikana, but they were opposed by *E.*, who alleged that *A.* had been acting throughout as his benamidar. The Collector referred the case under section 55 of Act VII of 1876 to the Civil Court, and the application of *C.* and *D.* was eventually disallowed. *C.* and *D.* thereupon, on the 5th November 1880, instituted the present suit against *E.* in the Court of the Subordinate Judge, for a declaration of their right to the malikana, and for a reversal of the order refusing to allow their names to be registered in respect thereof. *Held* that the suit was barred by limitation, being governed either by article 120, 131, or 144 of the Limitation Act (Act XV of 1877), because—(1) there being no allegation of dispossession, if it were contended that the suit was one for possession of an interest in immoveable property, article 144 would apply; (2) if it were contended that the suit was for the purpose of establishing a periodically recurring right, pure and simple, article 131 would apply, and the period must be reckoned from 1866, when the plaintiff was first refused the enjoyment of the right; (3) if, however, it were said to be a suit to establish a periodically recurring right, and something in addition, inasmuch as the right carried with it a right to the property itself, if the parties consented to take a settlement when the time for concluding the next temporary or permanent settlement came, article 120 must be held to apply. But that, in any event inasmuch as in the year 1866 the Collector refused to recognise *B.'s* right to the malikana, and adverse possession so far as possession could be taken of such an interest in immoveable property, was then taken by *A.*, or in other words by *E.*, because it must be taken that the Collector since that date had been holding for *A.*, whose right he had then recognised, after refusing to recognise the right claimed by *B.*, the present suit, having been instituted in 1880, was equally barred, whichever of the above articles was held to apply. *Rao Karan Singh* v. *Bakur Ali Khan, L. R., 9 I. A., 99,* referred to and distinguished. GOPINATH CHOWDHRY *v.* BHUGWAT PERSHAD **[I. L. R., 10 Calc., 697**

**LIMITATION ACT, 1877, art. 120**—*continued.*

——————— **and arts. 131, 144**—*continued.*

——————— **art. 121 (1871, art. 119; 1859, s. 7).**

*See* ART. 130 . **I. L. R., 8 Calc., 230**

**1.** ——————— *Sale for arrears of rent of putni tenure.*—Upon the sale of a putni talook for arrears of the landlord's rent, the purchaser acquires it free of all incumbrances created by the outgoing putnidar; and according to Act XIV of 1859, section 7, the purchaser's cause of action arises from the date of sale. BROJO SOONDUR MITTER *v.* FUTICK CHUNDER ROY . . . . **17 W. R., 407**

**2.** ——————— *Act IX of 1871, art. 120.—Suit to cancel under-tenures.—"Avoid."*—The interpretation which should be put on the word "avoid" in schedule II, articles 119, 120, of Act IX of 1871, is to do something in exercise of the right of avoidance. UNNODA CHURN BISWAS *v.* MOTHURA NATH DOSS BISWAS . . . **I. L. R., 4 Calc., 860 [4 C. L. R., 6**

——————— **art. 122 (1871, art. 121; 1859, s. 1, cl. 11).**

——————— *Execution of decree against Sirdar's heir who is not a Sirdar.—Suit on decree.—Decree payable by instalments.*—The plaintiff's father obtained a decree in the Court of the Agent for Sirdars in 1848 against the defendant's grandfather, a third-class Sirdar. The decree gave an option to the Sirdar to pay up the debt at once, or year by year, out of the revenues of a village. The Sirdar chose the latter alternative, and execution proceeded accordingly on that footing till his death in 1862. His son survived him and died in 1867, when the defendant, who was not himself a Sirdar, succeeded. The Subordinate Judge of Khed—to whom, on the cessation of the Sirdarship in the defendant's family, the Agent referred the decree for further execution—proceeded with the execution up to the year 1876, when these proceedings were pronounced to be irregular. The plaintiff thereupon, in the year 1877, filed the present suit on the strength of his decree of 1848. *Held* that the period of limitation applicable was that of twelve years from the date of the decree (Act IX of 1871, schedule II, art. 121), but that the decree should be viewed as analogous to an instalment decree and made as against the defendant in 1867,—down to which time the proceeds were regularly realised,—because it then, on his father's death.

**LIMITATION ACT, 1877, art. 122**—*continued.*

became first operative against him. In the case of a decree payable by instalments, as the command of the Judge prescribes a term for the performance of the several parts of his order, it is to be construed as becoming a judgment for purposes of limitation as to each instalment only on the day when payment is to be made. SAKHARAM DIKSHIT *v.* GANESH SATHE . . . . **I. L. R., 3 Bom., 193**

**——— art. 123 (1871, art. 122; 1859, s. 1, cl. 11).**

1. ——— *Suit under will for sum as legacy.*—Where a sum assigned to sons was, by the terms of the will, to be regarded as a legacy, and not as a charge on the estate for their maintenance,—*Held* that clause 11, section 1, Act XIV of 1859, was the limitation applicable to suits under the will for recovery of the sum due as a legacy. NANA NARAIN RAO *v.* RAMA NUND . . . **2 Agra, 171**

2. ——— *Suit for legacy.*—*R.* by his will gave the whole of his property to his brothers, making a specific provision of R4,000 for one of his daughters (the mother of the plaintiffs), which was to remain as *amanut* in the family treasury, yielding her interest if and till she gave birth to a male child, when she should also have 200 beegahs of land. Shortly after this the testator died, and the elder of the plaintiffs was born. The mother having since died without drawing the principal or taking the allotment of land, and the manager of the family estate having refused to give the plaintiffs their due, they sued to recover what was left to their mother. *Held* that this was a suit for legacy, and that clause 11, section 1, applied so far as the claim for money was concerned; and that the cause of action to the plaintiffs occurred at the time of the birth of the elder plaintiff, when his mother became immediately entitled to the principal sum of money and to the land. PROSSONO CHUNDER ROY CHOWDRY *v.* GYAN CHUNDER BOSE . . **13 W. R., 354**

3. ——— *Will.—Suit for share of testator's moveable property.*—Article 122 of Act IX of 1871 applies to a suit for a share of the residue of a testator's moveable property disposed of by his will. TREEPOORASOONDERY DOSSEE *v.* DEBENDRONATH TAGORE . **I. L. R., 2 Calc., 45**

4. ——— *Suit for legacy against representative of testator.*—Article 123 of the Limitation Act only applies to cases in which the property sought to be recovered is not only a legacy but is also sought to be recovered as such from a person who is bound by law to pay such legacy, either because he is the executor of the will or otherwise represents the estate of the testator. ISSUR CHUNDER DOSS *v.* JUGGUT CHUNDER SHAHA **[I. L. R., 9 Calc., 79**

**——— art. 124 (1871, art. 123).**

Suits of the nature described in this article were, under Act XIV of 1859, held to be governed by clause 12 of section 1, the general limitation of twelve years.

**LIMITATION ACT, 1877, art. 124**—*continued.*

1. ——— *Office of hereditary priest.—Immoveable property.*—In a suit between Hindus, the office of hereditary priest to a temple, though not annexed to, or held by virtue of, the ownership of any land, yet being by that law classed as immoveable property, should be held to be immoveable property within the meaning of clause 12 of section 1 of the Limitation Act, 1859. KRISHNABHAT BIN HIRAGANGE *v.* KAPADHAT BIN MAHALBHAT . . . . **6 Bom., A. C., 137**

BALVANTRAV *alias* TATIAJI BAPAJI *v.* PURSHOTAM SIDHESHVAR . . . **9 Bom., 99**

In a Madras case, however, the six years' period was held to apply.

2. ——— *Office of karnam.—Incidental right to land attached to office.*—Suit brought in 1868 to establish that plaintiff had vested in him the right to the office of karnam of certain villages from which he had been ousted by the defendant in 1857, and to recover from defendant the mirasi lands annexed to the office. The Court of first instance decreed for plaintiff. The Civil Court reversed this decision on the ground that title to the office was the principal matter of the plaintiff's claim, and the right to possession of the land merely an incident dependent upon that, title; that, therefore, as the period of limitation applicable to the former claim (six years) had elapsed before the institution of the suit, it was not maintainable for the land. Upon special appeal, the decree of the Civil Court was affirmed on the grounds that it was conclusively found that the land was inseparably attached to the office as a source of endowment for the services of the holder of it for the time being, and that, as against the plaintiff, the defendant was protected in the possession of the office by clause 16, section 1, Act XIV of 1859. TAMMIRAZU RAMZOGI *v.* PANTINA NARSIAH . . . . **6 Mad., 301**

3. ——— *Suit for possession of hereditary office and for account.—Adverse possession.*—*X.*, the founder of two pagodas, died in 1795 leaving six sons, of whom two were named *C.* and *T.*, respectively. *T.*, the younger, died in 1834, leaving two sons, of whom one, who died in 1853, was the father of the plaintiff. The founder's elder son, *C.*, died in 1816 leaving two sons (*M.*, who died in 1840, and *L.*, who died in 1847) and two daughters (*A.* and the defendant's mother. The office of dharmakarta descended from the founder to *C.* After his death a manager was appointed by the Collector, and *C.'s* son *M.* was dispossessed by his uncle *T.*, and in 1834 *M.* brought a suit in equity against *T.* and his sons. Pending the final decree *M.* was appointed by the Supreme Court to act as dharmakarta. A decree was never passed and the suit abated on *M.'s* death in 1840. *M.* was succeeded in the office of dharmakarta by his brother *L.*, who held it till 1847, when he died, leaving it by will to his sister *A.* and her husband *R.* jointly. *R.* died soon after, and *A.* in 1872, leaving the office by will to her sister's son, the defendant. In a suit by plaintiff, as eldest surviving male member of the founder's family, claiming the

**LIMITATION ACT, 1877, art. 124**—*continued.*

office of dharmakarta, or that if he were not entitled, some proper person might be appointed to it, and praying that an account might be taken of the pagoda property against the defendant as dharmakarta and also as executor of *A.*,—*Held* on appeal (confirming the decision of the Court of first instance), on the first question, that the suit was barred by the Limitation Act, IX of 1871, schedule II, article 123: that whatever might be the effect of the possession by *M.* and *L.*, the will left by *L.* in 1847 bequeathing the office to his sister *A.* and her husband *R.* was an act unequivocally hostile to the rights of the male members of the family; and as the will was at once acted upon, they must have had notice of this invasion of their rights. MAMALLY CHENNA KESAVARAYA *v.* VAIDELINGA . . . **I. L. R., 1 Mad., 343**

4. ——— *Suit for possession of hereditary office.—Watan, Alienation of.*—Adverse possession, in the case of an alienation of a watan, only begins to run against the heir from the time when he is entitled to succeed to the possession of the watan property,—*i. e.*, from the date of the death of the watandar. RAVLOJIRAV BIN TAMAJIRAV *v.* BALVANTRAV VENKATESH . **I. L. R., 5 Bom., 437**

——— **art. 125 (1871, art. 124).**

*See* ART. 118 (1871, ART. 129).
**[I. L. R., 5 Mad., 121**

1. ——— *Suit to set aside deed made by Hindu widow.*—The cause of action in a suit by a reversioner during a widow's lifetime to declare a conveyance made by her to be void, was held under Act XIV of 1859 to arise from the date of the conveyance. BHIKAJI APAJI *v.* JAGANNATH VITHAL
**[10 Bom., 351**

*See* PERSHAD SINGH *v.* CHEDEE LALL
**[15 W. R., 1**

2. ——— *Hindu widow.—Suit to set aside alienation, and to restrain waste.—K.*, a Hindu widow, assigned one moiety of her share in her husband's estate to *H. S.*, in consideration that *H. S.* should conduct and pay all costs of a suit which was then to be instituted against her husband's brothers, of whom *B. C.*, the present plaintiff, was one, to recover the share to which she was entitled, and also to pay her maintenance in the meantime. The assignment was dated 24th December 1864. The suit was brought, and a certain sum, in Government paper and notes, was decreed to *K.* on August 5th, 1868. This sum was paid into Court by *B. C.* on 10th March 1869, and upon *K.'s* application was, on 10th March 1871, paid out to her. *B. C.* then sued as reversionary heir to have the deed of assignment set aside, and prayed that *H. S.* should be restrained from receiving the moiety. The plaint was filed on 14th March 1871. In it he alleged his apprehension of waste by *K.* *Held* that a suit simply to set aside the assignment would have been barred as brought more than six years from the date of the assignment, yet so far as it was based on the allegation of apprehended waste, it was not barred by the law of limitation. BISWANATH CHUNDER *v.* KHANTOMANI DASI
**[7 B. L. R., 131**

**LIMITATION ACT, 1877, art. 125**—*continued.*

This article applies only to suits to have deeds of alienation declared void. An omission to bring such a suit does not affect the right to sue for possession of the property alienated within twelve years of the widow's death. (*See* art. 141.)

*See* CHUNDER KANTH ROY *v.* PEARY MOHUN ROY . . . **1 Ind. Jur., O. S., 21**
**[Marsh., 33: 1 Hay, 69**

WOOMA CHURN BANERJEE *v.* HARADHUN MOZOOMDAR . . . . **1 W. R., 347**

and SRINATH GANGOPADHYA *v.* MAHES CHANDRA ROY . . . . **4 B. L. R., F. B., 3**

——— **art. 126 (1871, art. 125).**—*Cause of action.—Suit for possession of joint estate improperly alienated by father of plaintiff.*—In a suit under the Mitakshara law for possession of land by annulment of illegal sales by his father, the plaintiff's only cause of action is the taking possession by the defendant of what was the son's joint share of the family property, and his suit ought to be brought within twelve years of such adverse possession. POONHEET KOOER *v.* KISHEN KISHORE NARAIN SINGH . . . . . **23 W. R., 419**

*See* NOWBUT RAM *v.* DURBAREE SINGH
**[2 Agra, 145**

——— **art. 127 (1871, art. 127; 1859, s. 1, cl. 13).**

*See* S. 2 . . **I. L. R., 7 Calc., 461**
*See* ART. 62 . **I. L. R., 6 All., 442**
*See* ART. 136 . . **I. L. R., 11 Calc., 680**

Section 1, clause 13 of the Act of 1859, applied to Mahomedan as well as Hindu families. KHYROONISSA *v.* SABHOONISSA KHATOON . **5 W. R., 238** as this article does: the corresponding article of the Act of 1871 was specially applicable only to Hindus.

1. ——— *Suit for share in family dwelling.*—A claim by a member of a joint Hindu family to a share in a family dwelling, on the allegation that the house was originally joint, fell within the provisions of section 1, clause 13 of Act XIV of 1859. DENONATH SHAW *v.* HURRYNARAIN SHAW
**[12 B. L. R., 349**

KRISHNADHUN CHOWDHRY *v.* HUR COOMARY CHOWDHRAIN . . . **25 W. R., 37**

2. ——— *Mortgage by one member of Hindu family.—Surrender of equity of redemption.*—Act XIV of 1859, section 1, clause 13, was intended to apply to suits between members of a joint family, not to a case where a mortgage having been made by one member on behalf of all to a stranger, that member afterwards, against the will of his copartners, releases the equity of redemption. RADHANATH DAS *v.* ELLIOTT . . . . . **6 B. L. R., 530**

S. C. RADHANATH DAS *v.* GISBORNE & CO.
**[15 W. R., P. C., 24**
**14 Moore's I. A., 1**

**LIMITATION ACT, 1877, art. 127**—*continued.*

3. ——————— *Suit to establish right to share profits of watan.*—In a suit to establish a right to share in a watan and to recover a portion of the profits thereof for seven years,—*Held* that the case was governed, as to limitation, by clause 13 and not clause 16 of section 1, and that arrears for seven years were, therefore, properly awarded. GUNDO ANANDRAV *v.* KRISHNARAV GOVIND [4 Bom., A. C., 55

4. ——————— *Suit to enforce right to separate possession.*—Clause 13, section 1, applied to suits in which a plaintiff sought to introduce one or more additional co-sharers into the enjoyment of property alleged to be joint, not where a plaintiff sought to enforce his right to separate possession of that to which he was entitled. LUKHEE MONEE DOSSEE *v.* BROJO BULLUB SEAL . 11 W. R., 132

5. ——————— *Right of son claiming partition after father's death.—Survivorship.—Inheritance.*—Clause 13 of section 1 of Act XVI of 1859, when it provided, as the period of limitation for partition suits, "the period of twelve years from the death of the persons from whom the property alleged to be joint is said to have descended," must be taken to have been intended to apply, in this Presidency, to the case of a son claiming partition of joint family property after the death of his father; although in strictness the language of that clause would not then be applicable, inasmuch as in this Presidency, and wherever the Mitakshara law prevails, sons in such a case are considered to take by survivorship rather than by inheritance. HANSJI CHHIBA *v.* VALABH CHHIBA [I. L. R., 7 Bom., 297

6. ——————— *Suit for division of family property.*—Where a suit was brought for a division of family property twelve years after the death of the head of the family,—*Held* that the suit was not barred by clause 13, section 1, Act XIV of 1859. SUBHAIYAN *v.* SANKARA SUBHAIYAN . 2 Mad., 347

7. ——————— *Suit to compel partition of moveable and immoveable property.*—A Hindu of the Southern Maratha country, having two sons undivided from him, died in 1872, leaving a will disposing of ancestral estate substantially in favour of his second son, excluding the elder, who claimed his share in this suit. In 1861, a suit brought by this elder son against his father and brother to obtain a declaration of his right to a partition of the ancestral estate, was dismissed, on the ground that he had no right in his father's lifetime to compel a partition of the moveables; and that as to the immoveables, the claim failed, because they were situate beyond the jurisdiction of the Court. *Held* that the suit was not barred under the Limitation Act, XIV of 1859, section 1, clause 13. As to the immoveables: setting aside the fact that the plaintiff had remained in possession of one of the houses of the family which had been treated by the father as continuing to be part of the joint property, the decision of 1861, based as to the immoveables on the absence of jurisdiction to declare partition of them, caused this part of the claim to fall under the provisions of Act XIV of 1859, section 14. As to the moveables: assuming that they could, on the question of limitation, be treated as distinct from the immoveables, and that no payment had been made within twelve years before this suit by the ancestral banking firm to the plaintiff, the adjudication of 1861, whether in law correct or incorrect, had been that the elder son could not assert his rights in the moveables until his father's death. The defendant in this suit, who had taken the benefit of that judgment, could not now insist that it did not suspend the running of limitation on the ground that his brothers might have appealed from it if erroneous. So far, also, as the father's interest was concerned, the succession only opened on his death. LAKSMAN DADA NAIK *v.* RAMCHANDRA DADA NAIK [I. L. R., 5 Bom., 48 L. R., 7 I. A., 181

8. ——————— *Suit to recover share of joint property inherited.*—Clause 13, section 1 of Act XIV of 1859, was not applicable to a suit to recover a share of joint property to which the plaintiff claimed to be entitled by inheritance. DINONATH RANA *v.* RUBEEBUNNISSA BIBEE . . 20 W. R., 270

9. ——————— *Suit to enforce right to share in joint property.*—Suits to enforce the right to share in any property, on the ground that it is joint family property, must be brought within twelve years, exclusive of the period during which the property was under attachment by Government and neither party was in possession. SHIDOJIRAV *v.* NAIKJIRAV . . . . 10 Bom., 228

10. ——————— *Suit by adopted son for share of ancestral estate.—Cause of action.*—As against an adopted son suing for his share of the ancestral estate, the law of limitation does not begin to run until the allotment of such share has been demanded and refused. AYYAVU MUPPANAR *v.* NILADATCHI AMMAL . . . 1 Mad., 45

11. ——————— *Suit of share of family property.—Exclusion from possession.*—In a suit to enforce the right to share in property on the ground that it was joint family property,—*Held* that upon the construction of clause 13, section 1, Act XIV of 1859, the claimant, in order that the statute shall be a bar, must have been entirely out of possession and excluded from possession by those against whom he claims. GOVINDUN PILLAI *v.* CHIDAMBARA PILLAI [3 Mad., 99

*See* RAJESWARA GAJAPATY NARAINA DEO MAHARAJULUNGARU *v.* VIRAPRATAPAH RUDRA GAJAPATY NARAINA DEO MAHARAJULUNGARU [5 Mad., 31

And SUBBAIYA *v.* RAJESVARA SASTRULU [4 Mad., 354

12. ——————— *Question as to exclusive possession.—Onus of proof.—Refusal to allow share.*—The question of fact whether there has been such exclusive possession or enjoyment must be

LIMITATION ACT, 1877, art. 127—*continued.*

decided upon the evidence in each case, and may be satisfactorily proved, although there may be no evidence of an express refusal to allow plaintiff any part of the benefits of the joint property. SUBBAIYA *v.* RAJESVARA SASTRULU . . 4 Mad., 354

JARAOO *v.* FAKEERA . . 3 Agra, 133

RAJOO SINGH *v.* GUNESHMONEE BURMONEE [15 W. R., 400

13. ——— *Suit for share of joint property.*—*A.* got a decree for possession, but before she obtained possession *B.* obtained a decree declaring him jointly entitled with *A.* to a particular share of the same property. *Held* that when *A.* got possession, that possession inured to the benefit of *B.* as well as to herself, and *B.'s* cause of action in a suit against *A.* in respect of the same property dated from the time when *A.* obtained possession, and a suit was not barred if brought within twelve years of that time. GOOROO CHURN SIRCAR *v.* GOLUCKMONEE DOSSEE [13 W. R., 188

14. ——— *Suit for share of profits.*—If by arrangement the shares of certain co-sharers are left in the possession of other co-sharers during the period of a current settlement, the cause of action to the sharers whose shares have been so left for profits accrues only when the settlement expires. TOOLSEE RAM *v.* NAHUR SINGH . . 3 Agra, 271

15. ——— *Suit for share of joint property.*—*Cause of action.*—Where parties are living together in commensality and in joint possession of property, no cause of action arises to one of them for the recovery of his share until he is dispossessed by the other, and limitation runs from the date of such dispossession. JADUB CHUNDER SANDYAL *v.* BHYRUB CHUNDER SANDYAL [19 W. R., 344

16. ——— *Adverse possession.*—*Suit for partition.*—Where the bulk of the estate of a Hindu family is held and managed by a single member of the family, and the other members receive and enjoy part of the lands as sír, the possession of the bulk of the estate by the manager is not adverse so as to bar, under the Limitation Act, XIV of 1859, section 1, clause 13, a suit by the others for partition, unless there are circumstances to show that they accepted the sír lands in lieu of the shares that would have been allotted to them on a partition. The case of *Appovier* v. *Rama Subha Aiyan, 11 Moore's I. A., 75,* approved. RUNJEET SINGH *v.* GUGRAJ SINGH [L. R., 1 I. A., 9

17. ——— *Receipt of payments for share of joint property.*—That a Hindu widow, entitled to her husband's share of the joint property, continues to live in the family and mess with them, is sufficient, in the absence of evidence to the contrary, to show that she is receiving payments on account of her share, within clause 13, section 1, Act XIV of 1859. GOBIND CHUNDER BAGCHEE *v.* KRIPAMOYEE DABEE . . . . 11 W. R., 338

LIMITATION ACT, 1877, art. 127—*continued.*

18. ——— *Rent collected by one member of Mahomedan family living jointly.*—Even if a member of a Mahomedan family collects the rents and profits of the family property, his possession cannot be considered adverse to his mother and sister, so long as these live and mess jointly with him and receive money's worth in the payment of their family expenses. SIRDAR *v.* MOLUNGO SIRDAR [24 W. R., 1

19. ——— *Joint property, Suit for share of.*—*Onus probandi.*—A suit to enforce a right to a share of joint family property must be brought within twelve years from the date of the last payment to the plaintiff, or the person through whom he claims, on account of the share; and the onus is on the plaintiff to show possession of the share, or receipt of a payment on account of it, within twelve years. It is not sufficient for the plaintiff to show that the property was joint family property. GOSSAIN DOSS KOONDOO *v.* SIRO KOOMAREE DEBIA [12 B. L. R., 219: 19 W. R., 192

UMBIKA CHURN SHEE *v.* BHAGGOBUTTY CHURN SHEE . . . . . 3 W. R., 173

BYDDONATH OJHA *v.* GOPAL MAL [6 W. R., 170

HUREEHUR MOOKERJEE *v.* TEENCOWREE DOSSEE [6 W. R., 170

KRISTO CHUNDER BURMO SURMAH *v.* MOHESH CHUNDER BURMO SURMAH . 23 W. R., 381

20. ——— *Suit for share of joint ancestral property.*—A Hindu died in 1840, leaving him surviving seven sons, who, after their father's death, entered into joint possession of certain immoveable property which had been left by him, and continued to live in commensality until 1859, when a separation in mess took place. Subsequently, more than twelve years after the father's death, a suit was brought by the youngest son for his share of the joint ancestral property belonging to the father, and to property subsequently acquired out of the proceeds of such joint estate, to which the brothers were entitled in equal shares. The plaintiff failed to show that any payment was made to him, or any person through whom he claimed, by the person in possession or management of the property, within twelve years before the commencement of the suit. *Held* that the suit was barred by limitation under clause 13, section 1, Act XIV of 1859. UMA SUNDARI DASI *v.* DWARKANATH ROY [2 B. L. R., A. C., 284

S. C. WOOMA SOONDUREE DOSSEE *v.* DWARKANATH ROY . . . . 11 W. R., 72

AMITRAV BIN YESHVANTRAV DESHMUKH *v.* ANYABA ABAJI DESHMUKH [5 Bom., A. C., 50

21. ——— *Entry of names in register.*—*Held* that the plaintiffs' suit was barred by lapse of time, they having received nothing from the property, a share of which they claimed, for a period beyond that prescribed by clause 13, section 1, Act

**LIMITATION ACT, 1877, art. 127**—*continued.*

XIV of 1859. The fact that the plaintiffs had a manifest right by inheritance, and that their names had been entered in the revenue register as proprietors, is not equivalent to proof of payment to and receipt by them of any profit on account of their share. KHORUN SINGH *v.* BEHAREE LALL [3 Agra, 95

MAKSOOD ALI KHAN *v.* GHAZEEOODDEEN KHAN [3 Agra, 158

**22.** ——— *Suit to enforce share of joint property.—Proof of payments.*—In ruling that a suit to enforce the right to a share in certain property on the ground that it is joint family property is barred under section 1, clause 13, Act XIV of 1859, it is not enough to find that the plaintiff had occasionally received money from the defendant, and that his sister continued to live in what had originally been the joint family dwelling-house; but there must be a distinct finding as to what payments (if any) have been made to the plaintiff within twelve years next prior to the date of the institution of the suit, by the person in possession or management of the property on account of the plaintiff's alleged share. PROSSONO COOMAR MOOKERJEE *v.* SHAMA CHURN MOOKERJEE [17 W. R., 451

**23.** ——— *Payments for joint share.*—Proof of payment is not necessary to bring a case within clause 13, section 1, Act XIV of 1859; but the limitation therein prescribed will apply to the case of a person entitled to a share in property, and simply enjoying the property with the co-sharers, there being no division of money or any payment at all made between them. BHUJOHURRE PAUL *v.* HURO SOONDUREE DEBEE . . . . 17 W. R., 530

**24.** ——— *Receipt of share of profits otherwise than by money.*—In a suit to recover possession of land alleged to have belonged jointly to the plaintiff's late husband *O.* and his late elder brother *P.*, the defendant pleaded limitation, on the ground that neither the plaintiff nor her predecessor was in possession within twelve years. It was found that the two brothers had lived in the same mess, the elder collecting the rents and profits, and therewith managing the family expenses. *Held* that if *O.* did not receive money from *P.* he received money's worth, and that would suffice to bring the case within Act XIV of 1859, section 1, clause 13; and if clause 13 did not apply, clause 12 must, and the suit was not barred. CHUNDER MONEE DEBIA *v.* MEHARJAN BIBEE [22 W. R., 185

**25.** ——— *Suit by Hindu excluded from joint family property.*—In a suit by a Hindu excluded from joint family property, to enforce a right to a share therein, brought before the 1st of October 1877, the period of limitation must be computed under article 127 and not under article 143 of schedule II of Act IX of 1871. KALI KISHORE ROY *v.* DHUNUNJOY ROY . I. L. R., 3 Calc., 228

HANSJI CHHIBA *v.* VALABH CHHIBA [I. L. R., 7 Bom., 297

**LIMITATION ACT, 1877, art. 127**—*continued.*

Under Act IX of 1871, the cause of action arose from the time when the plaintiff demanded and was refused his share; consequently it was then necessary to make that allegation. HANSJI CHHIBA *v.* VALABH CHHIBA . . I. L. R., 7 Bom., 297

**26.** ——— *Exclusion from share of joint property.*—Article 127, schedule II of Act IX of 1871 presupposes the existence of joint family property, and that there has been an exclusion from participation in the enjoyment of such property. *Semble,*—The word "excluded" in that article implies previous inclusion. SARODA SOONDURY DOSSEE *v.* DOYA MOYEE DOSSEE . I. L. R., 5 Calc., 938

**27.** ——— *Joint property.—Evidence.*—Before a plaintiff can bring his case within article 127 of schedule II of the Limitation Act, 1877, it is incumbent on him to show that the property in which he seeks to recover a share is "joint property." OBHOY CHURN GHOSE *v.* GOBIND CHUNDER DEY [I. L. R., 9 Calc., 237

**28.** ——— *Claim to property as daughter's son.*—The provisions of article 127 of schedule II of the Limitation Act do not apply to a person who claims to inherit property as a daughter's son. MOTHURA NATH DUTT *v.* BORKANT NATH DUTT. PEARI MOHUN DUTT *v.* BORKANT NATH DUTT [11 C. L. R., 312

**29.** ——— *Suit for possession and partition.—Acquiescence in alienation.—Exclusion from share.*—In a suit to obtain a share by partition of a joint family property, the interest of the plaintiff's father having been sold in execution of a decree, limitation is to be computed from the time when exclusion from his share first becomes known to the plaintiff. ISSURIDUTT SINGH *v.* IBRAHIM [I. L. R., 8 Calc., 653

**30.** ——— *Exclusion from share.—Suit for partition.*—Where in a suit for partition a District Judge held the plaintiff's claim barred on the ground that the defendant had been in possession of the property in dispute for more than fifteen years without any claim having been made by the plaintiff,—*Held* that under the Limitation Act, XV of 1877, article 127, time would not run against the plaintiff until his exclusion (if he was excluded) from the property had become known to him. HARI *v.* MARUTI . . . I. L. R., 6 Bom., 741

**31.** ——— *Exclusion from joint property.*—A collateral member of a Hindu family, alleging it to be joint, claimed his share of ancestral property in Oudh, part of which formed a taluk inherited, for a considerable time past, by the eldest son, who, taking the whole of it, had given maintenance to the other members. This taking was entered in the first and second of the lists made under the provisions of the Oudh Estates Act I of 1869, and as to it there was no ground of claim. But with respect to the savings, accumulations, and investments made from the income and proceeds of the taluk before the confiscation and restoration of Oudh

**LIMITATION ACT, 1877, art. 127**—*continued.*

lands in 1858, the contention was that each member was entitled to his share, and that, by the presumption in respect of a joint family, the burden was on the talukdar to prove that there were no savings or accumulations made otherwise than out of the taluk and before the confiscation. *Held* that, if it were assumed that the family was for some purposes undivided, still this was not the case of an ordinary undivided Hindu family, and that, in such a case as this, the presumption must depend on somewhat special circumstances. However, this case must be decided on the distinct ground that, as the claimant had been excluded from his share, if he had one, for more than twelve years, he knowing of this exclusion, the law of limitation enacted in Act XV of 1877, schedule II, article 127, was applicable, and the claim was barred by lapse of time. RAGHUNATH BALI *v.* MAHARAJ BALI

**[I. L. R., 11 Calc., 777: L. R., 12 I. A., 112**

**32.** ——————— *Suit for share of joint property.—Exclusion.—Adverse possession.*—In a suit for a share of undivided property from which the plaintiff had been out of possession admittedly for thirty-five years,—*Held* that the suit was not barred by limitation, as the possession of the share in question by the defendants since 1845 had not been a possession of it as their own property to the exclusion of the plaintiffs or their father. NILO RAMCHANDRA *v.* GOBIND BALLAL

**[I. L. R., 10 Bom., 24**

**——————— art. 128 (1871, art. 128; 1859, s. 1, cl. 13).**

**1.** ——————— *Suit to recover maintenance.*—Section 1, clause 13, Act XIV of 1859, applied to suits for the recovery of maintenance, whether the right to receive maintenance arose out of the general law, or out of a specific deed granting such maintenance. BAMASOONDERY DEBEA *v.* SHAMASOONDERY DEBEA . . . . . **W. R., 1864, 13**

**2.** ——————— *Suit for maintenance.*—Clause 13, section 1, Act XIV of 1859, did not apply to a suit for maintenance, when the right to receive such maintenance was not a charge on the estate of a deceased person, but on the estate of living persons. BINODE LALL CHATTERJEE *v.* LUCKHEE MONEE DEBIA . . . . . **4 W. R., 84**

**3.** ——————— *Suit for maintenance.*—In a suit for maintenance, the cause of action ordinarily arises at the time when the maintenance having become necessary is refused by the party from whom it is claimed. Section 1, clause 13, Act XIV of 1859, did not apply to all suits for the recovery of maintenance brought by a Hindu widow against her husband's family, but only to suits in which the plaintiff seeks to have her maintenance made a charge on a particular estate. TIMMAPPA BHAT *v.* PARMESHRIAMMA . . **5 Bom., A. C., 130**

**4.** ——————— *Suit for maintenance as charge on estate.*—The plaintiff sued the defendants for future and past maintenance and obtained a

**LIMITATION ACT, 1877, art. 128**—*continued.*

decree for future maintenance and for arrears of maintenance for seven years. The parties were governed by the Aliyasantana law. It was found by the lower Appellate Court that for twenty years before the suit the plaintiff lived apart from the defendants and the other members of the family, and supported herself without receiving or applying for anything towards her maintenance out of the family property in the possession of the defendants, or obtaining any recognition of the right to maintenance. On special appeal,—*Held, per* SCOTLAND, *C. J.*, that, assuming the Aliyasantana law recognises the right of the plaintiff to enforce separate maintenance as a charge upon the estate, the plaintiff's claim was barred by section 1, clause 13, Act XIV of 1859. *Per* COLLETT, *J.*—It is doubtful whether clause 13, which applies to cases where the right to receive maintenance is a charge on the inheritance of any estate, applies in a case where the right of the plaintiff is said to exist by reason of her being a co-proprietor with the defendants. If the suit be not within clause 13, then it was one to recover an interest in immoveable property, and was equally barred by clause 12 of section 1. ABBAKKU *v.* AMMU SHETTATI

**[4 Mad., 137**

SUBRAMANIA MUDALIAR *v.* KALIANI AMMAL

**[7 Mad., 226**

Suits for maintenance not chargeable on any estate were governed by clause 16 of section 1 of the Act of 1859; the cause of action in such cases did not arise until there had been a demand and a refusal. KALO NILKANTH *v.* LAKSHMIBAI

**[I. L. R., 2 Bom., 637**

**5.** ——————— *Hindu widow.—Maintenance.*—With regard to the widow's right to maintenance, a statute of limitation would do much harm if it should force widows to claim their strict rights and commence litigations which, but for the purpose of keeping alive their claim, would not be necessary or desirable. A Hindu, disposing of his estate by will, expressed his hopes that his wives and son would all live amicably together after his death, and would all look upon his eldest son as the head of the family; he then bequeathed the whole of his property to his eldest son, directing him to provide for his (the testator's) widows, and for the other members and dependents of the family, and he declared that he made these provisions with a view to prevent dissensions in the family, and to enable them to live in peace and harmony after his decease. In a suit brought more than sixteen years after the death of the testator by one of his widows against the eldest son to recover maintenance, it was pleaded for the defendant that the claim was barred by limitation under clause 13, section 1, Act XIV of 1859, which provides that suits for the recovery of maintenance, when the right to receive such maintenance is a charge on the inheritance of any estate, must be brought within twelve years from the death of the person on whose estate the maintenance is alleged to be a charge. *Held* that the testator had not created, by his will, a specific charge on the inheritance of his estate within the meaning of the provision of Act XIV of 1859,

**LIMITATION ACT, 1877, art. 128**—*continued.*

but had merely imposed upon the defendant an obligation, in case the will should interfere with the ordinary Hindu law entitling his widows to maintenance, to make allowances for their support of a kind analogous to that which the law would have provided. *Held* also that, although there was no evidence of a specific demand for maintenance, there was ground for believing that maintenance had been withheld under circumstances amounting to a refusal, giving rise to a cause of action. NARAYANRAV RAMCHANDRA PANT *v.* RAMABAI

[I. L. R., 3 Bom., 415
L. R., 6 I. A., 114: 6 C. L. R., 162

**6.** ———— *Suit for arrears of maintenance.*—In suits coming within the operation of the Limitation Act, IX of 1871, the widow might recover arrears for any period, unless it appeared that there had been a demand and refusal, in which case she could recover arrears for twelve years only from the date of such demand and refusal. TIVI *v.* RAMJI

[I. L. R., 3 Bom., 207

**7.** ———— **and arts. 130 and 132.**—*Suit for arrears of maintenance charged upon immoveable property.*—An allowance for the maintenance of a younger member of a family was charged upon the inheritance to which the eldest male member alone succeeded. *Held* that a suit for arrears of such maintenance within twelve years was within time under Act XV of 1877. AHMAD HOSSEIN KHAN *v.* NILA-UD-DIN KHAN . I. L. R., 9 Calc., 945
[13 C. L. R., 330
L. R., 10 I. A., 45

**———— art. 130 (1871, art. 130; 1859, s. 1, cl. 14).**

*See* ONUS PROBANDI—RESUMPTION AND ASSESSMENT . . 3 W. R., 69, 182

Clause 14 of section 1 of the Act of 1859 applied to suits to resume or assess lands held rent-free subsequent to the Permanent Settlement, 1790. KRISHTO MOHUN DOSS BUKSHEE *v.* JOY KISHEN MOOKERJEE

[3 W. R., 33

DHUNPUT SINGH *v.* BOOJAH SAHOO

[4 W. R., 53

**1.** ———— *Suit for resumption.*—Under Act XIV of 1859 a zemindar could not resume land, whether lakhiraj or not, held from before 1790. Even an auction-purchaser was barred by limitation if the ryot could prove that the land was in the possession of those through whom he claimed before 1790. RADHA KISTO MYTEE *v.* BHUGWAN CHUNDER BOSE . . . . 1 W. R., 248

SRISTEEDHUR SAMUNT *v.* ROMANATH ROKHIT

[6 W. R., 58

KHELUT CHUNDER GHOSE *v.* POORNO CHUNDER ROY . . . . . 2 W. R., 258

**2.** ———— *Suit for land as part of mal tenure—Cause of action.*—The cause of action in a suit for land as part of the plaintiff's mal tenure, which land

**LIMITATION ACT, 1877, art. 130**—*continued.*

the defendant is holding on an invalid lakhiraj tenure arises when the defendant first begins to hold the land in dispute rent-free. FURLONG *v.* KUSROO MUNDUR . . . . . 7 W. R., 531

*See* BARODA KANT ROY *v.* SOOKMOY MOOKERJEE . . . . . 1 W. R., 29

**3.** ———— *Suit to recover portion of zemindari granted not in accordance with Mad. Reg. XXV of 1802.*—The appellant, a zemindar, sued to recover a portion of the zemindari granted by his grandfather upwards of forty years ago, upon the ground that the grant was not made in conformity with the requirements of Regulation XXV of 1802, and that, in the absence of the observance of the formalities there prescribed, the grant was void. *Held* that more than twelve years having elapsed since the title accrued to the person under whom the plaintiff derived his right to resume, the appeal should be dismissed. Section 1, clause 14 of Act XIV of 1859, considered and applied. SETA RAMA KRISHNA RAYUDAPPA RANGA RAO *v.* JAGUNTI SITAYAMMA GARU . . . . . 3 Mad., 67

ALI SAIB *v.* SANYASIRAZ PEDDABALIYARA SIMHULU . . . . . 3 Mad., 5

*See* KRISHNA DEVU GARU *v.* RAMACHANDRA DEVU MAHARAJULU GARU . 3 Mad., 153

**4.** ———— *Suit for resumption by durputnidar.—Cause of action.*—In a suit by a durputnidar for the resumption of land alleged to be held as lakhiraj under an invalid title, limitation must be calculated, not from the date of the creation of his dur-putni title, but from that of possession of the party from whom the putnidar originally derived his title. GUNGARAM CHOWDRY *v.* HUREE NATH CHOWDRY . . . 15 W. R., 436

And so if he is an auction-purchaser. BUSSEEROODDEEN *v.* SHIBPERSHAD CHOWDHRY

[W. R., 1864, 170

NIRUNJUN ACHARJEE *v.* KURALEE CHURN BANERJEE . . . . 1 W. R., 197

Or a purchaser from Government: his cause of action dates from the time when the right accrued to the Government. BUNNOO *v.* AMEEROODDEEN

[23 W. R., 24

**5.** ———— *Suit for assessment of rent after resumption of lakhiraj lands.*—*A.* got a decree against *B.*, which declared that certain lands in *B.'s* possession, alleged to have been lakhiraj lands from before 1790, were *A.'s* mal lands and liable to assessment. More than twelve years after the date of this decree, *A.* sued to assess the lands. *Held* (affirming the decision of AINSLIE, *J.*) that the suit was not barred by the provisions of Act IX of 1871, schedule II, article 130. PROTAP CHUNDER CHOWDHRY *v.* SHUKHEE SOONDAREE DASSEE . 2 C. L. R., 569

**6.** ———— *Service tenure.—Assessment of rent by Settlement Officer.*—In a suit against the Talookdari Settlement Officer, who had assessed rent-free land on the ground that it had been granted for

**LIMITATION ACT, 1877, art. 130**—*continued.*

service, and that service was no longer required,—*Held* that if the grant was the grant of an office remunerated by the use of land, the right to assess was barred by the possession of a person not claiming under the grantee for a longer period than twelve years after the right to resume accrued under Act IX of 1871, section 29, and article 130, schedule II. KEVAL KUBER *v.* TALUKDARI SETTLEMENT OFFICER [I. L. R., 1 Bom., 586

7. ——— **and arts. 121 and 149.**—*Resumption and assessment of lakhiraj land.*—Discussion of the law of limitation as applicable to the resumption and assessment of lakhiraj lands. KOYLASHBASHINY DOSSEE *v.* GOCOOLMONI DOSSEE [I. L. R., 8 Calc., 230 : 10 C. L. R., 41

——— **art. 131 (1871, art. 131).**

*See* ART. 120 . I. L. R., 10 Calc., 697

1. ——— *Cause of action.—Suit for turn of worship of an idol.*—The plaintiff sued the defendants for a declaration of his right to a turn of worship of an idol for seven and a half days in each month, alleging that the defendants, who were entitled to another turn, had in 1864 taken adverse possession of the idol and properties belonging to it, and had so deprived him (the plaintiff) of his turn of worship from that time. *Held* that the cause of action did not recur as the turn of worship came round. Such suit fell within the operation of clause 16, section 1, Act XIV of 1859. GAUR MOHAN CHOWDHRY *v.* MADAN MOHAN CHOWDHRY . 6 B. L. R., 352: 15 W. R., 29

2. ——— *Right to exclusive worship of idol.—Right to turn of worship.*—In a suit brought in 1875, in which the plaintiff claimed, as heir of her husband, a share in a certain taluk, together with exclusive right of worship of an idol, A., and the right to the worship of an idol, B., for one sixth of every year, from the possession and enjoyment of which she alleged she had been dispossessed by the defendants in 1866,—*Held* that her claim, as to the idol B. came under the provision of article 131 of Act IX of 1871, and was not barred; but as to A. the claim was governed by article 118 of the same Act, and, not having been preferred within six years, was barred by lapse of time. ESHAN CHUNDER ROY *v.* MONMOHINI DASSI . I. L. R., 4 Calc., 683

3. ——— *Worship of idol.—Turn of worship.—Recurring right.*—A suit for a *palla*, or right to worship an idol in turn, is a periodically recurring right within the meaning of Act XV of 1877, schedule II, article 131. *Eshan Chunder Roy* v. *Monmohini Dasi, I. L. R., 4 Calc., 683,* followed. GOPEEKISHEN GOSSAMY *v.* THAKOORDASS GOSSAMY [I. L. R., 8 Calc., 807 : 10 C. L. R., 439

4. ——— *Suit to recover burial fees.—Cause of action.*—In a suit to recover burial fees, the right to which occurred whenever a corpse was brought for burial, the period of limitation was held

**LIMITATION ACT, 1877, art. 131**—*continued.*

to be twelve years from the date of the first refusal of the enjoyment of the right. BAHAR SHAH *v.* PERO SHAH . . . . 24 W. R., 385

5. ——— *Claim for monthly allowance from zemindari.—Demand and refusal.—Recurring right.*—*S.*, being entitled to a monthly allowance from a zemindari under an agreement, dated 1861, died in that year. In 1867 *K.*, his senior widow, claimed the allowance; the zemindar contended that the allowance was personal to *S.*, and did not descend to his heirs. *K.* obtained a decree. In 1864 *R.*, the junior widow of *S.*, sued *K.* to establish the right of her son *M.* to succeed to the estate of *S.* as his son and sole heir, and obtained a decree from the Privy Council in 1871. In 1872 *M.* demanded and was refused the allowance from the zemindari. In 1875 *M.* came of age and in 1879 brought a suit against the zemindar to establish his right to the allowance,—*Held* that the claim by *M.* was not barred by limitation. RAMNAD ZAMINDAR *v.* DORASAMI . . . . I. L. R., 7 Mad., 341

ZAMINDAR OF RAMNAD *v.* DORASAMI [I. L. R., 7 Mad., 341

——— **art. 132 (1871, art. 132).**

*See* ART. 59 . . 12 C. L. R., 165

*See* ART. 62. [I. L. R., 8 Bom., 234, 426

*See* ART. 120 . I. L. R., 2 All., 358

*See* ART. 128 . I. L. R., 9 Calc., 945 . [13 C. L. R., 330

*See* ART. 146 (1871, ART. 149). [I. L. R., 3 Bom., 312

*See* ART. 147 . I. L. R., 6 All., 551 [I. L. R., 12 Calc., 111

1. ——— *Malikana.—Recurring cause of action.—Held* (by GLOVER, *J.*)—That malikana is rent under Regulation VIII of 1793; that a cause of action for recovery of arrears of malikana is a recurring cause of action; and that failure to recover arrears for more than twelve years would not bar the right to recover for such period as has not been barred by the statute, clause 16, section 1, Act. XIV of 1859,—that is, for a period of six years *Held* (by KEMP, *J.*) that the suit was barred, as no malikana had been paid for more than twelve years. *Bhuli Singh* v. *Nehmu Behu, 3 Ap., 102 : 12 W. R., 46. Held* on appeal that a suit for the recovery of malikana was barred by limitation if the malikana had not been received for a period of twelve years. BHULI SINGH *v.* NEHMU BEHU. [4 B. L. R., A. C., 29 : 10 W. R., 302

BADURUL HUQ *v.* COURT OF WARDS [12 W. R., 498

CHUMMUN *v.* OM KOOLSOOM . 13 W. R., 465

*Contra,* GOVERNMENT *v.* RHOOP NARAIN SINGH [2 W. R., 162

HEERANUND SAHOO *v.* OZEERUN . 6 W. R., 151

**LIMITATION ACT, 1877, art. 132**—*continued.*

Reversed, however, on review, in OZEERUN *v.* HEERANUND SAHOO . . . . 7 W. R., 336

where it was held that the twelve years' limitation applied, but that section 1, clause 13 of the Limitation Act, was applicable. On a second review in HEERANUND SAHOO *v.* OZEERUN . 9 W. R., 102 clause 12 of section 1 was held to apply to the case.

2. ——————— *Malikana.—Interest in land.*—Malikana is an interest in land coming under Act XIV of 1859, section 1, clause 12, and the right to recover it ceases when it is left as an unclaimed deposit in the Collector's hands for twelve years. GOBIND CHUNDER ROY CHOWDHRY *v.* RAM CHUNDER CHOWDHRY . . . . 19 W. R., 94

KRISHTO CHUNDER SANDEL CHOWDHRY *v.* SHAMA SOONDUREE DEBIA CHOWDHRAIN [22 W. R., 520

3. ——————— *Payment of malikana by one of joint holders.*—A payment by one of two persons holding land jointly of malikana on account of the joint land saves the operation of the limitation as against both of them. NURSINGH NARAIN SINGH *v.* AMEERUN . . . . 22 W. R., 551

4. ——————— *Malikana commuted from payment in cash to set off against rent.*—Where an arrangement has been effected by which malikana is to be paid, not in cash, but as a set-off against the rent payable, to be deducted therefrom, and it is not shown that the right to such malikana has been alienated, the fact of its not having been paid in cash for twelve years is not a bar to the claim of the maliks for the malikana. ALEH AHMUD *v.* NEHAL SINGH [21 W. R., 88

5. ——————— *Suit for malikana.*—Malikana is an annual recurring charge on immoveable property, and may be sued for within twelve years from the time when the money sued for becomes due. HURMUZI BEGUM *v.* HIRDAYNARAIN [I. L. R., 5 Calc., 921: 6 C. L. R., 133

6. ——————— *Suit for recovery of hak.—Immoveable property.*—In suits for recovery of haks, which are of the nature of claims of money charged upon or payable out of land, the period of limitation is twelve years. BHARATSANGJI MANSANGJI *v.* NAVANAIDHARAYA MANSUKHRAM . 1 Bom., 186

*See* FUTTEHSANGJI JASWANTSANGJI *v.* DESAI KULLIANRAIJI HAKOOMUTRAIJI [13 B. L. R., 254: 10 Bom., 281 S. C., L. R., 1 I. A., 34: 21 W. R., 178

Overruling decision in FATESSANGJI *v.* DESAI KALYANRAJA . . . . 4 Bom., A. C., 189

But *see* RAIJU MANOR *v.* DESAI KULLIANRAI HUKMATRAI . . . . 6 Bom., A. C., 56 which was held to be a case of a hak not charged on land.

7. ——————— *Suit by hakdar against original grantee.—Suit by sharer of hak against another.—Desaigiri allowance.*—Article 132, schedule II of the Limitation Act, IX of 1871, applies to suits which are brought by a hakdar against the person originally liable for payment of the hak, and not to suits by one sharer in a watan against another sharer or alleged sharer who has improperly received the plaintiff's share of the hak. A suit of the latter description is a suit for money received by the defendant for the plaintiff's use, and the period of limitation is three years as prescribed by article 60 of the Act. HARMUKHGAURI *v.* HARISUKHPRASAD [I. L. R., 7 Bom., 191

8. ——————— *Bond charging immoveable property.—Enforcing bond by demanding payment as if secured by collateral mortgage of land.*—Where a suit was brought upon a bond to secure the payment of principal and interest, and the relief sought was that payment of principal and interest might be enforced, both as a simple contract liability and a debt secured by a collateral mortgage of immoveable property,—*Held* that the suit was one for the recovery of an interest in land under section 1, clause 12, Act XIV of 1859, and was not barred for twelve years. KRISTNA ROW *v.* HACHAHA SUGAPA [2 Mad., 307

CHETTI GAUNDAN *v.* SUNDARAM PILLAI [2 Mad., 51

KAUNDAN *v.* MUTTAMMAL . . 3 Mad., 92

OOMRAO BEGUM *v.* KHOOSERAM [1 N. W., 181: Ed. 1873, 260

JONNA VENKATA SAWMY *alias* VENKATASETTI *v.* BASIREDDY KONDAREDDY . 5 Mad., 364

And SURWAR HOSSEIN KHAN *v.* GHOLAM MAHOMED . . . B. L. R., Sup. Vol., 879

S. C. SURWAN HOSSEIN *v.* GHOLAM MAHOMED [9 W. R., 170

Overruling PARUSH NATH MISSER *v.* BUNDAH ALI . . . . . 6 W. R., 132

The cases of GORA CHAND DUTT *v.* LOKENATH DUTT . . . . . 8 W. R., 334

KADARSA RAUTAN *v.* RAVIAH BIBI [2 Mad., 108

SEETUL SINGH *v.* SOORUJ BUKSH SINGH [6 W. R., 318

And LYSTER *v.* KO MIHONE . 7 W. R., 354

may also be considered as overruled.

9. ——————— *Bond.—Instrument creating interest in immoveable property.*—*B* having borrowed money from *A.*, executed in his favour a bond (which was afterwards duly registered), in which he engaged to repay the amount with interest on a day named, and hypothecated certain lands by way of security, with a condition that, in the event of the said lands being sold in execution of decree before the day fixed for repayment, *A.* should be at liberty at once to sue for the recovery of the debt. Before the term for repayment expired, the mortgaged lands were sold in execution of a decree obtained by another creditor on a second bond made by *B.*

**LIMITATION ACT, 1877, art. 132**—*continued.*

subsequently and subject to the bond made to *A*. In a suit by *A*. against *B*. and the purchasers of the lands at the execution sale, *A*. charged *B*. personally, and also sought to realise the amount due on his bond by the sale of the mortgaged lands. *Held* that the claim was in substance a suit for the recovery of immoveable property, or of an interest in immoveable property, within the meaning of clause 12, section 1, Act XIV of 1859, and consequently was governed by the twelve years' rule of limitation therein provided, and not by the rules provided by clauses 10 and 16 of the same section. *Semble*,—Although *A*. was at liberty to sue from the date of the sale of the lands, limitation did not run against his claim from that date, but only from the date fixed in the bond for repayment. JUNESWAR DASS *v.* MAHABEER SINGH **[I. L. R., 1 Calc., 163 : 25 W. R., 84 L. R., 3 I. A., 1**

**10.** ———— *Suit for money charged on immoveable property.*—*R.* obtained a decree on a bond hypothecating certain immoveable property and a declaration of his lien on the property, and attached the property in execution of the decree as the property of his judgment-debtors. *M.*, who was in possession of the property as purchaser in execution of a decree to which she was no party, objected to the sale, and obtained an order from the Court executing the decree for releasing it from attachment, under the provisions of section 246, Act VIII of 1859. *R.* sued to enforce his lien, referring in his plaint to the order as the cause of action, but not alleging that the order was illegal, nor suing to set it aside. Article 15 of the second schedule of Act IX of 1871 could not be made applicable to the suit. It was a suit for money charged on immoveable property to which article 132 of the schedule applied. RADHO PANDAY *v.* RUP KUAR . . . . **7 N. W., 223**

**11.** ———— **and art. 120.**—*Suit on mortgage bond to recover amount by sale of property.*—*Personal liability of mortgagor.*—*Cause of action.*—By a mortgage bond, dated the 28th Magh 1281 B. S. (9th February 1875), it was provided that if the mortgagors should fail to pay the money secured thereby according to the terms thereof, the mortgagees should immediately institute a suit and realise the amount due by sale of the mortgaged property, and that if the proceeds of such sale should not be sufficient to liquidate the debt, the mortgagees should realise the balance from the persons and other properties of the mortgagors. It was further agreed that the principal and interest secured by the bond should be repaid in the month of Magh 1282 (January–February 1876). In a suit instituted on the 9th October 1882 upon the mortgage to recover the amount due by the sale of the mortgaged property, and the balance, if any, from the persons of the mortgagors,—*Held* that the bond in question provided for two remedies in one suit, and did not contemplate a second suit being instituted to recover the balance from the persons of the mortgagors in the event of the first remedy against the mortgaged property proving insufficient to pay the debt in full, and consequently that the cause of action against the persons of the

**LIMITATION ACT, 1877, art. 132**—*continued.*

———— **and art. 120**—*continued.*

mortgagors accrued upon the date on which the mortgage money became due; and as the suit was instituted more than six years after that date, the plaintiff's claim was barred by limitation, so far as the personal liability of the mortgagors was concerned. *Held*, also, that article 132, schedule II of the Limitation Act (XV of 1877), only refers to suits to enforce payment of money charged upon immoveable property by the sale of such property. MILLER *v.* RUNGA NATH MULLICK . **I. L. R., 12 Calc., 389**

**12.** ———— *Suit to enforce charge under mortgage deed.*—*Held* that a suit to enforce the charge under a mortgage deed is a suit of the nature mentioned in clause 12, section 1, and can be brought at any time within twelve years. KOONJ BEHARY LALL *v.* RAJ NARAIN . **2 Agra, 244**

MANNU LALL *v.* PEGUE **[9 B. L. R., 175, note: 10 W. R., 379**

GOKALBHAI MULCHAND *v.* JHAVER CHATURBHUJ **[8 Bom., A. C., 61**

**13.** ———— *Mortgage.*—*Interest.*—*Charge on land.*—In suits to recover the principal and interest of a loan secured by a mortgage of immoveable property, interest for twelve years is recoverable by virtue of article 132 of schedule II of the Limitation Act, 1877. DAVANI AMMAL *v.* RATNA CHETTI . . . **I. L. R., 6 Mad., 417**

**14.** ———— *Money charged on immoveable property.*—The plaintiff held a mortgage of certain immoveable property given to him by the defendant to secure the repayment of a loan of money with interest. The plaint stated the fact of the mortgage, but prayed only for a money-decree. The mortgage contained a personal undertaking to repay. The said mortgage was dated 16th February 1870, and the plaint in this suit was filed on the 28th April 1881. The plaintiff maintained that he was not time-barred, as he had twelve years within which to bring the suit under article 132 of Act XV of 1877. *Held* that plaintiff was too late in bringing a suit for a money-decree on the promise to pay in the mortgage, inasmuch as the article referred to was meant to apply to suits brought to enforce against the property payment of "money charged upon immoveable property," and not, under any circumstances whatever, to a suit for a mere money-decree. PESTONJI BEZONJI *v.* ABDOOL RAHIMAN . **I. L. R., 5 Bom., 463**

**15.** ———— *Mortgage.*—*Suit by a mortgagee to recover debt from a mortgagor personally.*—*Money-decree.*—Article 132 of the Limitation Act, XV of 1877, schedule II, is applicable to a suit by a mortgagee to obtain a mere money-decree, to which suit, therefore, the limitation of twelve years from the time the money sued for becomes due applies. *Pestonji Bezonji* v. *Abdool Rahiman, I. L. R., 5 Bom., 463*, overruled. LALLUBHAI *v.* NARAN **[I. L. R., 6 Bom., 719**

**16.** ———— *Interest.*—*Bom. Reg. V of 1827, ss. 11 and 12.*—*Act XXVIII of 1855.*

**LIMITATION ACT, 1877, art. 132**—*continued.*

—*Act XIV of 1870.—Act I of 1868.—Damdupat.*—*Rule.*—The mortgagor of an estate gave to the mortgagee, subsequently to the date of the mortgage, two successive money-bonds, in each of which it was stipulated that, if the amount were not paid on the due date, it should take priority of the amount due under the mortgage, and that redemption of the mortgage should not be claimed until the bond had been satisfied. The assignee of the equity of redemption sued for possession of the estate on payment merely of the mortgage-money. *Held* that section 12 of Regulation V of 1827 is not in force. That section was repealed by Act XXVIII of 1855, section 1; and although the latter section was repealed by Act XIV of 1870, the former was not restored, there being no express provision in Act XIV of 1870 to revive it, as required by the General Clauses Act, I of 1868, section 3. The question of the period for which interest was to be allowed was, therefore, to be determined by Act XV of 1877, the Act in force at the date of the institution of this suit, article 132 of which applied; but as the rule of *damdupat* is not affected by Limitation Acts, the defendants could not be allowed, as interest, more than the amount of the principal on which it was to be paid. HARI MAHADAJI *v.* BALAMBHAT RAGHUNATH

[I. L. R., 9 Bom., 233

17. ——————— *Suit by mortgage to recover mortgage-money.—Suit for money charged on immoveable property.—Relief against the person of mortgagor.*—In a suit by a mortgagee to enforce the mortgage, No. 132, schedule II of the Limitation Act, 1877, is not applicable, so far as relief against the mortgagor personally is claimed. *Lallubhai* v. *Naran, I. L. R., 6 Bom., 719,* dissented from. RAGHUBAR DAYAL *v.* LACHMIN SHANKAR

[I. L. R., 5 All., 461

18. ——————— *Periods respectively applicable to personal demands and to claims charged on immoveable property.*—That there is a personal liability upon an instrument charging a debt upon immoveable property, does not carry with it the effect that the period of limitation fixed for personal demands by Act IX of 1871 is extended, by reason of this demand being thereby brought within the meaning of article 132 of schedule II of that Act, which applies to claims "for money charged upon immoveable property." A mortgagee of lands sought, after the lapse of more than six years from the date when the mortgage-money was payable, to enforce two distinct remedies, the one against the property mortgaged, and the other against the mortgagor personally, on the contract to repay the mortgage-money. *Held* that article 132, above mentioned, applied only to suits to raise money charged on immoveable property out of that property; and the twelve years' bar did not apply to the personal remedy, as to which the shorter period prescribed in article 65 of the same schedule applied. RAM DIN *v.* KALKA PRASAD

[I. L. R., 7 All., 502: L. R., 12 I. A., 12

19. ——————— **and art. 147.**—*Hypothecation.*—In 1884 *N.* sued *A.* to recover the principal and interest due on a registered bond executed in 1870. It was stipulated that the amount should be repaid with interest in 1871, and certain immoveable property was hypothecated as security for re-payment of the debt. *Held* that the suit did not fall under article 147 of schedule II of the Limitation Act, which allows sixty years to a mortgagee to sue for foreclosure or sale from the date the money becomes due, but under article 132 of the same schedule, which allows twelve years to enforce a payment of money charged on immoveable property. ALIBA *v.* NANU . I. L. R., 9 Mad., 218

**LIMITATION ACT, 1877, art. 132**—*continued.*

——————— **and art. 147**—*continued.*

20. ——————— *Suit for sale of immoveable property by a creditor who has a right to realise a charge not amounting to a mortgage.*—The special provision of article 147 of the Limitation Act (XV of 1877) applies to all suits properly brought by a mortgagee for foreclosure or sale, while the general provision of article 132 applies to suits for sale, by a creditor having a right to realise a charge not amounting to a mortgage. KHEMJI BHAGVANDAS GUJAB *v.* RAMA . I. L. R., 10 Bom., 519

21. ——————— *Suit for dower as a charge on immoveable property in hands of heir.*—A suit by a Mahomedan widow against the heir, who has ousted her, for her dower, as being a lien on landed property, was held to be governed by clause 12, section 1, Act XIV of 1859. JANEE KHANUM *v.* AMSTOOL FATIMA KHATOON . . 8 W. R., 51

22. ——————— *Suit for money lent on deposit of title-deeds.*—Where a creditor sues to recover money advanced by him on the deposit of title-deeds of property, his claim is governed by the limitation applying to debts; but where he seeks to have his lien realised, it is a claim to realise an interest in land, to which the limitation of twelve years applies. PEARY MOHUN BOSE *v.* GOBIND CHUNDRA ADDY

[10 W. R., 56

23. ——————— *Suit for money charged on rents and profits.—Suit for money charged on immoveable property.*—*K.* borrowed from *C.* a sum of R571, and at the same time executed a bond whereby he mortgaged usufructuarily to his creditor his "entire right and share" in a particular estate in lieu of the above-mentioned sum; and it was agreed that *C.* might realise the debt from the rents and profits of two years, and that, as soon as it had been realised, his possession should cease. *Held* that the money borrowed by *K.* was "money charged upon immoveable property," it being charged upon rents and profits *in alieno solo* which in English Law would be classed as "incorporeal hereditaments," but which by the law of India are included in immoveable property; and that therefore the limitation applicable to a suit for the recovery of the money was that provided in article 132, schedule II of Act XV of 1877. *Duli* v. *Bahadur, 7 N. W., 55;* and *Pestonji Bezonji* v. *Abdool Rahiman, I. L. R., 5 Bom., 463,* dissented from. *Fatehsangji Jaswantsanoji* v. *Desai Kullianraiji Hakoomathraiji, 13*

**LIMITATION ACT, 1877, art. 132**—*continued.*

*B. L. R., 254*, referred to. *Lallubhai* v. *Naran, I. L. R., 6 Bom., 719*, followed. MUHAMMAD ZAKI v. CHATKU . . . **I. L. R., 7 All., 120**

**24.** ——— *Suit for share of Government revenue and for declaration that estate is charged with amount.*—A suit for recovery of Government revenue, which the defendant was bound to pay, but which has been paid by the plaintiff to save the whole estate from sale, where the plaintiff asks to have the amount so paid made a charge on the portion for which he paid it, is governed by article 132 and not by article 99 of Act XV of 1877. RAM DUTT SINGH v. HORAKH NARAIN SINGH . **I. L. R., 6 Calc., 549 : 8 C. L. R., 209**

DEO NUNDUN AGHA v. DESPUTTY SINGH **[8 C. L. R., 210, note**

**25.** ——— *Suit to establish title and for arrears.*—The plaintiff sued the defendants to recover a share of the income of a certain watan which was admitted to be connected with an hereditary office, but was not, strictly speaking, charged upon immoveable property. In 1861 the plaintiff had brought a previous suit, and obtained a decree declaring his right to share in the watan, and awarding him arrears for six years. Under this decree he had received payment of his share up to the year 1860. In the present suit the plaintiff claimed arrears for twelve years, *viz.*, from 1862 to 1874. He admitted that he had received no payment for the year 1861, and that his claim for that year was barred. The defendants contended that the period of limitation applicable to such a claim was six years, and not twelve years; that this was the case, at any rate, so long as the Limitation Act, XIV of 1859, was in force, and that, therefore, the claim to so much of the arrears as was time-barred under that Act could not be revived by Act IX of 1871. *Held* that, whether Act XIV of 1859 or Act IX of 1871 applied to the plaintiff's claim, the period of limitation was twelve years. Article 132 of schedule II of Act IX of 1871 was a distinct provision to that effect. There was no similar provision in Act XIV of 1859; but all hereditary offices, and all payments or allowances made on account of such offices, are to be regarded as immoveable property within the meaning and intention of that Act, and are, therefore, governed by the provisions of clause 12 of section 1. It was also contended on behalf of the defendants that, even if the period of limitation were held to be twelve years, the plaintiff's claim was nevertheless barred *in toto*, inasmuch as he admitted that he had received no payment on account of his share for thirteen years preceding the institution of the suit. In support of this contention the cases of *Raiji Manor* v. *Desai Kallianrai, 6 Bom., A. C., 56*; and *Madvala* v. *Balvant, 9 Bom., 260*, were cited, where it was laid down that the cause of action to establish title, and the cause of action to recover arrears which rest on such title, are not distinct and independent of each other; so that if the former be barred, even the arrears which may be within the period of limitation cannot be recovered.

**LIMITATION ACT, 1877, art. 132**—*continued.*

*Held* that, while this is the rule which must be applied to cases in which a plaintiff must establish his title before he can ask for arrears accruing due under such title, the same rule does not apply where, as in the present case, the plaintiff has in a former suit obtained a decree declaratory of his title. It is no longer necessary for him to establish his periodically recurring right against any person who is bound by that decree; and that being so, there is nothing in the law of limitation which can be construed into a restriction of the plaintiff's right to recover the arrears falling due within the period of limitation. CHHAGANLAL v. BAPUBHAI **[I. L. R., 5 Bom., 68**

——— **art. 134 (1871, art. 134; 1859, s. 5).**

*See* s. 2 . **I. L. R., 9 Bom., 475**

**1.** ——— *Bonâ fide purchasers.*—Section 5, Act XVI of 1859, was intended to benefit only *bonâ fide* purchasers from trustees. KYROONISSA v. SABHOONISSA KHATOON . . **5 W. R., 238**

**2.** ——— *Priority of bonâ fide purchase.*—Section 5, Act XIV of 1859, was held not to apply to a case of priority of *bonâ fide* purchase. KALLY MOHUN PAL v. BHOLANATH CHAKLADAR **[7 W. R., 138**

**3.** ——— *Bonâ fide purchaser.—Property belonging to idol.*—In 1799 an estate was purchased in the name of an idol, and immediately afterwards was mortgaged. Subsequently, when the mortgage-debt had been paid off, it was reconveyed to the idol. After this the names of the idol and of its shebait were entered in the Collector's books as owners of the estate. In 1812 the purchaser again mortgaged the property, and in 1816 his widow executed a second mortgage of it to pay off the mortgage of 1812. In 1820 this second mortgage was purchased. The defendant held the property under titles derived from the mortgage of 1816. The shebait's representatives in 1867 sued to recover possession of the property as belonging to the idol, alleging that the purchaser was a mere trustee for the idol; that the present holders of the property were cognisant of this, or might have learnt it by reasonable enquiry, and therefore took the property subject to the trust; and that, accordingly, the suit now brought was a suit against a trustee within section 2, Act XIV of 1859, and could not be barred by any length of time. There was no evidence of a formal dedication of the property to the idol. *Held* that the defendant claimed under the purchasers who had purchased *bonâ fide* and for valuable consideration within section 5, and that therefore the period of limitation was twelve years from the date of purchase, and the suit was barred. BRAJA SUNDARI DEBI v. LACHMI KUNWARI **[2 B. L. R., A. C., 155 : 11 W. R., 13**

S. C. on appeal to Privy Council **[15 B. L. R., P. C., 176, note : 20 W. R., 95**

**4.** ——— *Endowed property.—Suit to have land declared wukf.*—In the case of wukf

**LIMITATION ACT, 1877, art. 134**—*continued.*

land, the mere stoppage of religious service does not start limitation. In a suit, therefore, to have land sold declared wukf and therefore unalienable, the cause of action arises not from the cessation of services, but from the date of the sale. DOYAL CHAND MULLICK *v.* KERAMUT ALI . **16 W. R., 116**

A suit by a mutwali for endowed property alienated would probably come within this article.

*See* LALL MAHOMED *v.* LALL BEIJ KISHORE **[17 W. R., 430**

5. ——————— *Mortgage of endowed property.—Suit for recovery of property.*—Certain landed property alleged to have been sold to an idol, and registered in the name of the vendee's infant son as shebait, had, after the death of that son, been mortgaged twice by the vendee, who succeeded to the office of shebait, and was mortgaged subsequently, on the death of the vendor, by his widow, to pay off the charge created by her husband. The last mortgage was foreclosed, and the mortgagee obtained a decree for possession. In a suit for the recovery of the property by descendants of the vendee, claiming as shebait of the idol,—*Held* that the last mortgagee was a *bonâ fide* purchaser for valuable consideration, and was therefore entitled to the protection of section 5. GOBIND NATH ROY *v.* LUCHMEE KOOMAREE . . . . . **11 W. R., 36**

6. ——————— *Suit against purchasers by representative of mortgagor.*—In a suit by the representative of a mortgagor against *bonâ fide* purchasers for valuable consideration from the mortgagee, —*Held* that the period of limitation was twelve years from the date of the purchase, under section 5, Act XIV of 1859. SITHA UMMAL *v.* RUNGASAMI IYENGAR . . . . . **5 Mad., 385**

7. ——————— *Mortgage by member of joint Hindu family.—Bonâ fide purchaser.*—To entitle a purchaser to claim the benefit of Act XIV of 1859, section 5, he must prove,—1st, that he is a purchaser of what is represented to him, and what he fully believes, to be not a mortgage, but an absolute title; 2nd, that he purchased *bonâ fide*,—that is to say, without a knowledge of the title having been originally a mortgage, and of a doubt existing as to the mortgage having ceased; and 3rd, that he is a purchaser for valuable consideration. Where an estate having been originally mortgaged by *K.*, a member of a joint Hindu family, he subsequently, without the knowledge of the other members, released the equity of redemption to *R.*, who afterwards sold to *H.*, the owner of a factory, who afterwards sold to *G. & Co.* the factory with the lands appertaining thereto, amongst which was the property so released, and proceedings had for many years been taken by the other members to assert their rights,—*Held*, reversing the decision of the High Court, that *G. & Co.* were not purchasers entitled to the protection of Act XIV of 1859, section 5. *Held*, also, that section 10 does not apply in such a case, although *K.* acted fraudulently. RADHANATH DAS *v.* ELLIOTT **[6 B. L. R., 530**

**LIMITATION ACT, 1877, art. 134**—*continued.*

S. C. RADHANATH DAS *v.* GISBORNE & CO. **[14 Moore's I. A., 1: 15 W. R., P. C., 24**

Reversing the decision of the High Court in GISBORNE & CO. *v.* RADANATH DAS . **5 W. R., 253**

8. ——————— *Sale of property by representatives of mortgagee.*—The sale of mortgaged property by the heirs of a mortgagee after it has been held and enjoyed by them upwards of sixty years does not give a fresh cause of action to the representatives of the mortgagor. RAM DHUN BHUGGUT *v.* GUNESHEE MAHTOON . . **16 W. R., 96**

9. ——————— *Bonâ fide purchaser.*—A defendant who seeks to protect himself by the provisions of section 5, Act XIV of 1859, against the claim of a mortgagor suing within sixty years to recover mortgaged lands, must show clearly that he, or the person from whom he derives his title, was a *bonâ fide* purchaser. JUGGURNATH SAHOO *v.* SHAH MAHOMED HOSSEIN . . **14 B. L. R., 386 [23 W. R., 99: L. R., 2 I. A., 49**

10. ——————— *Vendor and purchaser.—Bona fides.—Notice of charitable trust.*—The words "conveyed in trust" in article 134 of schedule II of the Limitation Act (IX of 1871) include devises in trust, or are equivalent to the words "vested in trust" in section 10 of the same Act. The words "in good faith" in article 134 of schedule II, and in section 10 of the Limitation Act (IX of 1871) do not necessarily involve absence of notice in the purchaser of an existing trust or equity, though the fact of there being such notice may be an important element in the question whether there was *bona fides*. The defendant in the present case, though he purchased with actual notice, must, having regard to all the circumstances, be held to have purchased in good faith, and the suit was accordingly barred by limitation, there being nothing in the Limitation Act (IX of 1871) excluding from its benefit those asserting their right to claim under a *bonâ fide* purchase for value, by reason that those claiming against them are the objects of a charitable trust imposed on such property. MANIKLAL ATMARAM *v.* MANCHERSHI DINSHA **[I. L. R., 1 Bom., 269**

——————— **art. 135 (1871, art. 135).**

*See* ART. 144 (1871, ART. 145)—ADVERSE POSSESSION . . **7 C. L. R., 580 [I. L. R., 10 Calc., 66**

1. ——————— **and art. 147.**—*Mortgagor and mortgagee.—Purchaser from mortgagor.—Adverse possession.—Beng. Reg. XVII of 1806, s. 8.—Transfer of Property Act, s. 86.*—Under Act XIV of 1859, a mortgagee was ordinarily bound to bring his suit within twelve years from the date of default, and was barred thereafter, unless it could be shown (or might properly be inferred) that the mortgagor or the person in possession held by permission of the mortgagor after the date of default. On the 17th of November 1865, certain property situate in the district of the 24-Pergunnahs was mortgaged by the

**LIMITATION ACT, 1877, art. 135**—*continued.*

**——— and art. 147**—*continued.*

owner thereof to secure the repayment of R15,785 with interest at 18 per cent. on the 17th of February 1866. The mortgagor and mortgagee were Hindus, and the mortgage was in the ordinary form of an English mortgage of real property. After the date of the mortgage, and before the 15th of February 1872, the mortgagor sold various portions of the mortgaged property. On the 15th of February 1872 the mortgagee filed a foreclosure petition in the Court of the Judge of the district of the 24-Pergunnahs under Regulation XVII of 1806. Notice of the petition was served on the mortgagor alone. Neither principal nor interest was paid by the mortgagor, and on the 6th of September 1882 the assignee of the mortgagee filed a suit for foreclosure against the mortgagor, and the purchasers of the various portions of the property, under the provisions of the Transfer of Property Act, praying for foreclosure and sale. *Held* that as against the purchasers from the mortgagor the suit was barred by limitation under clause 135, schedule II of Act XV of 1877. SHURNOMOYEE DASI *v.* SRINATH DAS **[I. L. R., 12 Calc., 614**

2. ——— *Suit for possession by mortgagee of deed of conditional sale.—Foreclosure.—Cause of action.*—A conditional mortgage-deed was drawn out, stipulating for the repayment of the loan by annual instalments in nineteen years, and empowering the mortgagee to foreclose if two instalments remained unpaid on any third yearly instalment falling due. *Held*, on the construction of the mortgage-deed, that the mortgagee was not thereby limited to foreclose as soon as the first default in payment of those instalments occurred, and not afterwards; but that the mortgagee was authorised in proceeding to foreclose if there were subsequent defaults, any previous default notwithstanding; in fact there is nothing in law to limit the time within which a mortgagee may foreclose, if, notwithstanding one or more default, the mortgagee's right is not repudiated but recognised. The mortgagee's right to sue for possession accrues upon the final foreclosure, and he can sue at any time within twelve years from that date, under clause 12, section 1, Act XIV of 1859. BULDEEN *v.* GOLAB KOONWER **[Agra, F. B., 102: Ed. 1874, 77**

3. ——— *Mortgage.—Dispossession of mortgagor.*—The rule that the date of expiry of the year of grace is the date from which a mortgagee's cause of action to obtain possession of the mortgaged estate is to be calculated, applies only when the mortgagor remains in peaceable and undisturbed possession of the estate. But when the mortgagor is dispossessed and his title disputed, and another person obtains possession of the estate, the possession of the new holder becomes adverse to both mortgagor and mortgagee. The mortgagee's cause of action against the new holder will count from the date on which the latter obtained such adverse possession, unless when the mortgagor contests the title of the new holder, and litigation ensues between them, in which case the mortgagee is not bound to take action upon his mortgage until that litigation is decided. But if the mortgagor's title is rejected, and his possession is disturbed by an adverse one, the mortgagee's cause of action against the new holder commences from the date on which the latter obtains possession on his title adverse to the mortgagor which has been confirmed by the Courts. RAMCOOMAR SEIN *v.* PROSONNOCOOMAR SEIN **[W. R., 1864, 375**

*See* SHEOUMBER SAHOO *v.* BHOWANEEDEEN KULWAR . . . **2 N. W., 223**

4. ——— *Suit for possession.—Mortgagor transferee, Possession by.*—In 1835, *A.*, a mortgagee, obtained a decree in a foreclosure suit, subject to two prior mortgages. In 1844, *B.* purchased the rights of the mortgagor in the mortgaged property, and in 1854 redeemed the two prior mortgages. *Held* that *A.* was not barred by the Statute of Limitations from asserting his title to the land subject to the prior mortgages. BHUGWAN DOSS *v.* BEHARY KHAN . **Marsh., 191: 1 Hay, 437**

5. ——— *Suit for possession after foreclosure of mortgage.—Adverse possession.—Possession of dur-putnidar.*—Where a plaintiff, who had acquired the right of a mortgagee in a putni turruf, had foreclosed the mortgage under a decree of the Supreme Court in 1852, but had omitted to take out execution until 1869, when he first sought to obtain possession; and defendant put in a claim to the turruf on the ground that his predecessor in title had as dur-putnidar paid in the revenue to save the putni, and had taken possession of the estate under section 13, Regulation VIII of 1819; and the lower Courts found that plaintiff was entitled to recover possession because the dur-putnidar had recovered the amount of his deposit in the intervening years,—*Held* by the High Court that the plaintiff's claim was barred by limitation. *Held*, also, that the dur-putnidar's occupation of the putni after his lien on it had expired was an adverse possession, which the plaintiffs were bound to resist as soon as they became aware of it; and that this obligation was not loosened by the fact that the mortgagees, on the expiry of their lien, were bound to find out the owners and deliver up the estate to them. KANTI CHUNDER MOOKERJEE *v.* BAMUN DOSS MOOKERJEE . . . **25 W. R., 434**

6. ——— *Purchaser from mortgagor.—Adverse possession.*—Where a party *bonâ fide* purchased from another, as his own property, land in fact mortgaged, and obtained possession and mutation of names, his title was held to be adverse to the mortgagee. After a *bonâ fide* purchaser had been in open possession more than twelve years, and after the lapse of more than twelve years from the accrual to the mortgagee of the right of entry under the mortgage-deed (which was in the English form), the mortgagee sued the purchaser to obtain possession of the property. *Held*, the suit was barred. *Quære*, —Whether in cases in the mofussil, where the mortgagor continues in possession, paying rent to the

**LIMITATION ACT, 1877, art. 135**—*continued.*

mortgagee, the law of limitation begins to run from the date of the right of entry. BRAJANATH KUNDU CHOWDHRY *v.* KHELAT CHANDRA GHOSE
[8 B. L. R., 104: 14 Moore's I. A., 144
16 W. R., P. C., 33

S. C. in High Court, KHELAT CHUNDER GHOSE *v.* TARACHURN KOONDOO CHOWDHRY . 6 W. R., 269

7. ——————— *Adverse possession.—Purchaser at a sale in execution of decree.*—The possession of a purchaser at a sale in execution of decree, without notice of a mortgage of the property, is adverse to the mortgagee, and a suit to disturb his possession must be brought within twelve years of the commencement of such possession. ANAND MAYI DASI *v.* DHARENDRA CHANDRA MOOKERJEE
[8 B. L. R., 122: 14 Moore's I. A., 101
S. C. 16 W. R., P. C., 19

Affirming decision of High Court in DHURUNDRO CHUNDER MOOKERJEE *v.* ANNUND MOYEE DOSSEE . . . . . 1 W. R., 103

8. ——————— *Suit for possession.—Conditional mortgagee, Title of.*—It is not necessary for a conditional mortgagee, if he be in possession at the expiry of the year of grace, to bring a suit to complete his title. The limitation period should be computed from the expiry of the year of grace, if the mortgagee be then in possession. KHOOB CHUND *v.* LEELA DHUR . . . . . 3 Agra, 103

9. ——————— *Mortgage.—Suit for possession.—Foreclosure.—Beng. Reg. XVII of 1806, s. 8.—Cause of action.*—*A.*, by a Bengali deed of conditional sale, dated the 10th of August 1853, mortgaged two estates, the deed providing that the mortgage-debt should be repaid on the 9th of July 1855, and that, on default of payment, the deed of conditional sale should become one of absolute sale, and that the mortgagee should thereupon acquire the absolute proprietary right, and might enter upon and retain possession of the mortgaged property. *A.* failed to pay at the time stipulated, and on the 18th of December 1856, her right, title, and interest in the estates were sold in execution, and purchased by the defendants without notice of the mortgage. On the 3rd of April 1866, the plaintiff bought the mortgagee's interest, and in August 1867 he instituted foreclosure proceedings under Regulation XVII of 1806 against the defendants, the auction-purchasers. In a suit instituted by the plaintiff on the 22nd January 1874 against the auction-purchasers to recover possession of the mortgaged property,—*Held* that the cause of action arose on 9th July 1865, when default was made in payment of the mortgage-debt, and the suit, not having been instituted within twelve years from that date, was barred by section 1, clause 12, Act XIV of 1859. No new cause of action arose by reason of the foreclosure proceedings on the expiry of the year of grace in August 1868. DENONATH GANGOOLY *v.* NURSING PROSHAD DASS . 14 B. L. R., 87: 22 W. R., 90

10. ——————— *Mortgage.—Suit for possession.—Foreclosure.—Cause of action.*—The defendant mortgaged certain immoveable property to the plaintiff by a *byebil-wafa*, or deed of conditional sale, dated 20th January 1851. The deed stipulated that the mortgage-debt should be repaid on the expiration of three years from the date of the execution. The money was not repaid at the stipulated period, and the mortgagor remained in possession of the property, but there was some evidence to show that he had made payments of interest on the mortgage-debt to the plaintiff. In February 1870 the plaintiff took proceedings to foreclose the mortgage, and on 16th February 1872 he instituted a suit for possession of the property. The defence was that the suit was barred, the plaintiff having been out of possession for more than twelve years previous to the institution of the suit. *Held* that payment and acceptance of interest was evidence of the continuance of the relation between the parties created by the mortgage-deed; and until the mortgagor advanced any rights adverse to the mortgagee, the possession of the mortgagor was permissive, and no cause of action accrued to the mortgagee. MANKEE KOOER *v.* MUNNOO . 14 B. L. R., 315: 22 W. R., 543

11. ——————— *Suit for foreclosure of mortgage.—Cause of action.*—The plaintiff, on the 2nd of August 1847, became mortgagee of a house under an instrument of mortgage, which provided that in default of payment by the mortgagor of the mortgage loan within five years, the house should be considered as absolutely sold to the mortgagee. Default was made in payment and the mortgagee entered into possession, and continued in possession until 1858, when he was dispossessed by the mortgagor. On the 29th March 1866, the plaintiff filed a suit in the nature of a foreclosure suit against his mortgagor, to which the defendant pleaded the law of limitation. *Held* that the plaintiff's cause of action arose in 1858, when he was dispossessed by the defendant, and that he had, under Act XIV of 1859, section 1, clause 12, twelve years from that date within which to file his suit. LAKSHMIBAI *v.* VITHAL RAMCHANDRA . . . . . 9 Bom., 53

——————— **art. 136 (1871, art. 136).**

*See* ART. 144—ADVERSE POSSESSION.
[I. L. R., 2 All., 718
I. L. R., 12 Calc., 197

1. ——————— **and art. 137.**—*Ejectment.*—On the 26th of September 1867, *A.* executed a conveyance of certain land to *B.* for valuable consideration. On the same day *A.* acknowledged the execution of the deed before the Registrar, who afterwards registered the same on the 19th of October 1867; *B.* never entered into possession of the land. On the 14th of November 1874, *C.* purchased this land at a sale in execution of a decree which he had obtained against *B.*; *C.* did not enter into possession of the land, but, on the 26th of September 1879, brought a suit for the recovery thereof against *A.*, who had all along remained in possession. *Held* that the suit was barred by limitation under articles 136, 137, schedule II of the Limitation Act, XV of 1877. ANAND COOMARI *v.* ALI JAMIN
[I. L. R., 11 Calc., 229

**LIMITATION ACT, 1877, art. 136**—*continued.*

2.——— and art. 144.—*Hindu law.—Joint family property, Suit to recover.—Purchaser of a share of joint family property when vendor is out of possession.*—In a suit for a share of a joint family property where the claimant is out of possession, the material issue is when did the possession of the defendant become adverse to the plaintiff or the person under whom he claims by purchase. *Per* GARTH, *C. J.*—The onus lies upon the purchaser of a share in a joint family property whose vendor is out of possession to show that the exclusion, if any, took place within twelve years of the institution of the suit. The rule of limitation applicable to a suit by a purchaser of a share in a joint family property whose vendor is out of possession at the date of the sale is article 136 of schedule II, Act XV of 1877. *Per* GHOSE, *J.*—The rule applicable to such a suit is article 144. RAM LAKHI *v.* DURGA CHARAN SEN . . I. L. R., 11 Calc., 680

——— art. 137.

*See* ART. 136 . I. L. R., 11 Calc., 229

——— art. 138 (1871, art. 138).

*See* RIGHT OF SUIT—FRESH SUITS.

[I. L. R., 9 Calc., 602

1.——— *Suit for possession by purchaser at sale for arrears of revenue.—Cause of action.*—Under the general Law of Limitation the cause of action in a suit for possession by an auction-purchaser at a sale for arrears of revenue arises from the date of purchase. HURREE MOHUN THAKOOR *v.* ANDREWS . . . . W. R., 1864, 30

2.——— *Sale in execution of decree by Sheriff.—Period from which time runs.*—As land may pass by mere parol between a Hindu vendor and purchaser, the sale by auction by the Sheriff is enough, without his bill of sale, to complete the transaction as between vendor and purchaser, for the purpose of the Law of Limitation; therefore, where the suit was brought within the time fixed by the Law of Limitation, counting from the date of the Sheriff's bill of sale, but too late counting from the time of the actual auction-sale,—*Held* that the plaintiff was barred. MOHESH CHUNDER CHATTERJEE *v.* ISSUR CHUNDER CHATTERJEE . 1 Ind. Jur., N. S., 266

3.——— *Purchase by mortgagee of mortgaged property.*—While a mortgagee was in possession of the mortgaged premises, the lands were sold for arrears of Government revenue, and purchased by the mortgagee. *Held* that his possession as mortgagee was superseded by his possession as purchaser, and that the Statute of Limitation commenced to run from the beginning of his possession as such purchaser. BYKUNT DHUR SINGH *v.* LALLA BHUGOBUT SAHOY . . Marsh., 391: 2 Hay, 475

4.——— *Suit by purchaser at sale for arrears of rent of putni tenure.—Cause of action.—Adverse possession.*—*A.* let an under-tenure to *B.*, which under-tenure was sold for arrears of rent under section 105, Act X of 1859, and bought in by *A.* On proceeding to take possession, *A.* found that *C.* had trespassed upon the under-tenure during *B.'s* tenure, and had held possession for more than twelve years. *A.* sued to recover possession of the under-tenure, and it was held by the senior Judge of the Division Bench (BAYLEY, *J.*) that *A.'s* cause of action was the act of dispossession by *C.*, and that the suit was barred, more than twelve years having elapsed; and that *A.'s* right to sue was not affected by the fact that *B.'s* tenure was still running. The junior Judge (PHEAR, *J.*) held that the suit was not barred; that the cause of action to *A.* accrued when he obtained back the property at the auction-sale; and that during the period of encroachment the cause of action did not arise to *B.*, and pass from *B.* to *A.* during the time the putni lasted, the putni entirely disappearing in the superior title of zemindar vendee. *Held* by the Appellate Court, in confirmation of the view of PHEAR, *J.*, that the cause of action to *A.*, who was a purchaser of an estate free from incumbrances against *C.*, who was a trespasser, and had encroached on *B.*, the defaulter, must be taken to accrue at the same time as his, *A.'s*, right to turn out under-tenants of the defaulter,—*viz.*, from the time of the purchase of the tenure of the defaulter; and the fact that *A.* was both taloukdar and purchaser did not prevent him from exercising the same rights as any other purchaser would be entitled to. WOOMESH CHUNDER GOOPTO *v.* RAJNARAIN ROY

[10 W. R., 15

*See* RAJNARAIN ROY v. WOOMESH CHUNDER GOOPTO . . . . 8 W. R., 444

5.——— *Survey proceedings.—Suit for possession.*—Where the plaintiffs alleged that the disputed lands were fraudulently caused to be demarcated with defendant's zemindari at the time of the survey, and the Appellate Court had held that as plaintiffs were not parties to the survey proceedings, the present suit was barred by limitation under the decision in *Woomesh Chunder Goopto* v. *Rajnarain Roy, 10 W. R., 15. Held* that in order to bring a suit within the purview of that decision, it was not enough for plaintiffs to say that this fraud was committed against them by the defendants, and that these defendants were still in possession of the lands as belonging to them and other neighbouring proprietors; but that it was necessary for them to show that they themselves were in possession of the disputed lands at the time when they granted the putni to the defendants, and that they made over that possession to those defendants at that time. GOPAL KISHEN SIRCAR *v.* RAM NARAIN KOONDOO

[17 W. R., 175

6.——— *Suit for possession.—Cause of action.*—Where formal possession was given by the Court, but the defendants have remained in actual possession, the plaintiff must still date his cause of action from the date of sale. JOWHER ALI *v.* RAMCHAND

[2 B. L. R., Ap., 29: 24 W. R., 419, note

*Contra*, BINDUBASHINI DASI *v.* RENNY (RAINEY

[7 B. L. R., Ap., 20: 15 W. R., 30

**LIMITATION ACT, 1877, art. 138**—*continued.*

7. ——————— *Possession, Suit for.—Auction-purchaser, Suit by, for possession.*—Where it was shown in a suit by an auction-purchaser at an execution sale that the formal possession obtained by him through the Court had not been followed by any act of possession, and consequently that it had been infructuous,—*Held* that the purchaser was entitled to bring a suit to obtain actual possession, but was bound to bring it within twelve years from the date of the sale, the period prescribed by article 138, schedule II of the Limitation Act (Act XV of 1877). The decisions in *Kristo Gobindo Kur* v. *Gunga Pershad Surmah, 25 W. R., 372;* and *Lolit Coomar Bose* v. *Ishan Chunder Chuckerbutty, 10 C. L. R., 258,* require such purchaser to obtain possession through the Court before bringing his suit, but they do not preclude him from enforcing his right by suit when the formal possession given by the Court has failed to put him in actual possession. KRISHNA LALL DUTT *v.* RADHA KRISHNA SURKHEL [I. L. R., 10 Calc., 402

8. ——————— and arts. 91 and 95.—*Suit for possession of immoveable property.—Suit for cancellation of instrument.*—The purchasers of property sold in execution of a decree, having been resisted in obtaining possession of the property by a person claiming under a mortgage from the judgment-debtor, sued for possession, by avoidance of the mortgage, alleging that the same was collusive and fraudulent. The plaintiffs did not ask for the cancellation or setting aside of the instrument of mortgage. *Held* that the law of limitation governing the suit was not article 91 or 95 of the Limitation Act, but article 138. *Hazari Lall* v. *Jadaun Singh, I. L. R., 5 All., 76; Ramausar Pandey* v. *Raghuber Jati, I. L. R., 5 All., 490; Sobha Pandey* v. *Sahodhra, I. L. R., 5 All., 322;* and *Raj Bahadur Singh* v. *Achambit Lal, L. R., 6 I. A., 110,* referred to. UMA SHANKAR *v.* KALKA PRASAD [I. L. R., 6 All., 75

——————— art. 139 (1871, art. 140).

*See* ART. 144—ADVERSE POSSESSION. [I. L. R., 9 Calc., 367

1. ——————— *Adverse possession.—Plea of receipt of rent.*—In a suit to recover, with mesne profits and other incidents, a jirayati village alleged by the plaintiff to form part of his zemindari, and to be wrongfully held by defendant by virtue of the execution of a decree of the late Commissioner of the Northern Sirkars passed in 1844, the defendant pleaded that he held on a permanent lease subject to a fixed quit-rent, that he and his ancestors had held on that tenure since and previously to the Permanent Settlement, and that the quit-rent had been received from him by the plaintiff. *Held* that, as the defendant stated that the plaintiff had received kattubandi from him since 1857, the plaintiff's claim to eject could not be disposed of absolutely on the ground that it was barred by the Act of Limitations. VAIRICHARLA SURYA NARAYNA *v.* NADIMINTI BHAGAVAT PATANJALI SHASTRI . . 3 Mad., 120

**LIMITATION ACT, 1877, art. 139**—*continued.*

2. ——————— *Landlord and tenant.—Receipt of rent.*—*A.* a Hindu, died, leaving his widow, *B.*, and mother, *C.* *B.* adopted *D.* *C.* granted a putni pottah to *E.* of certain property belonging to the estate of *A.* During the minority of *D.*, *B.* received the rent from *E.*, and afterwards *D.*, on attaining majority, realised rent from *E.* by suits under Act X of 1859. Twelve years after attaining majority, *D.* sued for cancellation of the putni lease, and for obtaining khas possession of the property. *Held* that the suit was not barred. BUNWARI LAL ROY *v.* MAHIMA CHANDRA KNUALL [4 B. L. R., Ap., 86: 13 W. R., 267

*See* SHUMBOONATH SHAHA *v.* BUNWAREE LALL ROY . . . . 11 W. R., 102

3. ——————— *Adverse possession.—Cultivated and uncultivated lands.—Ghatwals.*—The owners of a putni of Bishenpore sued to set aside a survey award and alter a map (1855) which demarcated certain lands as cultivated and uncultivated belonging to Government, and in the possession of ghatwals. Certain ghatwali lands, part of the zemindari of Bishenpore, had been given up to the Government by the zemindars in 1802, and the ghatwals had since paid a quit-rent to Government for the same. The plaintiffs became purchasers of the putni in 1839 under a sale for arrears. They admitted that, as to the uncultivated lands, they had never been in actual possession or in the receipt of any rents since they purchased, but they alleged that, from that time, the ghatwals fraudulently or dishonestly refused to pay them rents in respect of the cultivated lands, as they had done to their predecessors; and that the ghatwals had encroached upon the uncultivated lands. The ghatwals, on the other hand, stated that they never had paid rent to the putnidar, and that the lands were all included within those for which they paid a quit-rent to Government. *Held* (LOCH, *J*, dissenting) that the ghatwals, if proved to have been the tenants of the plaintiffs or their predecessors, could not acquire a title against them by adverse possession of twelve years. *Per* PEACOCK, *C. J.*—The issues are: (1) whether the ghatwals paid rent for the cultivated lands to the putnidar; (2) whether the cultivated or uncultivated lands form part of the putni estate; (3) whether the ghatwals were in possession of the uncultivated lands from 1839, or for a period exceeding twelve years before the commencement of the suit; (4) whether they paid rent for the same to the putnidar. WATSON *v.* GOVERNMENT [B. L. R., Sup. Vol., 182: 3 W. R., 73

4. ——————— *Suit for land.—Cause of action.—Non-payment of rent.*—In a suit to establish a right to land, the cause of action arises when the defendant sets up an adverse holding. The mere non-payment of rent does not constitute an adverse holding; but if a tenant openly sets up an adverse title, and holds adversely, limitation runs. HURONATH ROY v. JOGENDUR CHUNDER ROY [6 W. R., 218

**LIMITATION ACT, 1877, art. 139**—*continued.*

5. ——————— *Landlord and tenant.—Adverse title set up by tenant.*—Where a landlord sued, after the lapse of more than twelve years from the date of his knowledge that a tenant was setting up a mokurrari title, for a declaration that the alleged mokurrari title was invalid,—*Held* that the suit was barred by lapse of time. NAZIMUDIN HOSSEIN v. LLOYD . . . . **6 B. L. R., Ap., 130**

NUJMOODDEEN HOSSEIN v. LLOYD **[15 W. R., 232**

6. ——————— *Landlord and tenant.—Suit for possession.*—About twenty-five years before suit, *R.*, being possessed of a house, allowed *K.* to occupy it without rent, on condition that *K.* would keep it in repair, and restore it to *R.* on demand. Nine years afterwards, and without any demand having been made by *R.*, *K.* died, and his heirs continued to occupy the house on the same terms as *K.* had done. In a suit brought by *R.* against the heirs of *K* to recover possession of the house,—*Held* that the suit was barred. being governed by the twelve years' period of limitation. RADHABHAI v. SHAMA **[4 Bom., A. C., 155**

7. ——————— *Tenant on sufferance.*—Although the English rule of law as to the nature of the possession of a tenant for a term of years, who holds over, has been adopted in British India, the rule of limitation prescribed by 3 and 4 William IV, C. 27, by which time begins to run against the landlord from the date of his right of entry, has not been adopted in the Indian Limitation Act, 1877. If a tenant for years holds over in British India, time does not begin to run against the landlord until the tenancy on sufferance has been determined. ADIMULAM v. PIR RAVUTHAN . **I. L. R., 8 Mad., 424**

——————— **art. 140 (1871, art. 141).**

*See* ART. 141 . **I. L. R., 9 Calc., 934**
**[I. L. R., 11 Calc., 791**

——————— *Cause of action.—Suit by reversioner against his ancestor's lessee.*—A reversioner's cause of action against his ancestor's lessee does not accrue until the expiration of the lease, unless the reversioner is evicted or deprived of his rent, or rent is received adversely to him by a stranger from the lessee. HURONATH ROY v. INDOO BHOOSUN DEB ROY . . . **8 W. R., 135**

1. ——————— **art. 141.**—*Suit to set aside alienation by widow.—Cause of action.*—A suit to set aside alienations of ancestral property made by a childless Hindu widow during her life-tenancy, may be brought at any time within twelve years from the death of the widow. TILUCK ROY v. PHOOLMAN ROY **[7 W. R., 450**

SUNTOKHEE THAKOOR v. BELASSEE KOONWUR **[10 W. R., 276**

GOPAL MULLICK v. ONOOP CHUNDER ROY **[11 W. R., 183**

GREEDHAREE SINGH v. INDRO KOOER **[17 W. R., 237**

**LIMITATION ACT, 1877, art. 141**—*continued.*

CHUNDER KANTH ROY v. PEARY MOHUN ROY **[1 Ind. Jur., O. S., 21**

S. C. PEARY MOHUN ROY v. CHUNDEE KANTH ROY . . . **Marsh, 33: 1 Hay, 69**

ANUND MOHUN ROY v. CHUNDER MONEE DASEE **[Marsh., 547: 2 Hay, 648**

2. ——————— *Reversioners.—Cause of action.*—*R.* purchased a putni mehal and devised it to his son *G. G.*, died after *R.*, childless and intestate, and leaving a widow, *S.*, who also died, neither of the three having ever taken possession of the mehal. Plaintiff, as *G.'s* nephew, sued to recover possession of the mehal. *Held* that his cause of action did not arise until the death of *S.* RAM DOOLLUB SANDYAL v. RAM NARAN MOITRO **[7 W. R., 455**

3. ——————— *Cause of action.—Hindu law.—Alienation by widow.*—*A.*, a Hindu widow, while in possession of the property left by her husband, sold a portion thereof. After her death, her daughter *B.* succeeded to the property, but took no steps to set aside the alienation made by her mother. After her (*B.'s*) death, her sons succeeded to the property, and instituted the present suit, after a lapse of thirty-six years from the death of *A.*, but within twelve years from the death of *B.*, to obtain possession of the property sold by *A.* *Held* (MITTER, *J.*, dissenting) that the suit was barred. The cause of action arose when *B.* succeeded to the property. RAJKISHOR DUTT ROY v. GIRISH CHANDRA ROY CHOWDHRY **[4 B. L. R., A. C., 136**

4. ——————— *Reversioners.—Cause of action.—Suit to set aside alienation.*—In a suit against a widow for acts of waste and alienations alleged to have taken place during the lives of the plaintiffs' mothers, who were then the next heirs to the property,—*Held* that as the mothers allowed more than twelve years to elapse, their cause of action expired, and that it did not revive in favour of the plaintiffs, who had since been born and had now arrived at majority. *Held* that, if by the death of the widow a new cause of action accrued to the plaintiffs as reversioners entitled to the property, they might sue again; but they could not succeed in the present suit. PERSHAD SINGH v. CHEDEE LALL **[15 W. R., 1**

5. ——————— *Cause of action.—Adverse possession.—Suit for property inherited from father.*—The plaintiff sought to recover certain property which she inherited from her father, and which had been taken possession of by the defendant during the lifetime of plaintiff's mother. The lower Court dismissed the suit on the ground that it was barred by the law of limitation, plaintiff having failed to show that her mother was in possession at any time within twelve years before the suit. *Held*, on special appeal, that the suit was not barred. Until the death of her mother, plaintiff's alleged cause of action did not arise, and her right not being derived from or through her mother, the period of

**LIMITATION ACT, 1877, art. 141**—*continued.*

limitation could not be considered as having been running against her from the commencement of the adverse possession in her mother's lifetime. ATCHAMMA *v.* SUBBA RAYUDU . 5 Mad., 428

6. ——————— *Estate held jointly by two widows.—Cause of action.—Reversioners.*—Where the estate of a deceased Hindu held jointly by his two widows survives, on the death of one of them, to the surviving widow alone, no cause of action can accrue to the reversioners until the death of the survivors even in respect of a moiety of the property. GOBIND CHUNDER MOJOOMDAR *v.* DULMEER KHAN [23 W. R., 125

7. ——————— *Reversioner.—Cause of action.—Adverse possession.*—Where, however, the estate is held by some one adversely to the widow, so as to give her a cause of action to recover it, a suit to recover it brought by her or the reversioners is barred after twelve years of such adverse holding. Where a cause of action with regard to the husband's estate has once accrued to a Hindu widow, who nevertheless fails to assert her rights, no new cause of action arises to the heirs after her death. TARINI CHARAN GANGULI *v.* WATSON [3 B. L. R., A. C., 437 : 12 W. R., 413

RAJKUNWAR *v.* INDERJIT KUNWAR [5 B. L. R., 585 : 13 W. R., 52

8. ——————— *Female heir.—Adverse possession.—Suit by reversioner.*—Adverse possession against a Hindu female heir, which would bar her right of suit if she were alive, will equally bar that of the reversioner. NOBIN CHUNDER CHUCKERBUTTY *v.* GURUPERSAD DOSS [B. L. R., Sup. Vol., 1008

S. C. NOBIN CHUNDER CHUCKERBUTTY *v.* ISSUR CHUNDER CHUCKERBUTTY . 9 W. R., 505

Overruling AMEER ALI *v.* MOHENDRO NATH BOSE. BEHARY KOOMAREE *v.* MOHENDRO-NATH BOSE. SUHODARA BIBEE *v.* MOHENDRO-NATH BOSE . . . 2 W. R., 271

JEONATH BHUGGUT *v.* ROOPA KOONWUR [2 W. R., 273, note

And HARADHUN NAUG *v.* ISSUR CHUNDER BOSE [6 W. R., 222

And followed in RAM KANAI ROY CHOWDRY *v.* TRILOCHAN CHUCKERBUTTY [1 B. L. R., S. N., 12

PARBUTTY MOFLESSA *v.* RAJOO [W. R., 1864, 88

RAM DYAL GOSSAIN *v.* KATTYANEE DEBIA [8 W. R., 256

BRINDA DABEE CHOWDHRAIN *v.* PEAREE LALL CHOWDHRY . . . 9 W. R., 460

RASH BEHAREE LALL *v.* BURMESSUR NAUTH [10 W. R., 30

CHUNDER NATH SEIN *v.* ANUNDOMOYEE DOSSEE [11 W. R., 289

GUNESH DUTT *v.* LALL MUTTEE KOOER [17 W. R., 11

**LIMITATION ACT, 1877, art. 141**—*continued.*

9. ——————— *Reversioners.—Cause of action.*—Where a Hindu widow, who takes by inheritance from her husband, is dispossessed, the period of limitation as against the reversionary heir claiming the succession after the widow's death is, in the absence of fraud, to be reckoned, not from the time of the widow's death, but from the time from which it would have run against the widow had she lived and sued to recover the inheritance. *R.*, holding ancestral estates in Bengal jointly with his brothers as an undivided Hindu family, died, leaving a widow, *S.*, and three unmarried daughters, *B.*, *S. M.*, and *N.* On her husband's death *S.* continued to reside with his brothers, and was supported out of the income of the joint estate. During the lifetime of *S.* her daughters married, and *B.* became a widow without having had a child. After *S.'s* death, and during the lifetime of *S. M.*, *N.* also became a childless widow. *S. M.* died after her mother, leaving a son, *R. K.* *R. K.*, on attaining majority, sued to recover with mesne profits a 4-anna share in the ancestral estates to which he claimed to be entitled on his mother's death as heir of *R.*, and from which he alleged that he had been dispossessed by the representatives of *R.'s* brothers, whom he made defendants in the suit, joining *B.* and *N.* with them as co-defendants. Some time after the institution of the suit, a petition was filed, purporting to proceed from *B.* and *N.*, by which they admitted that the plaintiff was the heir of *R.*, and that they had no defence to offer. *Held* that limitation could not be taken to have run against the plaintiff's claim during the lifetime of *S.*, who, in the absence of proof that she had received only maintenance, as distinguished from participation in the profits of the estate, must be presumed to have had possession of the share in the estate which she inherited as her husband's widow. *Quære*,—Whether, if *N.* had been considered as having relinquished her rights, she would not, at the time of the relinquishment, have been barred by limitation. AMRITOLAL BOSE *v.* RAJONEEKANT MITTER . 15 B. L. R., 10 : 23 W. R., 214 : [L. R., 2 I. A., 113

10. ——————— *Reversioner.—Hindu widow.*—Where after the death of a Hindu who had been separate in estate from his brothers, and, during the lifetime of his widow, his brother's sons obtained mutation of their names on the Collector's rent-roll, and held possession of the estate in right of inheritance for more than twelve years,—*Held* that, under the Mitakshara law, the possession by the nephews being adverse to the widow, the claim of the reversioner on her death was barred. GOPAL SINGH *v.* KANHYA LALL SAHEBZADA [2 B. L. R., Ap., 14 : 11 W. R., 9

11. ——————— *Reversioner.—Hindu widow.—Cause of action.—Adverse possession.*—A Hindu died leaving two daughters, who succeeded to their father's property. One sold her half share of the property and died in 1835; the other died in 1859, and her son instituted the present suit in 1867 for recovery of the half share which her sister had sold. The defence set up was that the suit was

**LIMITATION ACT, 1877, art. 141**—*continued.*

barred by lapse of time, as the plaintiff's cause of action arose in 1835, or more than twelve years before the institution of the suit. *Held* (following a dictum in the Full Bench ruling in *Nobin Chunder Chuckerbutty* v. *Guru Persad Doss, B. L. R., Sup. Vol., 1008*) that the words "cause of action" in clause 12, section 1, refer, not to the new cause of action which accrues to the reversioner, but to the "cause of action" which accrued to the tenant-for-life; and that the suit having been brought after a lapse of more than twelve years after the death of the tenant-for-life, was barred. GANGA CHARAN ROY CHOWDRY *v.* JAGARNATH DUTT

[3 B. L. R., A. C. 208: 12 W. R., 97

12. ——————— *Suit by reversionary heirs.—Possession by adopted son.*—A Hindu widow, in 1824, assumed to adopt a son to her husband, and such son, and after him the defendant, his heir, was put in possession of the properties in suit. The widow died in 1861. The suit was instituted in 1866 to recover the property and to declare the adoption illegal. *Held* that such possession during the life of the widow could not be said to be adverse as against the widow. The cause of action to the reversionary heirs arose at the time of the death of the widow, and was consequently not barred by limitation. SRINATH GANGOPADHYA *v.* MAHESH CHANDRA ROY

[4 B. L. R., F. B., 3: 12 W. R., F. B., 14

13. ——————— *Relinquishment by Hindu widow.—Cause of action by heirs.*—Where a widow relinquished her right to her husband's property in favour of his then reversionary heirs, who were accordingly put into possession, and other persons subsequently claimed the property as the husband's heirs, the cause of action of such other persons was held to have accrued from the time when the then reversionary heirs came into possession of the property. KALEE COOMAR NAG *v.* KASHEE CHUNDER NAG . . . . . 6 W. R., 180

14. ——————— *Right to possession of property on death of Hindu widow.—Reversioner.*—The right of a Hindu to the possession of immoveable property on the death of a Hindu widow, to which article 142, schedule II, Act IX of 1871, refers, must be one *in esse* at the time of the death of the widow. The determination, therefore, of such right during her lifetime, extinguishes also the right of the reversioner on her death. SARODA SOONDURY DOSSEE *v.* DOYAMOYEE DOSSEE

[I. L. R., 5 Calc., 938

15. ——————— *Will.—Gift of estate subject to vested interest of widow.—Suit in widow's lifetime for declaration of right and account.—V. S.*, a Hindu, died in 1858, leaving a will, of which he appointed *G.* and *S.* executors. After payment of debts, legacies, &c., the executors were directed to manage the residue of the estate, and not to sell it during the lifetime of *L.*, the junior wife of *V. S.*, to whom a monthly payment for life was to be made by them. After the death of *L.*, the executors were directed to divide the property that remained in equal shares between them, and to continue to enjoy the same in equal shares. *L.* survived both *G.* and *S*, who died in 1875 and 1879 respectively. In a suit brought in 1879 by the divided nephew of *V. S.* against *L.* and the representatives of *G.* and *S.* to have his right to the estate of the testator upon the death of *L.* declared and for an account,—*Per* KINDERSLEY, *J.*—*Semble*,—The suit was barred by limitation, as the widows of *V. S.* had not been in possession of the estate as Hindu widows, but had enjoyed merely their allowance under the will. KOLLA SUBRAMANIAM CHETTI *v.* THELLANAYAKULU SUBRAMANIAM CHETTI

[I. L. R., 4 Mad., 124

16. ——————— *Suit by reversioners after death of Hindu widow.*—In 1846 a widow, under an ikrarnama, made over to her brother-in-law certain properties formerly belonging to the estate of one *L.*, her late husband. The widow died in 1878. In March 1879 a suit was brought by the daughters of *L.* to recover the properties formerly belonging to their father from the hands of certain vendees. *Held* that the suit by the reversioners was not barred under article 141 of Act XV of 1877, there having been no possession adverse to the widow, by dispossession, for more than twelve years, the widow's cause of action having ceased when she entered into the ikrarnama in 1846, and gave up her right to the property; nor, under section 2 of Act XV of 1877, could the right of the plaintiffs be said to be barred by any Act repealed thereby, inasmuch as article 142 of Act IX of 1871 prescribes the same period of limitation as is prescribed in article 141 of Act XV of 1877: and that although, under Act XIV of 1859, repealed by Act IX of 1871, it was decided in *Nobin Chunder Chuckerbutty* v. *Guru Persad Doss, B. L. R., Sup. Vol., 1008*, that adverse possession which bars a widow also bars the reversionary heirs, yet the exception laid down in that case would be applicable, and would save limitation. PURSUT KOER *v.* PALUT ROY . . . . . I. L. R., 8 Calc., 442

17 ——————— and art. 140.—*Act IX of 1871, sch. II, art. 140.—Suit by reversioner for possession.*—Under article 141 of schedule II, Act XV of 1877, a reversioner who succeeds to immoveable property has twelve years to bring his suit for possession from the time when his estate falls into possession. SRINATH KUR *v.* PROSUNNO KUMAR GHOSE

[I. L. R., 9 Calc., 934: 13 C. L. R., 372

18. ——————— *Alienation by Hindu widow.—Suit by reversioner.*—Where there had been a suit and compromise by a Hindu widow, which were held to be tantamount to an alienation by her, it was held that there had been no adverse possession during her life, and that the period of limitation in a suit by the reversioners must be calculated from her death. SHEO NARAIN SINGH *v.* KHURGO KOERRY. SHEO NARAIN SINGH *v.* BISHEN PROSAD SINGH

[10 C. L. R., 337

**LIMITATION ACT, 1877, art. 141**—*continued.*

19. ——————— *Adverse possession.*—*Alienation by Hindu widow.*—A title by adverse possession for more than twelve years accrues even during the lifetime of a Hindu widow, but if possession arises directly from any invalid alienation on her part, special provision is made for the right to sue on the parts of the reversioners within twelve years from her death and the accrual of their title. GYA PERSAD *alias* LAL PERSAD *v.* HEET NARAIN **[I. L. R., 9 Calc., 93**

20. ——————— *Reversioner, Suit by.*—*Adverse possession against Hindu widow.*—In a suit instituted on the 26th August 1879 by the reversioner on the death of a widow, who died on the 28th August 1867, to recover certain immoveable property, it appeared that the defendant had forcibly dispossessed the widow of the property in 1864 and held it ever since. *Held* that, under article 141 of schedule II of Act XV of 1877, the reversioner was entitled to a fresh period of limitation from the death of the widow, although limitation had begun to run against her. *Semble,*—The law as laid down by the Full Bench in *Nobin Chunder Chuckerbutty* v. *Issur Chunder Chuckerbutty, 9 W. R., 505,* has been intentionally modified by the Legislature by article 141 of schedule II of the Limitation Act of 1877. DWARKA NATH GUPTA *v.* KOMOLMONI DASI **[12 C. L. R., 548**

21. ——————— **and art. 140.**—*Adverse possession.*—*Hindu mother.*—*Reversioner.*—*Semble,*—That, in Hindu law, where a mother succeeds to property as heir of her son, and her right thereto becomes barred by adverse possession, the next heirs of her son on her death will have twelve years therefrom in which to sue for possession of the property. KOKILMONI DASSIA *v.* MANICK CHANDRA JOADDAR **[I. L. R., 11 Calc., 791**

22. ——————— *Suit by persons claiming immoveable property on death of Hindu or Mahomedan female.*—*N.,* a Mahomedan, died in 1849 leaving immoveable property which was inherited by his mother *B.,* his brother *E.,* and his sister *A.* It was found that *A.* was never in possession of the share inherited by her, and that she died in 1878. *Held,* in a suit against *E.* and his son, brought in 1884 by *A.'s* heirs for possession of that share, that article 141 of the Limitation Act did not apply, and that the suit as to that share was barred. *Per* WILSON, *J.*—Article 141 of schedule II of Act XV of 1877 refers to suits by persons claiming on the death of a Hindu or Mahomedan female, under an independent title, in the same way as, in respect of suits by remaindermen, reversioners, and others, article 140 does. It does not apply to the case of a person suing on the very same cause of action which accrued to a female, and suing by right of being her heir. AZAM BHUYAN *v.* FAIZUDDIN AHAMED . **I. L. R., 12 Calc., 594**

23. ——————— *Suit to obtain a declaration that an alleged adoption is invalid or never took place.*—*Suit for possession of immoveable property.*—Article 118 of the Limitation Act applies only to suits where the relief claimed is purely for a declaration that an alleged adoption is invalid or never in fact took place. Such a suit is distinct from a suit for possession of property, and the latter kind of suit cannot be held to be barred as a suit brought under article 118, merely by reason of its raising a question of the validity of an adoption, but is separately provided for by article 141. It is discretionary in a Court to grant relief by a declaration of a right, and consequently the fact that a person has not sued for a declaration should not be a bar to a suit for possession of property on any ground of limitation prescribed for the former. In a suit by a person who had objected to an attachment of immoveable property in execution of a decree, and whose objection had been disallowed, to set aside the order disallowing the objection, for removal of the attachment, and for possession of the property, the defendants, at whose instance the attachment had been made, set up a title based on the adoption of the judgment-debtor by the widow of the person whom the plaintiff claimed to succeed by right of inheritance. *Held* that the limitation applicable to the suit was article 141 and not article 118 of the Limitation Act (XV of 1877), the suit being not to obtain any declaration that the alleged adoption was invalid, but for recovery of possession of immoveable property, for which there was a special limitation. BASDEO *v.* GOPAL . . **I. L. R., 8 All., 644**

——————— **art. 142 (1871, art. 143).**

*See* ART. 127 . **I. L. R., 7 Bom., 297**

1. ——————— *Sale in execution of decree.*—When a suit to establish his title and to recover possession of property is brought by a person who has been dispossessed under a sale in execution of a decree against other persons, and no summary order has been made declaring the property liable to be sold in execution of such decree, the period of limitation applicable is that prescribed by clause 12, section 1, Act XIV of 1859,—*viz.,* twelve years from the date of dispossession. JODOONATH CHOWDHRY *v.* RADHOMONEE DASSEE **[B. L. R., Sup. Vol., 643: 7 W. R., 256**

GEDROO SIRCAR *v.* BEHAREE LALL RUDRA **[20 W. R., 165**

2. ——————— *Suit to recover possession.*—*Sale in execution.*—*Civil Procedure Code, ss. 249, 259, 264, and 269.*—In execution of a decree obtained against *A.,* his right, title, and interest in certain property were sold, but the certificate of sale erroneously recited that *A.* and *B.'s* ancestor were defendants in the suit, and that the interest of the defendants in the suit had been sold; and, accordingly, the purchaser was put in possession, under section 264, Act VIII of 1859, of the right, title, and interest of *B.'s* ancestor as well as of *A.* in the property. In a suit brought by *B.* for confirmation of title and recovery of possession after the lapse of a year, but within twelve years from the date of dispossession,—*Held* that the suit was not barred

**LIMITATION ACT, 1877, art. 142**—*continued.*

by lapse of time. PROTAB CHUNDER CHOWDHRY *v.* BROJOLOLL SHAHA [B. L. R., Sup. Vol., 638: 7 W. R., 253

3. ——— *Dispossession under sale in execution.—Improper certificate of sale.*—Plaintiff having been dispossessed under a certificate of sale which was not conformable to or warranted by the sale itself, was declared entitled (having made no complaint to the Court which was executing the decree) to bring his suit for restoration to his property any time within twelve years from the date of his dispossession. BHEEM GOYALLEE *v.* KHOOBUN SAHOO . . . . . 17 W. R., 429

4. ——— *Suit to recover possession of lands sold in execution of decree.*—The plaintiff's tenant having been ejected from certain immoveable property of the plaintiff, under an auction sale in execution against a third party, the plaintiff made no application to the Court under section 246 or 269 of the Civil Procedure Code to prevent or set aside the sale. *Held* that he was not bound to do so, but that he was entitled to file a regular suit to establish his title and recover possession at any time within twelve years from the date of the dispossession, under clause 12, section 1. LALCHAND AMBAIDAS *v.* LAKHARAM . . . . . 5 Bom., A. C., 139

Overruling KRISHNAJI *v.* JOSHI MAKUND CHIMANSHET . . . 2 Bom., A. C., 18

5. ——— *Suit for lands in excess taken in execution of decree.*—A suit to recover excess lands wrongfully taken under cover of a decree comes within the twelve years' period of limitation. GOUR MONEE MOORAIN *v.* SHUN KUREE PAHARINEE [13 W. R., 459

6. ——— *Decree for wrongful possession.—Cause of action.*—In a suit for recovery of possession of a share in a certain talook, on the allegation that the plaintiff had been dispossessed under an award passed under section 15, Act XIV of 1859, the defence set up was that the plaintiff was not in possession of the property within twelve years of suit. *Held* that the wrongful possession which the plaintiff held during the few months before the award under Act XIV, was no possession which could take his case out of the Act of Limitation. The dispossession under the award did not give him a fresh cause of action. GOLAM NABI *v.* BISWANATH KAR . . 3 B. L. R., Ap., 85 [12 W. R., 9

PREMCHAND KYBUTTA *v.* HUREE DOSS KYBUTTA [22 W. R., 259

TARA BANU *v.* ABDUL GUFFER CHOWDHRY [12 C. L. R., 486

7. ——— *Suit to establish title invaded by award under s. 15, Act XIV of 1859.*—A suit to establish the plaintiff's title to property invaded by an award under section 15, Act XIV of 1859, was governed by the limitation of twelve years, and the cause of action arose from the date of the award. ESHAN CHUNDER BANERJEE *v.* ZAMUDUROONISSA KHATOON . . 17 W. R., 468

8. ——— *Suit for possession.—Illegal resumption by Government.*—The plaintiff was possessed of an estate situate on the bank of a river, and of certain chur lands which had accreted thereto. The Collector took possession of the chur lands in 1818, upon the default of the proprietor to appear to answer a claim made by Government to assess the chur land. In 1824 a suit was filed by Government under Regulation II of 1819 for the resumption of these lands; the Government officers, however, continuing to hold possession and collect the rents. In 1847 the Collector, in conformity with a general order under Act IX of 1847, "for the abatement of all suits for the resumption of alluvial lands then pending," struck off the suit and restored the lands to the possession of the zemindar. The proprietor claimed the wasilat enjoyed by the Government during his dispossession; and the Government again dispossessed him, under the assumption that the lands were an island in the river, and that the plaintiff was not entitled to them as an accretion The plaintiff having brought a suit in 1854 to establish his right to the lands in question,—*Held* that the Statute of Limitation was no answer to the suit, because the pendency of the suit for the resumption and assessment of the lands between 1824 and 1848 prevented the proprietor from commencing a suit during that period, and that during such period the limitation did not run; and, further, after that period the necessity for a suit was obviated by the restoration of the lands to the proprietor. *Held*, also, that a fresh cause of action accrued under the second ouster. SURNOMOYE *v.* COLLECTOR OF RUNGPORE . . Marsh., 13: W. R., F. B., 4 [1 Hay, 37

9. ——— *Suit to recover possession of land sold for arrears of revenue.*—In a suit to recover possession of certain villages belonging to a talook which had been sold by Government for arrears of revenue, where the plaintiff alleged that they ought not to have been sold as they were not subject to revenue, the second defendant, who was the purchaser and in actual possession, pleaded limitation as a bar. The plaintiff urged that a fresh cause of action arose in consequence of some proceedings of the Government by which they made a new grant of the villages to the second defendant at an increased revenue. *Held* that such grant would not give a new cause of action, and could not affect the time when the only cause of action arose to the plaintiff. CHAITANYA CHUNDRA HURIS CHANDANA JAGADEVU *v.* COLLECTOR OF GANJAM . 22 W. R., 187 [L. R., 1 I. A., 335

10. ——— *Cause of action.—Suit for land sold but taken back under agreement to exchange.*—In a suit to recover possession of lands which had been sold to plaintiff, but which had been subsequently taken back by one of the vendors under an agreement that he would make over other lands

**LIMITATION ACT, 1877, art. 142**—*continued*

in exchange, plaintiff's contention being that he had been dispossessed of these other lands which were eventually decreed to another party,—*Held* that plaintiff's cause of action originated on the date of the decree depriving him of the lands last mentioned. KABUL KRISHNA DOSS *v.* MOHESSUREE DEBIA

**[16 W. R., 270**

11. ——————— *Discontinuance of possession.—Diluviated lands afterwards re-formed.—Adverse possession.—Per* GARTH, *C. J.*—Where a person can show that he has been in possession of certain lands prior to such lands becoming diluviated, his possession must be considered as continuing during the time of diluvion until such time as he becomes dispossessed by some other person; and in such a case the onus lies upon the dispossessor to show that he has acquired a title under the Law of Limitation which has put an end to the rights of the original possessor. *Per* WHITE, *J.*—The dispossession, or discontinuance of possession, mentioned in article 143, schedule II of Act IX of 1871, is that which occurs where the property is taken actual possession of by another, and does not apply to the case where the property is submerged by the act of God, and so made impossible of occupation and actual possession. Owners of land which has suffered from successive diluviations and re-formations must, if they wish to preserve their rights, bring their suit within twelve years of the time when adverse possession is first taken of land re-forming on the original site, whether at the time of suit the land is capable of occupation or is lying under water in consequence of a second diluvion. KALLY CHURN SHAHOO *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL

**[I. L. R., 6 Calc., 725 : 8 C. L. R., 90**

12. ——————— **and arts. 139, 144.**—*Discontinuance of possession.*—In a suit to recover possession of a house, the plaintiffs alleged that their predecessor in title had permitted *A.*, the father of the defendants, to occupy the house in question without paying any rent for it, and that since *A.'s* death, which took place about twenty years before the institution of the suit, the defendants had been permitted to reside therein without paying rent. The defendants contended that the plaintiffs' predecessor in title had made a gift of the house to *A.*; that he had remained in possession of it until his death; and that since then they had been in possession of the house by virtue of the gift. *Held* that the suit was barred by limitation under Act XV of 1877, schedule II, article 142. The meaning of article 142 is, that where there has been possession followed by a discontinuance of possession, time runs from the moment of its discontinuance, whether there has or has not been any adverse possession, and without regard to the intention with which, or the circumstances under which, possession was discontinued. Articles 139 and 142 of Act XV of 1877 considered. GOBIND LALL SEAL *v.* DEBENDRONATH MULLICK

**[I. L. R., 5 Calc., 679 : 5 C. L. R., 527**

In the same case on appeal,—*Held*, a suit for th

**LIMITATION ACT, 1877, art. 142**—*continued.*

——————— **and arts. 139, 144**—*continued.*

recovery of immoveable property against a person who had originally been in mere permissive occupation or possession accorded on the ground of charity or relationship, is governed by Act XV of 1877, schedule II, clause 144, and not by clause 142 of the same schedule. In such a case the owner of the property, who has accorded the permissive occupation, cannot be said to have "discontinued" the possession. GOBIND LALL SEAL *v.* DEBENDRONATH MULLICK

**[I. L. R., 6 Calc., 311 : 7 C. L. R., 181**

13. ——————— *Suit for possession.—Dispossession during unexpired lease by plaintiff's predecessor.*—In a suit brought by the plaintiff in 1880 to recover possession of certain lands from which his predecessor in title had been dispossessed, in which suit the Court of first instance found that the defendant had dispossessed the plaintiff's father in 1860, during the unexpired term of a lease granted by the plaintiff's father to a ticcadar,—*Held* that the preponderance of authority in India was in favour of the view that limitation ran from the date of the expiry of the ticca, and not from the time when the defendant had been held by the Court of first instance to have dispossessed the plaintiff's father. SHEO SOHYE ROY *v.* LUCHMESHUR SINGH

**[I. L. R., 10 Calc., 577**

14. ——————— *Suit for possession of immoveable property.—Suit for cancellation of instrument.—Act XV of 1877, sch. II, No. 91.*—The plaintiff sued to set aside a mortgage by conditional sale of certain immoveable property belonging to him, made on his behalf during his minority, and for possession of the property. *Held* that the suit was one described in No. 142, schedule II, Limitation Act, 1877, and not in No. 91 of that schedule. RAMAUSAR PANDEY *v.* RAGHUBAR JATI . . **I. L. R., 5 All., 490**

——————— **art. 143 (1871, art. 144).**

*See* ART. 39 . **I. L. R., 6 Bom., 580**

1. ——————— *Stipulution by tenant to clear land, Suit for breach of.*—Limitation was held to apply in a case where it was stipulated in a lease that the tenant should clear a defined area in a certain time, the cause of action accruing when the defendant did not clear by the time specified. TUMEEZOODEEN CHOWDHRY *v.* SURWAR KHAN

**[7 W. R., 209**

2. ——————— *Breach of condition.—Forfeiture.—Alienation by Hindu widow.*—A Hindu widow, under an arrangement with her deceased husband's cousin, was in possession for life of a share of ancestral property of her husband's family, in which he, jointly with the cousin, had held a share in his lifetime. This share she sold as if she had held an absolute interest, and the purchaser's name was entered, instead of hers, in the revenue records; but no change of possession took place till her death. To a suit brought by the cousin's heirs to recover the pro-

**LIMITATION ACT, 1877, art. 143**—*continued.*

perty purchased from the widow, more than twelve years after the sale, but less than twelve years after the widow's death, the defence was limitation under Act IX of 1871, schedule II, clause 144, commencing from the date of the sale, there having been, it was alleged, "a breach of condition or forfeiture" within the meaning of that clause. By the terms of the arrangement contained in a solehnama, the widow was to have no power to alienate; and after her death her share was to belong to the cousin. *Held* that these terms prohibited only such an alienation by the widow as would prevent the cousin's succeeding after her death, and the alienation made was good for the widow's lifetime. There was no condition against such an alienation; and if there had been, there was neither any rule of law, nor anything in the words used in the solehnama, attaching forfeiture to the breach of such a condition. *Held*, accordingly, that article 144 did not apply, and the suit was not barred by limitation. SAHODRA *v.* RAI JANG BAHADUR. LUTCHMAN SAHAI CHOWDHRY *v.* RAI JANG BAHADUR . **I. L. R., 8 Calc., 224: L. R., 8 I. A., 210**

3. ——————— *Act IX of 1871, s. 23.—Breach of condition in mortgage.—Suit for ejectment of mortgagees.—Continuing breach of contract.*—In November 1873 *M.* sued for the cancelment of a deed of usufructuary mortgage executed by her in November 1856, and for the ejectment of the mortgagees, on the ground of the breach of a condition in the deed that the mortgagees should pay her a life annuity of R15, during the term of the mortgage (twenty years) and also after foreclosure, otherwise, on any failure, they would be liable to ejectment and to the forfeiture of the mortgage. It did not appear that any payments of the annuity had been made. The plea of limitation having been taken, the lower Courts held that the suit was within time, as the case fell within clause 148, schedule II, Act IX of 1871. It was held in special appeal that, assuming that they were in error in so holding, the case was governed by clause 144, and the provisions of section 23 enabled the plaintiff to treat each failure to pay the stipulated annuity as a new breach giving a new right to eject, and that the suit was therefore clearly within time. SADHA *v.* BHAGWANI . **7 N. W., 53**

4. ——————— *Agreement to pay annual fees.—Right of possession in default.—Suit for possession.*—The purchasers of certain land agreed to pay the vendors certain fees annually in respect of such land, and that in default of payment the vendors should be entitled to the proprietary possession of a certain quantity of such land. The purchasers never paid the fees, and more than twelve years after the first default the vendors sued them for possession of the land they were entitled to. *Held* that the suit, being governed by No. 143, schedule II of Act XV of 1877, and more than twelve years having expired from the first breach of such agreement, was barred by limitation. The difference between section 23 of Act IX of 1871 and Act XV of 1877 pointed out. BHOJRAJ *v.* GULSHAN ALI . **I. L. R., 4 All., 493**

**LIMITATION ACT, 1877**—*continued.*

——————— **art. 144 (1871, art. 145; 1859, s. 1, cl. 12).**

Col.
1. INTEREST IN IMMOVEABLE PROPERTY . 3408
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*See* ART. 91 . **I. L. R., 5 All., 76**
*See* ART. 113 . **I. L. R., 6 All., 231**
*See* ART. 120 . **I. L. R., 10 Calc., 697**
*See* ART. 136 . **I. L. R., 11 Calc., 680**

## 1. INTEREST IN IMMOVEABLE PROPERTY.

1. ——————— *Immoveable property.—Toda giras hak.*—The expression "immoveable property" in Act XIV of 1859, section 1, clause 12, must not be construed as identical with "lands or houses." It comprehends all that would be real property according to English law, and possibly more. A toda giras hak being a right to receive an annual payment, the liability for which is not a mere personal liability, but one which attaches to the inamdar into whosesoever hands the village may pass, is "an interest in immoveable property" within the meaning of clause 12, section 1, Act XIV of 1859. FUTTEHSANGJI JASWANTSANGJI *v.* DESAI KULLIANRAIJI HAKOOMUTRAIJI

**[13 B. L. R., 254: 10 Bom., 281**
**S. C. L. R., 1 I. A., 34: 21 W. R., 178**

Overruling decision in FATESANGJI *v.* DESAI KALYANRAIJI . . **4 Bom., A. C., 189**

2. ——————— *Immoveable property.—Fees paid to hereditary office-holder.*—The clause of the Limitation Act (No. XIV of 1859) which was applicable to a suit to recover fees payable to the incumbent of an hereditary office such as that of a village Joshi, was clause 12 and not clause 16 of section 1 of that Act. *Krishnabhat* v. *Kapabhat, 6 Bom., A. C., 187*, followed. The meaning of the term "immoveable property," as used with regard to Hindu law, discussed. BALVANTRAV *alias* TATIAJI BAPAJI *v.* PURSHOTAM SIDHESHVAR . . **9 Bom., 99**

3. ——————— *Immoveable property.—Suit for dues of hereditary office.*—A suit to recover payment of sums claimed by certain persons as hereditary officers, and arising out of a grant by the sovereign proprietor of the territory by which the possessors thereof were bound to contribute to the maintenance of such hereditary officers,—*Held* to fall within the 4th section of Bombay Regulation V of 1827, limiting the period of recovery to twelve years. BEEMA SHUNKER *v.* JAMASJEE SHAPOORJEE

**[2 Moore's I. A., 23: 5 W. R., P. C., 121**

4. ——————— *Suit for share of hereditary land set apart for performance of office of patil.*—Plaintiff being entitled by an arrangement between the members of a family of patils, of whom he was one, to a third of the emoluments of the office of managing revenue and police patil, sued the defendant in possession to recover a third of a portion of the hereditary fields set apart as remuneration for the performance of the duties of the office; and the

**LIMITATION ACT, 1877, art. 144—*continued.***

**1. INTEREST IN IMMOVEABLE PROPERTY —*continued.***

District Judge on appeal found his claim barred on the ground solely that he had not for twelve years been in possession of the one third which he claimed of the service land. *Held* that, having regard to section 4 of Act XI of 1843, the plaintiff's cause of action did not depend on his possession within twelve years, but on whether his turn to officiate as patil, and his right to enjoy the land in dispute, arose more than twelve years before the suit was brought. SINDE *v.* SINDE . . . **4 Bom., A. C., 51**

5. ——————— *Grant by a Hindu sovereign to a Hindu temple.—Immoveable property.*— The Peishwa, by a sanad dated 1790, granted to an ancestor of the plaintiffs, for the support of a Hindu temple, an annual cash allowance of R350 out of the "antastha sadilvar" and three khandis of rice out of the "kherij jamabandi parbhare," to be levied from certain mehals and forts mentioned in the sanad. The allowances were paid till the death of the plaintiff's father on the 26th December 1859, when the Collector of Thana stopped them. On the 23rd December 1870, the plaintiffs sued to establish their right to the grant and to recover six years' arrears of the allowances. The defendant pleaded that the suit was barred by the Law of Limitation. The question for consideration was whether the suit was governed by clause 12 or clause 16 of section 1 of the Limitation Act, XIV of 1859. *Held* (*per* SARGENT, *J.*) that the grant in question was of the nature of immoveable property, and that the suit, therefore, fell within the provisions of clause 12 of section 1 of the Limitation Act, XIV of 1859. In using the expression "subject of the suit" in the rule laid down by the Privy Council in the Toda Giras case (*Fatesangji* v. *Desai Kallianrayaji, L. R., 1 I. A., 34*), their Lordships intended to include in it all the facts which determine the nature of the plaintiff's claim, and not merely of the allowance itself, and to confine the application of Hindu law to those cases in which the "subject of the suit" has such a distinctive Hindu character as that only Hindu law and usage can be legitimately invoked to determine its quality and nature. It is the fixed and permanent character of an allowance from whatever source derived, which by Hindu law entitles it to rank with immoveables. Here the grant, from the object which it had in view, was to be deemed to be one in perpetuity, and the fund out of which this perpetual allowance was to be paid was derived from a permanent source. It had, therefore, all the characteristics of permanency and durability which were essential to bring it, according to Hindu law, within the term "immoveable property." *Held* (*per* MELVILL, *J.*) that the allowance in question was not immoveable property, and that the suit, therefore, did not come within the provisions of clause 12 of section 1 of the Limitation Act, XIV of 1859. From a consideration of the judgment of the Privy Council in *Fatesangji* v. *Desai Kallianrayaji, L. R., 1 I. A., 34*, it would appear that the rule which their Lordships intended to lay down is this, *viz.*, that, whenever it is possible to do so, the terms "immoveable property" and "interest in immoveable property" in Act XIV of 1859 must be interpreted, on general principles of construction, with reference to the nature of the thing sued for, and not to the status, race, character, or religion of the parties to the suit; but that in exceptional cases, in which the thing sued for is of such a special and exceptional character that its nature cannot be determined without reference to the special and peculiar law of a particular sect or class, in such cases, and in such cases only, the law of such sect or class may properly be referred to as furnishing a guide to the determination of the question. The Privy Council has thus laid down a rule and an exception, and the question in every case must be whether the rule or the exception applies. The rule is that the terms "immoveable property" and "interest in immoveable property" are to be held to include, not only land and houses, and such other things as are physically incapable of being moved, but also such incorporeal hereditaments as issue out of, or are connected with, immoveable property properly so called, and which, therefore, savour of the realty:" *e.g.*, rights of common, rights of way, and other profits *in alieno solo*, rents, pensions, and annuities secured upon land,—all these clearly constitute an interest in immoveable property. Pensions and annuities not secured upon land, houses, or the like, as clearly do not constitute such an interest. When a classification can thus be made, it ought to be so made without reference to the character of the party claiming the right. But there may be cases in which the test prescribed by the rule fails, or is very difficult of application, and then will come in the operation of the exception to the rule, and it may become the duty of the Court to seek for guidance in some arbitrary definition contained in the religious law of the claimant: *e.g.*, in the instance of an hereditary office in a Hindu community incapable of being held by any person not a Hindu. The claim now in question is a claim to an annuity granted by a Hindu sovereign to a Hindu temple. The annuity is not made a charge upon land, and it is not, therefore, according to general principles of construction, immoveable property. That being so, it is not necessary to go further. COLLECTOR OF THANA *v.* KRISHNANATH GOVIND . . . . **I. L. R., 5 Bom., 322**

*Held*, by a Full Bench on appeal under the Letters Patent, that the grant made by the sanad was "nibandha," and that the subject-matter of the suit was immoveable property, or an interest in immoveable property, within the meaning of the Limitation Act, XIV of 1859, section 1, clause 12. *Held*, also, that the Hindu law might be properly resorted to for the purpose of determining whether the subject-matter of the suit was immoveable property (*i.e.*, nibandha) within the meaning of the Limitation Act, XIV of 1859, section 1, clause 12. Assuming that it was incorrect to apply Hindu law to ascertain the nature of the grant in question, nevertheless held that the grant was an interest in immoveable property within

**LIMITATION ACT, 1877, art. 144**—*continued.*

1. INTEREST IN IMMOVEABLE PROPERTY —*continued.*

the meaning of the Limitation Act, XIV of 1859, section 1, clause 12. The grant savoured throughout of locality, and was undoubtedly irresumable, inalienable, and perpetual. The Indian Legislature did not intend to exclude such property from section 1, clause 12 of the Act. The Indian Legislature, which passed the Limitation Act, XIV of 1859, has not given any explanation or defiuition in the Act of the phrase "immoveable property," but has left suitors to their former ideas on the subject. Under these circumstances it would be a hardship upon them to construe the Act inconsistently with such ideas, inasmuch as they were furnished with no guide which could have led them to suppose that "immoveable property," according to Act XIV of 1859, meant anything less than what they had previously known as such. And that the Indian Legislature were not disposed to be very harsh, is shown by its subsequent more fully developed legislation on the subject of limitation, which to haks and other periodical payments assigns the twelve years' limit. A pension or other periodical payment or allowance granted in permanence is nibandha, whether secured on land or not. COLLECTOR OF THANA *v.* HARI SITARAM **[I. L. R., 6 Bom., 546**

6. ——————— *Claim to easement.*—*Immoveable property.*—A claim to an easement is one relating an interest in land and is governed by the limitation of twelve years. DEO SURUN POORY *v.* MAHOMED ISMAIL . . . **24 W. R., 300**

7. ——————— *Immoveable property.*—*Jalkar, Suit to establish.*—A jalkar is not an easement within the meaning of section 27 of Act IX of 1871, but is an interest in immoveable property within the meaning of schedule II, article 145 of that Act. Where the defendant had been exercising a right of fishing in certain water adversely to the plaintiff for more than twelve years,—*Held* that a suit by the plaintiff for a declaration that he was entitled to the exclusive right of fishing in such water was barred by limitation. PARBUTTY NATH ROY CHOWDHRY *v.* MUDHO PAROE **[I. L. R., 3 Calc., 276: 1 C. L. R., 592**

8. ——————— *Suit for opening water-course stopped by defendant.*—*Interest in immoveable property.*—A suit for recovery of possession of land and for opening a water-course through it, alleged to have been stopped by the defendant, is a suit "for an interest in immoveable property," and therefore subject to the limitation prescribed by clause 12, section 1. OODOYESSURREE *v.* HUROKISHORE DUTT . . . . **4 W. R., 107**

9. ——————— *Suit for possession of immoveable property.*—*Suit for a declaration of proprietary right.*—Where the plaintiff claimed a declaration of his proprietary right to land, and to be maintained in possession thereof as proprietor free from the liability to pay rent,—*Held* that the limitation applicable to the present suit was not that provided by article 118 of schedule II of Act IX of 1871, but that provided by article 145 of that schedule, a suit by a person in the possession of land for a declaration of proprietary right being substantially a suit for possession of immoveable property, and the present suit was therefore within time; and that articles 14 and 15 of that schedule were not applicable, there being no decree or order which the plaintiff was bound to have set aside within one year. DEBI PRASAD *v.* JAFAR ALI . . **I. L. R., 3 All., 40**

10. ——————— *Suit claiming exemption from payment of assessment on land after payment.*—Where a person claiming to hold land free of Government assessment was compelled by the Collector to pay the same, and afterwards brought his suit to establish his right,—*Held* that the suit was one to recover an interest in immoveable property, and the cause of action first arose when the right was actually interfered with by the Collector compelling payment of the rent; and that as the suit was brought within twelve years from that date, it was not barred; but that only one year's arrears was recoverable under Act XIV of 1859, section 1, clause 4. BHUJANG MAHADEE *v.* COLLECTOR OF BELGAUM **[11 Bom., 1**

11. ——————— *Agreement defining shares of parties in immoveable property.*—*Deed of compromise.*—An agreement by way of compromise of disputed title to immoveable estate, under which shares are allotted to the parties thereto, gives to each party a cause of action founded not merely upon contract within the meaning of Act XIV of 1859, section 1, clause 10, but upon the title which is acknowledged and defined by the agreement; and a suit brought to recover a share of the estate was governed by section 1, clause 12. MEWA KOWAR *v.* HULAS KOWAR . . . . **13 B. L. R., 312 [L. R., 1 I. A., 157**

12. ——————— *Suit on agreement to lease land.*—An agreement to grant a lease cannot be said to create an interest in immoveable property, nor can a suit upon it be said to be one for the recovery of such property or of an interest in it. Such a suit was governed not by the 12th but by the 16th clause of section 1, Act XIV of 1859. LALLA RAM SAHOY LALL *v.* CHOWBAIN . . . . **22 W. R., 287**

13. ——————— *Trees.*—*Interest in immoveable property.*—Trees are immoveable property, and a claim in connection with them relates to an interest in such property, and was subject to the limitation specified in section 1, clause 12 of Act XIV of 1859. GHUFOORUN BEBEE *v.* MUSTUKEDEH **[2 Agra, 300**

14. ——————— *Suit to set aside solehnamah relating to produce of trees.*—*Interest in immoveable property.*—The plaintiff executed a deed of gift of a village in favour of his sons and nephews, with a condition that they should not alienate the

LIMITATION ACT, 1877, art. 144—*continued.*

1. INTEREST IN IMMOVEABLE PROPERTY —*continued.*

property. On their hypothecating it, the deed of gift was set aside in a suit by the plaintiff. One of the plaintiff's rights as proprietor was to receive half of the produce of a certain grove, which right, while the deed was in force, the donees had agreed, by a solehnamah with the defendant, to commute for a yearly rent. The plaintiff sued to set aside the solehnama and to recover half of the value of two trees which the plaintiff had cut down and appropriated. *Held* that, as the suit was not for the recovery of rights and interests in immoveable property, to which clause 12, but to set aside a solehnamah, to which clause 16, of section 1 of Act XIV of 1859, applied, and for damages, the suit to set aside the solehnamah was barred by limitation under clause 16. HANOOMAN PERSHAD *v.* SURUBJEET SINGH . . . . . **4 N. W., 167**

**15.** ——————— *Mortgage of house "exclusive of land."—Interest in immoveable property.*—A bond whereby "the superstructure of a house exclusive of the land beneath" is hypothecated, creates an interest in immoveable property within the terms of the Limitation Act, the apparent intention being to mortgage the existing house and not merely the materials. NARAYANA PILLAY *v.* RAMASAWMY THAVUTHARAN . . . . **8 Mad., 100**

**16.** ——————— *Immoveable and moveable property.*—In the year 1857 *A.* died, leaving a son, the plaintiff *B.*, and the defendants *C.* and *D.*, his widows, him surviving. *C.* took possession of all *A.'s* property. The plaintiff *B.* was the son of *D.*, and, shortly after *A.'s* death, *D.* gave birth to another son, the plaintiff *E.* In 1865 *D.* instituted a suit against *C.*, and *B.*, and *E.*, alleging that *A.* had left a will. In this suit *C.* claimed to be the heiress of *A.* No decree was made in the suit, which was compromised. In November 1877 *B.* and *E.* entered into possession of a shop which had belonged to their father, and which had been managed, during their minority, by the defendant *C.* In 1879 the plaintiffs instituted the present suit, claiming to recover from *C.* the property of *A.* come to her hands. *Held* that, so far as the immoveable property was concerned, the case fell either under article 120 or article 144 of Act XV of 1877, schedule II; and as to the moveable property, under article 89 or 90 of the same Act. KALLY CHURN SHAW *v.* DUKHEE BIBEE . **I. L. R., 5 Calc., 692: 5 C. L. R., 505**

2. ADVERSE POSSESSION.

**17.** ——————— *Adverse possession.*—*A.*, *B.*, and *C.* were brothers. In 1846 and 1847 a partition was effected between *A.* (since deceased) and *C.* on the one part and *B.* on the other, *C.* being at the time a minor. *B.* then obtained, and since held separately as his share, certain lands in the village of K. among others. By a razinama in 1852 the same quantity of land was confirmed to him as his share. In 1855 certain proceedings were taken, the object of which was to adjust the shares so as to

LIMITATION ACT, 1877, art. 144—*continued.*

2. ADVERSE POSSESSION—*continued.*

make them equal in quality as well as in quantity, *B.* continuing to hold nearly the same quantity of land as he did before. *C.* attained his majority in 1854, and in December 1863 brought a suit against *B.* for a readjustment of the partition completed in 1847, so far as it respected lands held by *B.* in the village of K. *Held* that *B.'s* possession was adverse from 1847, and the readjustment in 1855 could not give the plaintiff a new starting-point; the suit, therefore, was barred by limitation. SRINIVASSIENGAR *v.* SRINIVASSARANGA CHARIYAR . . **4 Mad., 10**

**18.** ——————— *Adverse possession.*—The political department in Chota Nagpore, as judgment-creditors, took out attachment against a family estate, in which the rule of primogeniture prevailed, to meet ancestral debts, and appropriated the proceeds in satisfaction. Objection was made by a member of the family claiming ten of the villages as held by him and his ancestors under a mokurrari grant for maintenance. An answer was put in and litigation followed, resulting in a final decision by the civil authorities of the zillah, that the claimant was not entitled to four out of the villages claimed, and the proceeds were diverted to the payment of debts which were not his. He then sued for a declaration of his right and title to the four villages. *Held* that the possession of the political department had not been adverse to the plaintiff, and his cause of action did not arise till his title was devised and the proceeds diverted from his use. COURT OF WARDS *v.* BUNWAREE LALL THAKOOR . . **15 W. R., 102**

**19.** ——————— *Suit for possession of land.—Collector's possession not adverse to true owner.*—Act IX of 1871, schedule II, article 145, enacting that suits for possession of immoveable property, or any interest therein, must be brought within twelve years from the time when the possession of the defendant, or some person through whom he claims, has become adverse to the plaintiff, differs from the rule formerly in force under Act XIV of 1859, section 1, clause 12. The latter was that the suit must be brought within twelve years from the time when the cause of action arose; and thus the former rule that, where the cause of action arose upon an alleged dispossession, the burden was upon the plaintiff to show that he, or some one through whom he claimed, had actual possession within twelve years before the institution of the suit, has been superseded by the above. Where the Government, in the Revenue Department, has taken possession of land, it is the duty of the Collector, after payment of the revenue and the expenses of the collection, to pay over the surplus proceeds of the estate to the true owner. The Collector's possession does not become adverse to the owner by reason of his making this payment to another claimant. KARAN SINGH *v.* BAKAR ALI KHAN . . . **I. L. R., 5 All., 1 [L. R., 9 I. A., 99**

**20.** ——————— *Adverse possession.—Attachment of vatan lands.—Peshwa's Government.—Resumption by British Government.—Restoration.—Inability to sue during attachment and resump-*

**LIMITATION ACT, 1877, art. 144**—*continued.*

2. ADVERSE POSSESSION—*continued.*

*tion.—Bombay Act I of 1865, s. 34.—"Contra non valentem agere non currit præscriptio," Application of.*—In the year 1806-7 the Peshwas attached certain vatan lands belonging to the plaintiff's family. The attachment continued till the year 1866, when the British Government made them khalsa, or resumed them. The defendant in the meanwhile entered upon them as tenant to the Government, and paid assessment thereon. In the year 1871 the lands were ordered to be restored to the plaintiffs. After this order of restoration the plaintiffs brought a suit against their coparceners for partition, and obtained a decree. In the execution of this decree they were obstructed by the defendant, who claimed the lands as his own. The plaintiffs thereupon brought a suit against the defendant in 1881 to eject the defendant and to obtain possession of the lands. The Court of first instance held the plaintiffs entitled merely to such assessment as might remain after payment of judi to Government. It further held that the defendant's possession had become adverse to the plaintiffs, as the latter did not bring their suit within twelve years from the resumption of the lands by Government in 1866, since which time the defendant was to be considered as tenant or occupant under Government. From this decree the plaintiffs appealed, and the lower Appellate Court was of opinion that by the order of restoration the plaintiffs were restored to the right of such assessment as was left after deduction of judi, and that their claim to that even was barred, as it was brought after twelve years from the date of resumption. On appeal to the High Court,—*Held*, restoring the decree of the Court of first instance, that the claim of the plaintiffs was not barred. After the attachment of the lands in dispute, the Peshwa's Government held the same as constructive trustees for the plaintiffs, and when that Government was succeeded by the British Government the same relation continued. The British Government, having succeeded to the trust, continued to hold as trustee for the family of the plaintiffs; their possession, therefore, could not be made adverse by intimation or notice to the plaintiffs. It was not found that the defendant held the lands before the attachment by the Peshwas, and the British Government could not, as guardian or bailiff for the real owners, the plaintiffs, put the defendant into a better position than their own. The plaintiffs' right having never been extinguished, had the same legal force in 1870, when the lands were restored, as it had before attachment in 1806. From 1871 onwards the plaintiffs could act; and as the suit was commenced within the term computed from that time, it was not barred —the inability of the plaintiffs to sue before 1871 falling within the purview of the maxim *contra non valentem agere non currit præscriptio.* It was contended for the defendant that section 34 of Bombay Act I of 1865 applied in the present case. *Held* that, if it could apply, it would apply only in the sense of limiting the rights acquired under the Collector's management to the term of that management, and nothing further. TUKARAM *v.* SUJANGIR GURU

**[I. L. R., 8 Bom., 585**

**LIMITATION ACT, 1877, art. 144**—*continued.*

2. ADVERSE POSSESSION—*continued.*

21. ——————— *Adverse possession.—A.* became a bairagi and went on a pilgrimage. He alleged that before his departure he made over his property to *B.*, on the condition that it should revert to him on his return. *B.* sold it to *C.* Upon his return after several years, *A.* claimed the property from *C.*, who refused to give up possession. *D.* purchased *A.'s* rights, and then sued the widow of *C.* to obtain possession. She denied that the property was made over to *B.* upon trust for *A.* on his return, and contended that the suit was barred under clause 12 of section 1 of Act XIV of 1859. The lower Appellate Court held that it was not barred, on the ground that *B.'s* possession was not adverse. On special appeal, the case was remanded, that it might be found whether *B.* had been in possession in trust for *A.*, or adversely to him, for more than twelve years. JAGANNATH PAL *v.* BIDYANAND

**[1 B. L. R., A. C., 114: 10 W. R., 172**

22. ——————— *Suit for possession.—Interrupted adverse possession.*—In a suit to recover possession of immoveable property, the defence was adverse possession for more than twelve years, except for two short periods, during which plaintiffs had been put in possession by a Civil Court: first, under a decree of the High Court between the same parties, but that they had been dispossessed upon that decree being reversed on review; and second, under a misconception, by the Principal Sudder Ameen, of another order of the High Court, in another suit between the same parties; but that they had again been dispossessed after appeal by defendant to the High Court. *Held, per* EOCH, *J.* (GLOVER, *J.*, dissenting), that plaintiff's possession during those two periods was not *bonâ fide*, and that the suit was barred. MATI SINGH *v.* LILANAND SINGH

**[2 B. L. R., A. C., 173**

S. C. MOTEE SINGH *v.* LEELANUND SINGH

**[11 W. R., 49**

23. ——————— *Adverse possession.—Admission of lumberdar to partition.*—Where the lumberdar had clearly admitted in the wajib-ul-urz that there were shareholders paying the Government revenue through him, who cultivated sír land, although at the time he, the lumberdar, has had sole right to the profit and loss,—*Held* that the claim of the shareholders to definition of their shares was not lost. MEHTAB SINGH *v.* PURMA . **3 Agra, 241**

24. ——————— *Adverse possession.—Insolvency.*—Suit by the official assignee of a deceased insolvent to recover a talook conveyed (several years before his insolvency) by the insolvent, who was sole or chief acting executor of his father-in-law's will, as a security for his own debt to his father-in-law, not to any other person in trust for the benefit of any parties who might be entitled to the estate, but to the insolvent's wife, who was the tenant for life of the residue. *Held* that, in the absence of any proof of fraud, the widow's continuous and adverse pos-

LIMITATION ACT, 1877, art. 144—*continued.*

2. ADVERSE POSSESSION—*continued.*

session for more than twelve years barred the suit. COCHRANE *v.* HURROSOONDERY DEBIA [4 W. R., P. C., 103 : 6 Moore's I. A., 494

25. ——— *Adverse possession.—Joint entry of names.*—In a suit by a Hindu widow for a declaration of right and title to dhurmutter land of which she asserted she had always been in possession, but which defendant had got registered in his own name as well as in hers, and claimed to have been in possession of with his father since the death of the husband,—*Held* that the entry of plaintiff's name conjointly with defendant's was a declaration of at least joint title such as nullified a plea of bar by limitation by adverse possession. DEEPO DEBIA *v.* GOBINDO DEB . . . 16 W. R., 42

26. ——— *Suit by widow for share on partition of husband's estate.—Adverse possession.*—In a partition suit by a widow for the recovery of her husband's share of property, held during his lifetime jointly with his brother, although such suit be brought more than twelve years after her husband's death, her claim is not barred by the Statute of Limitations, unless the brother has for a period of twelve years before suit held adversely to her. KISTOMONEE CHOWDHRY *v.* SIBCHUNDER CHOWDHRY . . . Marsh., 196 : 1 Hay, 473

27. ——— *Adverse possession.*—A Hindu of Tirhoot died in 1849, leaving two widows and a brother. A compromise was made by the three, whereby they agreed that the brother should remain in possession of the property left by the deceased, and that some land should be assigned to the widows for maintenance. The elder widow died in 1867, and the younger sued the heirs of the brother for recovery of possession of the property. The defence set up was that the suit was barred by limitation, as her cause of action arose not on the death of her co-widow, but on the death of her husband. *Held* that, as to recovery of possession of a moiety of the property, the cause of action arose on the death of the co-widow; that the possession of the elder widow was not adverse to the younger widow, as the elder widow was permitted to enjoy the possession of the husband's property during her lifetime, the younger widow receiving an allowance from the profits of the estate. INDUBANSI KUNWAR *v.* GRIBHIRUN KUNWAR . . 3 B. L. R., A. C., 289

S. C. JUDOOBANSEE KOER *v.* GIRBHIRUN KOER [12 W. R., 158

28. ——— *Hindu widow.—Adopted son.—Possession.*—A Hindu died after leaving directions to his widow to adopt a son. Upon a partition of the joint property amongst his brothers and widow, a certain property was allotted to his widow as her share of the joint property. Afterwards, in 1849, his brothers dispossessed the widow. In 1851 she adopted a son, who attained his majority in 1865, and in 1866 instituted the present suit for possession of the property. *Held* that the suit was barred

LIMITATION ACT, 1877, art. 144—*continued.*

2. ADVERSE POSSESSION—*continued.*

by lapse of time. GOBIND CHANDRA SARMA MAZOOMDAR *v.* ANAND MOHAN SARMA MAZOOMDAR [2 B. L. R., A. C., 313

29. ——— Two sisters, *B.* and *P.*, not being heirs, took possession of ancestral property as heirs on the death of their mother *H.* After a few years they quarrelled. *P.* adopted a son, and executed a deed of gift in his favour. *B.* claimed the whole property through her deceased husband as heir of *B. M.*, who, again, was heir of the maternal uncle, on whose death *H.* had succeeded. *Held* that, in the absence of any agreement creating a life-estate in favour of the two sisters, the cause of action of the collateral heirs arose from the time that *P.* quarrelled with her sister and adopted a son. BUNGSEEDHUR GHOSE *v.* TARINEE CHURN SINGH . . 3 W. R., 195

SHAMA SOONDERY DOSSEA *v.* TARINEE CHURN SINGH . . . . 3 W. R., 194

30. ——— *Impartible zemindari.—Succession.—Adverse possession by one branch of family.*—Upon the death of *G.* in 1829, the impartible zemindari of Sivaganga, which had been acquired by him, was taken possession of by the representative of his older brother, *O.*, from whom it was recovered by *K.*, the daughter of *G.*, in 1863 by suit. From that date until her death in 1877, the estate remained in the possession of *K.* It was subsequently recovered by suit from her sons by the defendant (the son of her elder sister), as being the eldest surviving grandson of *G.* The plaintiff, alleging that he was the third son of *N.*, who was the second son of *G.* by his wife *M.*, and that he and not the defendant was the eldest surviving grandson of *G.*, sued in 1881 to recover the estate from the defendant. Admitting that he was born in the lifetime of *G.*, the plaintiff pleaded that it was not open to him to sue for the estate until the year 1870, when his father, his elder brothers, and a son of his father's elder brother had all died. *Held* that from 1829 limitation began and continued to run against the descendants of *M.* VIJAYASAMI *v.* PERIASAMI . I. L. R., 7 Mad., 242

31. ——— *Widow in possession of estate for dower.—Suit by heirs for possession.—Adverse possession.*—If a Mahomedan widow, without the consent of the heirs, takes possession of her husband's estate in satisfaction of her dower, and continues to hold it for forty years, the heirs of her husband cannot intervene; and their claim must be brought within twelve years, unless they prove that the possession of the widow as to their shares was permissive or fiduciary possession. OOMRAO BEGUM *v.* HAMID JAN . . . . . 3 Agra, 279

32. ——— *Suit for possession of jungle lands.—Evidence of ownership.*—In a suit for possession of jungle lands, where there is no proof of acts of ownership having been exercised on either side, possession must be presumed to have continued with the person to whom they rightfully belong. A suit, therefore, held not to be barred even if plaintiffs

**LIMITATION ACT, 1877, art. 144**—*continued.*

2. ADVERSE POSSESSION—*continued.*

failed to prove any acts of ownership, unless the defendants made out a case of twelve years' adverse possession. LEELANUND SINGH *v.* BASHEEROONISSA [16 W. R., 102

*See* SUNNUD ALI *v.* KURIMOONISSA [9 W. R., 124

MOOCHEE RAM MAJHEE *v.* BISSAMBHUR ROY CHOWDHRY . . . 24 W. R., 410

33. ——————— *Possession of ijaradar. Effect of dispossession on zemindar.*—The zemindar or owner is bound by the dispossession suffered by his ijaradar. BRINDABUN CHUNDER SIRCAR CHOWDHRY *v.* BHOOPAL CHUNDER BISWAS . 17 W. R., 377

34. ——————— *Confirmation of title.—Cause of action.*—The plaintiff sued for confirmation of his title to, and for possession of, a jote in the Nowabad mehal, deriving his title under a pottah from the ijaradar. The defendant's case was that he had bought the lands as a talook, and been in possession accordingly; but finding that the lands had been surveyed as a part of the Nowabad mehal, he took a pottah from the ijaradar four years previous to the plaintiff's pottah. The defendant's pottah was found to be a forgery. *Held* that the plaintiff's cause of action arose solely from the title set up by the defendant under the pottah derived from the ijaradar, and not from the date when the defendant purchased the lands as a talook. SHAHABOODEEN *v.* NADUROOJUMA . . . . 12 W. R., 44

35. ——————— *Lessee under Government.*—*A.* claimed certain immoveable property as lessee, under a Government settlement made in 1859. *B.* had been in possession for more than twelve years before the institution of the suit. *Held* that the suit was barred under clause 12 of section 1. ASU MIA *v.* RAJU MIA [1 B. L. R., A. C., 34 : 10 W. R., 76

36. ——————— *Landlord and tenant.—Suit for possession.—Cause of action.*—The plaintiff stated that in the year 1862 he purchased a talook in which some of the defendants then held an ijara for a term of years expiring in 1868. The talook had previously been a khas mehal in the possession of the Government, and was bought by the plaintiff at an auction sale held by the Collector. The plaintiff also stated that the ijaradar defendants, in collusion with the other defendants, had continued in possession of the lands held in ijara after the term of the ijara had expired, and had refused to give up possession thereof to the plaintiff. The Judge of the lower Appellate Court found that the defendants (other than the ijaradars) had been in possession previously to the sale in 1862, and he also found that there was no evidence to support the charge of collusion with the ijaradar defendants. He therefore dismissed the suit (which was brought in 1880) on the ground of limitation. *Held*, on second appeal, that the plaintiff's cause of action arose on the expiration of the ijara, and that the suit, whether governed by article

**LIMITATION ACT, 1877, art. 144**—*continued.*

2. ADVERSE POSSESSION—*continued.*

139 or 144 of the Limitation Act, Act XV of 1877, was not barred on the ground of limitation. *Woomesh Chunder Goopto* v. *Raj Narain Roy, 10 W. R., 15,* cited. KRISHNA GOBIND DHUR *v.* HARI CHURN DHUR [I. L. R., 9 Calc., 367 : 12 C. L. R., 19

37. ——————— *Landlord and tenant.—Adverse possession.—Trespasser.*—A defendant has a right to set up the plea of tenancy and at the same time to rely on the Statute of Limitations. The plaintiff sued to recover possession of certain land. The defendant pleaded that it was included in a permanent lease granted to him in 1849 by the plaintiff's predecessor in title, and that the suit was barred by the Law of Limitation. It was found at the hearing that the land was not included in the lease. It appeared that there were disputes between the parties about the land since 1856, each asserting his own right to it. It was contended for the plaintiff that inasmuch as the defendant had claimed the land as a tenant, his possession was not adverse under article 144 of the Limitation Act, XV of 1877. *Held* that, under the circumstances, the defendant's possession was adverse. The defendant was a trespasser, setting up a pretended tenancy which the plaintiff denied throughout. The case, therefore, was to be regarded as one against a trespasser, and not as one between landlord and tenant. *Dinomoney Dabea* v. *Doorgapersad Mozoomdar, 12 B. L. R., 274,* followed; and *Tekaitne Gowra Kumari* v. *Bengal Coal Company, 12 B. L. R., 282, note,* distinguished. MAIDIN SAIBA *v.* NAGAPA . . . I. L. R., 7 Bom., 96

38. ——————— *Adverse possession.—Landlord and tenant.*—The plaintiffs sued for possession of a third share in certain immoveable property, alleging that they were entitled to it under an agreement dated the 1st December 1848, and executed by one Balaji, deceased. By that document Balaji appointed as successors to his estate, after his death, three persons, *B.*, *R.* (plaintiff's father), and *S.*, on condition that they should maintain him during the remainder of his life, pay off his debts, and perform his obsequies. Accordingly one of the three donees, *B.*, lived with Balaji, and managed the property. Balaji died in 1852. *B.* continued to manage the property till his own death in 1865, when *B.'s* eldest son took up the management, and he and the other heirs of *B.* subsequently sold a portion of the property. The suit was principally against the sons and heirs of *B.* and the purchaser. The plaint was filed on the 8th September 1873, and alleged (*inter alia*) that *B.* managed the property as trustee. The defence substantially was that *B.* held it exclusively as owner and not as trustee, and that the suit was barred by limitation. Both the lower Courts dismissed the suit as barred by limitation, holding that *B.'s* possession was adverse, and that *R.* had no possession or enjoyment within twelve years previously to the institution of the suit. On appeal to the High Court, —*Held* that *B.'s* possession, whether it commenced before the death or only on the death of Balaji, was

**LIMITATION ACT, 1877, art. 144**—*continued.*

2. ADVERSE POSSESSION—*continued.*

held, after that event, consistently with and in fulfilment of the agreement. *B.* having entered into possession and been left in possession in the first instance in accordance with the contract, could not change the character of the possession by his mere will. He did not intimate to *R.* or *S.* that he repudiated the contract and intended to go into possession in opposition to any rights which they might assert. As he entered and continued to hold in a character consistent with the subsistence of their rights, they were never called on to eject him, or by any other process to establish rights which were not denied. While there subsisted any contract, express or implied, between the parties in and out of possession to which the possession might be referred as legal and proper, it could not be pronounced adverse. DADOBA *v.* KRISHNA . . . . . **I. L. R., 7 Bom., 34**

TATIA *v.* SADASHIV . **I. L. R., 7 Bom., 40**

**39.** ———— *Ijaradar, Dispossession of.—Adverse possession.—Zemindar, Suit by.*—Possession taken by a trespasser during the currency of an ijara lease does not become adverse to the zemindar (lessor) until upon the expiration of the term, and a suit for possession may be brought within twelve years of that date under the provisions of article 144 of the Limitation Act. *Krishna Gobind Dhur* v. *Hari Churn Dhur, I. L. R., 9 Calc., 367,* followed. SHABAT SUNDARI DABIA *v.* BHOBO PERSHAD KHAN CHOWDHURI . . **I. L. R., 13 Calc., 101**

**40.** ———— *Adverse possession of limited interest in land.*—The manager of a Nambudri family in Malabar having demised certain land on kanam in 1868, was removed from his position as manager in 1875. In 1883 his successor sued to eject the kanam-holders. *Held* that the suit was barred by limitation. MADHAVA *v.* NARAYANA **[I. L. R., 9 Mad., 244**

**41.** ———— *Adverse possession.—An outside person claiming an interest in an estate together with an undivided family.—Inheritance to such owners.*—In a family of three undivided brothers, an estate was purchased by the eldest as manager, on whose application a fourth party, a sister's husband, was recorded in the revenue records as a co-proprietor with them. The latter, even if he by joining in the purchase had become entitled to an undivided fourth share in the estate, did not thereby become a member of the undivided family; and the members of it would not have had a right to succeed to his fourth share, which would have descended to his own heirs; the other three fourths which he would not have inherited going by survivorship among the members of the family. A son of the eldest brother obtained, by the deaths of his father and uncles, sole possession of the whole estate. *Held* that he did not take the one fourth share above mentioned by any right of inheritance, and that in the absence of proof that his possession of it was by authority of the fourth recorded co-proprietor, his possession must be presumed to have been adverse to the latter and to any one claiming through him. It followed that a suit to obtain

**LIMITATION ACT, 1877, art. 144**—*continued.*

2. ADVERSE POSSESSION—*continued.*

from those claiming through the son, who was now dead, the one fourth share, brought more than twelve years after possession taken by the son, by a purchaser relying on a title through the fourth co-proprietor, was barred by limitation under article 144 of the second schedule of Act XV of 1877. RAMALAKSHAMMA *v.* RAMANNA . **I. L. R., 9 Mad., 482**

S. C. COLLECTOR OF GODAVERY *v.* ADDANKI RAMANWA PANTULU . **L. R., 13 I. A., 147**

**42.** ———— *Suit for possession.*—On the 7th December 1863, *A.*, in execution of his decree, purchased and obtained symbolical possession of a certain 4 annas share, the property of his judgment-debtor. The 4 annas share was at the time under a mortgage to *B.*, who happened to be in possession of the share as lessee. The term of the lease expired in 1870 or 1871. *A.*, *C.*, and *D.*, who were members of a Hindu joint family, afterwards came to a partition of their common estate in which was included the 4 annas share, and one of them, *D.*, sold his share in the 4 annas to *B.*, who, on the 22nd December 1871, purchased it in the name of *E.* *B.* then brought a suit to enforce his mortgage against *F.*, the heir of his mortgagor, and on the 8th December 1873 obtained a decree, which on special appeal was confirmed by the High Court on the 21st December 1875. On the 6th December 1875, *A.*, *C.*, and *E.* had brought a suit for the possession of the 4 annas share against one Mukund Kishore, who had wrongfully taken possession of the property in 1870 or 1871, soon after the expiration of the lease to *B.* The suit was finally decided in their favour on the 29th July 1879. In the meantime,—that is, somewhere in 1876,—*B.* had contrived to take possession of the whole share. In 1883 symbolical possession was obtained under the decree of the 29th July. *B.* then executed his mortgage decree, and attached the 4 annas share, excluding the portion which stood in the name of his benamidar. *Z.*, the heir of *A.*, having failed to make good his claim to a share of the property in the execution proceedings, now brought a suit for possession against *B.* on the 19th July 1884. *Held* that the suit, having been brought within twelve years from the date of the fraudulent possession by *B.*, was in time, and fell under article 144 of the Limitation Act. RAM KISHORE GANGAPADHYA *v.* BANDIKARATAN TEWARI CHOWDHRY . **I. L. R., 13 Calc., 203**

**43.** ———— *Suit to recover possession from mortgagees.*—The defendant was in possession of three fields (Survey Nos. 222, 360, 372) as mortgagee under mortgages executed by one *G.*, who was the plaintiff's guru and his predecessor in office as jairgam or presiding Lingayat priest of the math. *G.* died in 1874, and the present suit was brought in 1882 to recover possession of the fields on the ground that *G.* was not competent to alienate them. Two of these fields had been originally mortgaged by *G.* to one *S.* in 1863. In July 1866 a fresh loan on the security of the same land was obtained from *D.*, the son of *S.*, and the first mortgage deed was then superseded by one executed in favour of *D.* In 1871

**LIMITATION ACT, 1877, art. 144**—*continued.*

2. ADVERSE POSSESSION—*continued.*

*D.* assigned his mortgage to the defendant. It was contended that the plaintiff's claim to these two fields was barred, as the mortgage to *D.* was more than twelve years anterior to the suit. *Held* that the suit was not barred, as the cause of action accrued to the plaintiff on *G.'s* death, and the suit was brought only eight years after that event. JAMAL SAHEB *v.* MURGAYA SWAMI . **I. L. R., 10 Bom., 34**

**44.** ——————— *Adverse possession.—Benamidar.*—In a suit against a purchaser at a sale under Act XI of 1859, section 13, the plaintiff claimed to have an incumbrance by virtue of two mokurrari pottahs executed by the heirs of the last of a series of benamidars, and it appeared that the last benamidar had actual ownership of one fourth of the property comprised therein. *Held* that the incumbrance was good to the extent of such fourth, and that the claim was not barred by article 144 of Act XV of 1877. IMAMBANDI BEGUM *v.* KUMLESWARI PERSHAD

**[L. R., 13 I. A., 160: I. L. R., 14 Calc., 109**

**45.** ——————— *Adverse possession.—Under-tenure granted under ghatwali tenure.*—A judgment in a suit regarding conflicting claims made by a ghatwal and the under-tenure-holders to receive certain compensation-money which had been paid in respect of lands in part comprised in the under-tenure, determined that the ghatwal was entitled to the money, the under-tenure-holders having been in possession of the lands by the mere sufferance of the ghatwal, who could put an end to the tenure at any time. In a suit brought by the ghatwal to resume, as determinable at will, the under-tenure which had been granted by one of his ancestors of land, part of the ghatwali mehal, limitation was set up in bar of the suit. *Held* that, after the creation of the under-tenure, as long as there was no dispute or conflicting claim, the possession of it was not adverse to the ghatwal; and proceedings, either between the ghatwal or between under-tenure-holders on the one side and creditors on the other, could not be taken to show an assertion of right by either of the parties now in litigation, as against one another. There being nothing else to render the possession adverse, limitation only commenced at the date of the above-mentioned claim to the compensation-money which was made less than twelve years before the present suit was brought; and accordingly the suit was not barred. RAM CHUNDEE SINGH *v.* MADHO KUMARI

**[I. L. R., 12 Calc., 484: L. R., 12 I. A., 188**

reversing on this point the decision of the High Court in MADHO KOOERY *v.* RAM CHUNDER SINGH

**[I. L. R., 9 Calc., 411**

**46.** ——————— *Possession by mortgagee.*—Where plaintiff's ancestors mortgaged land and the mortgagee obtained possession on condition that the produce should extinguish interest,—*Held* that the plaintiff's suit was not barred by the Law of Limitation, although the transaction took place twelve years before the passing of Regulation II of 1802. *Held*, also, that in such a case no cause of action could

**LIMITATION ACT, 1877, art. 144**—*continued.*

2. ADVERSE POSSESSION—*continued.*

accrue until something was done to render the friendly possession hostile. VANNERI PURUSHOTTAMAN NAMBUDRI *v.* PATANATTIL KANJU MENAVAN

**[2 Mad., 382**

**47.** ——————— *Suit for possession of immoveable property.—Adverse possession.*—*I.* died in 1861, leaving a zemindari estate, a moiety of which at the time of his death was in the possession of a mortgagee. On the death of *I.* the defendants in this suit, who were among his heirs, caused their names to be recorded, as his heirs, as the proprietors of such estate, to the exclusion of the plaintiff in this suit, who was his remaining heir; and they appropriated to their own use continuously for more than twelve years the profits of the unmortgaged moiety of such estate, and the malikana paid by the mortgagee of the mortgaged property. In 1877 the defendants redeemed the mortgage of the mortgaged moiety of such estate from their own moneys. In 1878 the plaintiff sued for the possession of her share by inheritance of such estate. *Held* (SPANKIE, *J.*, doubting), with reference to the mortgaged moiety of such estate, that the possession of the defendants in respect of such moiety did not become adverse, within the meaning of article 144 of schedule II of Act XV of 1877, on the death of *I.* in 1861, but on the redemption of such moiety in 1877—"adverse possession" under that article meaning the same sort of possession as is claimed,—that is to say, in this case, full proprietary possession, which was not the nature of the possession of the defendants until the redemption of the mortgage; and the suit, therefore, in respect of such moiety, was within time. UMR-UN-NISSA *v.* MUHAMMAD YAR KHAN

**[I. L. R., 3 All., 24**

**48.** ——————— *Adverse possession.*—On the 6th September 1865, *B.* obtained a putni lease of certain land from the zemindar, and at an auction sale by the Sheriff of Calcutta on the 21st February 1867, the zemindar's interest was knocked down to *B.*, and a conveyance of the property to him was executed by the Sheriff on the 1st April 1867. On the 13th March 1879, a suit for khas possession was brought against *B.* by *C.*, who had bought the property at a sale in execution of a decree made on a mortgage thereof, the date of the mortgage being 11th January 1865, and the date of the decree being 30th November 1865. *B.* pleaded adverse possession. *Held* that *B.'s* possession as putnidar only could not be considered as adverse to *C.*, who claimed the superior interest; that *B.'s* possession as purchaser could not be considered to have commenced before the date of the conveyance to him by the Sheriff,—namely, the 1st of April 1867; and that, therefore, the plea of adverse possession was bad, since the suit had been instituted within twelve years of that date. KASUMUNNISSA BIBEE *v.* NILRATNA BOSE

**[I. L. R., 8 Calc., 79: 9 C. L. R., 173**
**10 C. L. R., 113**

**49.** ——————— *Adverse possession.—Suit for possession of mortgaged property.*—Where there

**LIMITATION ACT, 1877, art. 144**—*continued.*

2. ADVERSE POSSESSION—*continued.*

was nothing to show whether the family had been a joint or a divided family, and where the suit was not against a mortgagee, but, before the plaintiff could get at the mortgagee, he had to remove the obstacle presented by the adverse title (based on a twelve years' usufructuary original possession) of the daughter-in-law of the original mortgagor,—*Held* that the limitation applicable to the case was that prescribed by clause 12, section 1, Act XIV of 1859. NUND KOOMAR LALL *v.* SHUMBOO SINGH

[8 W. R., 34

50. ——————— *Mortgagor and mortgagee.—Adverse possession of tortious mortgagee.—Heir of mortgagee, Right of, to redeem.*—Lands descended to three sisters. On a question whether a mortgage of a portion by one of the sisters, thirty years ago, was in her own right, or on behalf of the family, or how otherwise, it appeared that each sister had dealt with several portions as on her own behalf; that one of them was the family manager for joint interests, but she had not interfered in respect of the portion mortgaged. The mortgagee had held and enjoyed from the first, and had assigned absolutely, and the assignee had again assigned absolutely as owner. In execution for the debt of the widow of the mortgagor's son, her right and interest mortgaged in the premises were sold, and the Sheriff's vendee sold to the mortgagee. The son of the surviving sister (not the mortgagor) sued for redemption and possession. *Held* that as his title accrued (on his showing) on his mother's death, at which time defendant's vendors held adversely, no mortgage relation had been established as between plaintiff and defendants; and more than twelve years having elapsed before suit, the suit was not maintainable. SREEMULMONEY BEBEE *v.* GOBERDHONE BERMONO

[2 Ind. Jur., N. S., 319

51. ——————— *Cause of action.—Adverse possession.*—*R.* obtained, on 7th January 1862, a decree declaring a deed of sale of an estate in his favour, dated 7th January 1854, to be a genuine, authentic, and valid instrument. In the meantime the plaintiff had acquired possession of the estate under a farm from Government, which farm expired in 1872. In a suit for possession based on the deed of sale and the decree of 1862,—*Held* that the period of limitation of the suit began to run from the termination of the farming tenure, when only the vendors or their representatives could have obtained adverse possession. DHUNDI *v.* RAM LALL

[7 N. W., 149

52. ——————— *Transfer of rights.—Dispossession of ijaradar.*—After adverse possession of immoveable property for more than twelve years, a new period of limitation cannot commence to run by the mere circumstance of a transfer of rights or supposed rights or relinquishment. BRINDABUN CHUNDER SIRCAR CHOWDHRY *v.* BHOOPAL CHUNDER BISWAS . . . . . 17 W. R., 377

**LIMITATION ACT, 1877, art. 144**—*continued.*

2. ADVERSE POSSESSION—*continued.*

53. ——————— *Adverse possession.—Transferee from defendant not a party to suit.*—*A.* took and held possession of land adversely to *B.*, and afterwards let it in putni to *C.* *B.* brought a suit for possession against *A.*, and, having obtained a decree, attempted to execute it by turning *C.* out of possession. Between the date on which *A.* originally took adverse possession of the land and the date on which *B.* attempted to turn *C.* out of possession, more than twelve years elapsed. *Held* that *B.'s* claim against *C.* was was barred by limitation; and that he was not bound by the decree obtained by *B.* against *A.*, not having been made a party to the suit. MOHENDRO NATH MUKERJEA *v.* NAFFUR CHUNDER PAL CHOWDHRY

[1 C. L. R., 537

54. ——————— *Adverse possession.—Suit to recover possession of property sold at execution sale.*—The plaintiff and two other members of his family, *M.* and *S.*, held a zemindari in the following shares, *viz.*: the plaintiff ten annas, *M.* two annas, and *S.* four annas. Having first held the land ijmali, or joint, they agreed, in the year 1839, to effect a butwara, or private partition, and of this the result was, that parcels of land representing his ten annas share were allotted to the plaintiff, and other parcels representing their shares, which together made six annas, were allotted to *M.* and *S.*, who held jointly. *M.* died in 1842, and his share came to the plaintiff. The four annas share of *S.* was sold in execution of a decree against him in 1856, and the purchaser of it, not accepting the fact of partition, sued both *S.* and the plaintiff in 1858 to have it declared that there had been no partition, and for a declaration of his right to possession of a four annas share of the whole estate. A decree was made to that effect in 1860, and in 1863 an appeal by *S.* alone against this decree was dismissed by the High Court. The purchaser's heirs, he having died, obtained possession of land representing the four annas share under the decree of 1860. *S.* then set up a title to hold part of the lands allotted under the butwara of 1839 to the six annas share, on the ground that they were lakhiraj lands, and distinct from the revenue-paying villages in which his interest had passed under the execution sale. The plaintiff sued, in September 1873, the defendant, who had purchased this last alleged interest of *S.* at another sale in execution of a decree against him, claiming that the partition having been set aside and a four annas share of the whole estate obtained by the purchasers under the decree of 1863, a right accrued to him to have his share, now twelve annas, declared upon the lands which had fallen within the six annas share. He also claimed to have it declared that the parcels alleged to be lakhiraj were not so. On the question of limitation it was held that the 145th article of the second schedule of Act IX of 1871 was applicable; and that even if, technically, the lands now in question remained in the possession of *S.* pending the appeal against the decree of 1860, there was no possession adverse to the plaintiff rendering it necessary for him to assert his right until the

LIMITATION ACT, 1877, art. 144—*continued.*

2. ADVERSE POSSESSION—*continued.*

dismissal of the appeal in 1863. MANWAR ALI *v.* ANNODAPERSAD RAI [I. L. R., 5 Calc., 644: 6 C. L. R., 71 L. R., 7 I. A., 1

55. ——— *Suit by trustee to recover temple lands.—Possession for twelve years by party claiming to be trustee.*—The defendant purchased from one of the two co-trustees of a temple the right to manage the affairs of the temple and enjoy certain land which formed the endowment of the temple, and held possession of the land for more than twelve years. *Held* that a suit by the other trustee to recover the land was barred by limitation. KANNAN *v.* NILAKANDAN . . I. L. R., 7 Mad., 337

56. ——— *Cause of action.—Suit for accretions to tenure.*—The cause of action in respect of accretions accrues from their formation and delivery to the defendant, and a suit brought after twelve years from that time is barred. LUCHMEE NARAIN SHAHA *v.* JUTADHAREE HOLDAR . 7 W. R., 89

Upheld on review in DOYAMOYEE DOSSEE *v.* LUCHMEE NARAIN SHAHA . . . 7 W. R., 457

57. ——— *Suit for division of lands according to custom established in former suit.—Establishment of right.*—A co-owner of village lands sued in 1861 to have them divided among the villagers according to a custom (last observed in 1835) that at the expiration of every twelve years the lands should be redistributed by lot among the co-owners, and to have two of the shares delivered to him as one of such co-owners. In 1851 another co-owner had, in a suit to which some only of the present defendants were parties, obtained a decree for the periodical allotment of the lands; and in 1853 such decree, which clearly recognised the existence and validity of the custom, was affirmed on appeal. *Held* that litigation which commenced in 1851 was sufficient to prevent the Law of Limitation from barring the plaintiff's right to sue, and that the circumstance that some only of the present defendants were parties to such litigation could make no difference with regard to the limitation bar. *Quære,*—Whether, in the absence of such litigation, the Law of Limitation would have been a bar. VENKATASVAMI NAYAKKAN *v.* SUBBA RAU. SANKARA SUBBAIYAN *v.* SUBBA RAU . . . . . 2 Mad., 1

58. ——— *Suit for possession by avoidance of sale-deed.—Cause of action.—Adverse possession.*—The suit was instituted on the 17th of February 1874, the plaintiff claiming the possession of his deceased brother's share in the joint ancestral estate, by avoidance of a sale-deed, dated the 14th of May 1859, on the averment that he and his brother had mortgaged the estate, the mortgagees taking possession; that after his brother's death the defendant *M.*, his widow, had made a sale of the share in favour of the defendant *B.*, who had redeemed the mortgage about five years before suit and obtained possession; and that *M.*, having made a second marriage, had lost her interest in the share. It was held that the suit was barred by limitation under article 145, second schedule, Act IX of 1871, reckoning the period from the date of the sale, from which date *B.* began to hold adversely to the plaintiff. GOBARDHAN *v.* BALMUKAND . 7 N. W., 349

59. ——— *Act IX of 1874, art. 93.—Suit to set aside deed and for possession.*—On the death of *A.*, his property was taken possession of by *C.* under an alleged deed of sale from *A.* *Held* that a suit by *A.'s* heir for possession and to set aside the deed was governed by Act IX of 1871, schedule II, clause 145, and not by clause 93. TRILOCHUN CHATTAPADHYA *v.* NOBOKISHORE GHUTTUCK [2 C. L. R., 10

60. ——— *Suit for cancellation of deed of sale.*—Plaintiff sued for cancellation of the sale of certain lands made to defendants in 1841. In 1843 defendants executed an agreement (A.) to plaintiff, giving her a right of re-purchase. The language of the document was—"If you and your posterity pay in a lump the 175 rupees, we will hand over the lands to you." Upon the question of limitation,—*Held*, in special appeal, that the plaintiff's claim was barred, more than twelve years from the date of the cause of action (1843 at latest) having elapsed before suit. VENKAPPA CHETTI *v.* AKKU [7 Mad., 219

61. ——— and art. 91.—*Suit for possession of immoveable property.—Suit for cancellation of instrument.*—The purchasers at a sale in execution of decree of land sued to set aside an instrument of usufructuary mortgage of the land executed by the judgment-debtor before the sale, and for possession of the land, alleging that the mortgage was fraudulent and collusive. *Held* that, as the main and substantial relief sought was the recovery of possession of immoveable property from persons trespassing on it under the title of a fictitious mortgage, and the declaration of the invalidity of the defendants' pretensions was no more than an incidental step in the assertion of the plaintiffs' title and right to possession, the limitation of twelve years was applicable to the suit. *Tawangar Ali* v. *Kura Mal, I. L. R., 3 All., 394;* S. A. No. 432 of 1882, decided the 11th August 1882, *Weekly Notes, All., 1882, p. 173; Sobha Pandey* v. *Sahodra Bibi, I. L. R., 5 All., 322; Ramausar Pandey* v. *Raghubar Jati, I. L. R., 5 All., 490; Uma Shankar* v. *Kalka Prasad, I. L. R., 6 All., 75;* and the judgment of STRAIGHT, *J.*, in *Hazara Lal* v. *Jadaun Singh, I. L. R., 5 All., 76,* followed. *Bhawani Prasad* v. *Bisheshar Prasad, I. L. R., 3 All., 846;* and *Ashgar Ali* v. *Mahammad Zainulabdin, I. L. R., 5 All., 573,* distinguished. IKRAM SINGH *v.* INTIZAM ALI [I. L. R., 6 All., 260

62. ——— and art. 44.—*Omission to sue within due time to set aside instrument affecting immoveable property.—Suit to recover property.* Where a certain period is allowed by the Law of

**LIMITATION ACT, 1877, art. 144**—*continued.*

2. ADVERSE POSSESSION—*continued.*

Limitation within which an instrument affecting a person's rights or immoveable property must be impugned, and the person whose rights or property are affected fails to impugn such instrument within that period,—*Held* that he will not be precluded from availing himself of the longer period allowed for the recovery of immovable property, provided that he can prove that such instrument is null and void so far as his interests are concerned. RAGHUBAR DYAL SAHU *v.* BHIKYA LAL MISSER . **I. L. R., 12 Calc., 69**

**63.** ——————— *Agreement not to execute decree.—Wrongful execution in breach of agreement—Deed of conditional sale.—Disavowal of trust.*—The plaintiff sued in 1875 to recover possession of immoveable property which the defendant had obtained in 1873, in execution of an *ex parte* decree dated the 8th June 1861. That decree was founded on a deed purporting to be a deed of conditional sale, dated the 24th December 1853, executed by the plaintiff in favour of the defendant. The plaintiff alleged that the deed was executed in order to protect the property against the claims of plaintiff's son, and the plaintiff sought to set it aside on account of defendant's breach of an agreement, dated the 16th January 1856, whereby the defendant stipulated that plaintiff's possession should not be disturbed. The defendant, *inter alia*, pleaded the bar of limitation against plaintiff's suit. *Held* that the suit was not barred by limitation, as plaintiff's cause of action only arose when defendant first practically disavowed the trust by seeking more than nominal execution of decree. PARAM SINGH *v.* LALJI MAL **[I. L. R., 1 All., 403**

**64.** ——————— *Suit for recovery of endowed property.*—In 1801 the shebait and proprietor of the gudi of a debsheba at K. alienated part of the land by deed of gift to *B.* for the purpose of founding a sheba at C, which was accordingly done. In 1823 the then shebait of the debsheba at K. instituted a suit for the recovery of the alienated lands against the then shebait of the sheba at C., and in that suit it was declared that the sheba was independent of the debsheba, and the then plaintiff was referred to a regular suit. In 1861 the then shebait of the debsheba brought a suit for recovery of the lands against the then shebait of the sheba. *Held* that the suit, not having been instituted until after the lapse of more than twelve years from the plaintiff's succession to the sheba, was barred by the Statute of Limitations. *Semble*,—That the Statute of Limitations, Bengal Regulation III of 1793, barred the suit twelve years after the death of *A.* KISSNONUND ASHROM DUNDY *v.* NURSINGH DASS BYRAGEE . . . . . **Marsh., 485**

**65.** ——————— *Religious endowment.—Sale of trust property in execution.—Suit by trustee to recover the property.*—In execution of decrees against the plaintiff, as the representative of his deceased father and brother, certain lands were sold to the first defendant. The plaintiff sued to recover them, alleging that the former owner of the lands had assigned them to his (the plaintiff's) brother and himself (the plaintiff) and their descendants by a deed of gift to perpetuate the worship of the donor's household idol. *Held* that the plaintiff was entitled to recover the property. The gift was a valid one creating a religious endowment under the Hindu law: and that the plaintiff's suit was not to set aside the sale, but was one by the trustee of the endowment to recover the property to which the limitation of twelve years was applicable. RUPA JAGSHET *v.* KRISHNAJI GOVIND . . **I. L. R., 9 Bom., 169**

**66.** ——————— *Suit by mirasidar to recover land resigned to Government by his ancestor.—Cause of action.*—In a suit brought by a mirasidar to recover possession of miras land, which his ancestor had resigned to Government, against a holder to whom Government had subsequently granted it, it was held that the Statute of Limitations commenced to run against the mirasidar and his heirs from the time the miras was signed, and not from the date of the subsequent grant of it by Government. To the validity of the registration of miras land by a mirasidar to Government the consent of his heirs is not requisite. ARJUNA VALAD BHIVA *v.* BHAVAN VALAD NIMBAJI . . . . **4 Bom., A. C., 133**

**67.** ——————— *Suit by mirasidar to recover tenure relinquished and taken up by another.*—Where a mirasidar left his miras in 1850 without executing a razinamah resigning it, and the miras lay waste until 1855, when the defendant took it up and cultivated it, it was held that the cause of action of the mirasidar arose in 1855, when the miras was taken up by the defendant. LAKSHUMAN RAMJI *v.* RAMLAL VALAD MAHIPATA . **6 Bom., A. C., 66**

**68.** ——————— *Adverse possession.—Mokurrari title.—Onus probandi.*—The plaintiff purchased a mouzah from the proprietor in 1869, and now sued to obtain possession from the defendant, who was proved to have held under a ticca lease down to 1856, and who now claimed to hold under a mokurrari lease, which he said was granted by the former proprietor in 1859. The plaintiff failed to prove possession by his vendor within twelve years of suit brought, and therefore the Courts below dismissed his suit. On special appeal it was held that the defendant, before succeeding on the question of limitation, ought to have shown that the plaintiff had notice of the mokurrari title set up. The case was sent back to the Court below to try the validity of that title. DHANUK DHARI SINGH *v.* GARI SINGH **[6 B. L. R., Ap., 151: 15 W. R., 191**

*See* PRAHLAD SEN *v.* RUN BAHADUR SINGH **[2 B. L. R., P. C., 111: 12 Moore's I. A., 289 12 W. R., P. C., 6**

**69.** ——————— *Suit to set aside mokurrari grant.—Notice of claim.—Cause of action.*—In a suit by the guardian of a minor to recover possession of certain lands in her zemindari and to set aside an alleged mokurrari grant, the plaintiff's case was that the defendants had held under a ticca lease, and had

**LIMITATION ACT, 1877, art. 144**—*continued.*

2. ADVERSE POSSESSION—*continued.*

wrongfully held on after its expiration. The defendants set up an old mokurrari grant under which they claimed to hold in perpetuity upon the payment of a fixed rent. The High Court, overruling the decision of the first Court upon the Statute of Limitations, held, and, in the opinion of the Privy Council, rightly, that the statute does not begin to run in favour of the mokurraridar against the zemindar until the latter has had notice that the former claims under a mokurrari grant, and such notice was not given in the present instance twelve years before the commencement of the suit. TEKAETNEE GOURA COOMAREE *v.* SAROO COOMAREE . . **19 W. R., P. C., 252**

Affirming TEKAITNEE GOURA COOMAREE *v.* BENGAL COAL COMPANY
**[13 W. R., 129; 5 B. L. R., 667, note**
**12 B. L. R., 282, note**

**70.** ——————— *Act IX of 1871, art. 135.—Suit for possession after foreclosure proceedings.*—Under the Limitation Act of 1871, a mortgagee who has taken foreclosure proceedings may bring a suit for possession at any time within twelve years from the expiration of the year of grace. Article 135, schedule II of that Act, does not apply to such a case. GHINARAIN DOBEY *v.* RAM MONARUTH RAM DOBEY
**[7 C. L. R., 580: I. L. R., 6 Calc., 566, note**

**71.** ——————— *Suit by mortgagee for possession after foreclosure.*—In a suit by a mortgagee to obtain possession after foreclosure instituted more than twelve years after such mortgagee had, upon default, become, under the words of the deed, entitled to possession, but within twelve years of the date of the expiry of the year of grace granted under the foreclosure proceeding,—*Held*, under section 145 of the Limitation Act, IX of 1871, that the period of limitation must be calculated from the date of the expiry of the year of grace, and not from the time when the default was first made. BURMAMOYE DASSEE *v.* DINOBUNDHOO GHOSE . **I. L. R., 6 Calc., 564**
**[7 C. L. R., 583**

GHINARAM DOBEY *v.* RAM MONARUTH RAM DOBEY
**[I. L. R., 6 Calc., 566, note: 7 C. L. R., 580**

**72.** ——————— *Act XV of 1877, sch. II, art. 135.—Possession under mortgage.*—Under a mortgage deed, which by its express terms allows the mortgagee a right to take possession upon default by the mortgagor in payment of the mortgage-money, the mortgagee, as absolute owner of the property, has twelve years from the time at which his right to possession commences, in which he may bring his suit for possession. But where there is no such stipulation in the mortgage, the right of the mortgagee to take possession does not accrue until after the expiration of the year of grace. MODUN MOHUN CHOWDHRY *v.* ASHAD ALLY BEPAREE
**[I. L. R., 10 Calc., 68: 13 C. L. R., 51**

*See* DENONAUTH GANGOOLY *v.* NURSINGH PROSHAD DOS . **14 B. L. R., 87: 22 W. R., 90**

**LIMITATION ACT, 1877, art. 144**—*continued.*

2. ADVERSE POSSESSION—*continued.*

**73.** ——————— *Suit to set aside alienation by mortgagee.*—The cause of action in a suit by a mortgagor to set aside an alienation by a mortgagee in possession arises from the date of redemption of the property by the mortgagor. ADJOODHYA SINGH *v.* GIRDHAREE . . . **2 N. W., 199**

**74.** ——————— *Suit for redemption against person not claiming under mortgagee.*—When the plaintiff brought the suit for redemption, it was found that the defendant, who was in possession, did not claim under the mortgagee, and that for more than twelve years before the date of the suit he had held possession from the Government by a title adverse to that of the plaintiff. *Held* that the claim was barred under article 145 of Act IX of 1871. The contention that so long as the mortgagor is entitled only to the equity of redemption there can be no invasion of his interest cannot be assented to. There are cases in which the rights and interests of the mortgagor and mortgagee are equally invaded, and in such cases the mortgagor must come into Court within the time allowed for the recovery from trespassers of interests in land. AMMU *v.* RAMAKRISHNA SASTRI
**[I. L. R., 2 Mad., 226**

**75.** ——————— *Suit to set aside sale after conversion from mortgage into sale.*—Where a mortgage is subsequently converted into a sale, the cause of action in a suit to set it aside arises, not at the date of the mortgage, but from the date of the sale, and if within twelve years from that date the suit is in time. IRADAT KHAN *v.* DABEE DYAL
**[1 Agra, 180**

**76.** ——————— *Adverse possession.*—Obstruction to the obtaining possession by a mortgagee under his mortgage by persons who, while claiming a lien on the property, admitted the mortgagor's title to the property,—*Held* not to be adverse possession as against the mortgagee's title as purchaser. PURMANANDDAS JIWANDAS *v.* JAMNABAI
**[I. L. R., 10 Bom., 49**

**77.** ——————— *Adverse possession.—Mortgagor and mortgagee.—Suit by mortgagee for possession of mortgaged property.—Pre-emption.—Purchaser for value without notice.*—Under a registered deed of mortgage dated in May 1869, the mortgagee had a right to immediate possession; but by arrangement between the parties the mortgagors remained in possession, the right of the mortgagee to obtain possession as against them being, however, kept alive. In October 1869 the mortgagors sold the property, and thereupon one *R.* brought a suit to enforce the right of pre-emption in respect of the sale and obtained a decree, and got the property and sold it in 1871 to *D.* In 1883 the mortgagee brought a suit against *D.* to obtain possession under his mortgage. *Held*, with reference to a plea of adverse possession for more than twelve years set up by the defendant, that the position of a person who purchased property by asserting a right of pre-emption was not analogous to that of an auction-purchaser in execution of a decree, but that

**LIMITATION ACT, 1877, art. 144**—*continued.*

2. ADVERSE POSSESSION—*continued.*

such person merely took the place of the original purchaser and entered into the same contract of sale with the vendor that the purchaser was making. There was privity between him and the vendor, and he came in under the vendor, and his holding must be taken to be in acknowledgment of all obligations created by his vendor. *Anundoo Moyee Dossee* v. *Dhonendro Chunder Mookerjee, 14 Moore's I. A., 101 : 8 B. L. R., 122,* distinguished. DURGA PRASAD *v.* SHAMBHU NATH . . . . . **I. L. R., 8 All., 86**

**78.** ——————— *Limitation Act, 1871, arts. 15 and 82.—Suit by minor to set aside alienation of property by guardian.*—A Hindu family being heavily oppressed with debts, ancestral and otherwise, the two elder brothers of the family, for themselves and as guardian of their minor brother, under Act XL of 1858, applied to and obtained from the District Judge an order under section 18 of the Act for the sale of several portions of the ancestral estate, and sold the same under registered deeds signed by the Judge. Within twelve years after the registration, the adopted son of the minor brother brought several suits against the purchasers to set aside the sales and recover back his share of the property, alleging that the two elder brothers had made the sale fraudulently and illegally to satisfy personal debts of their own. *Held* that a suit of this nature was not a suit to "set aside an order of a Civil Court" under article 15, schedule II of Act IX of 1871; nor was it a suit "to cancel or set aside an instrument not otherwise provided for" under article 82, but that it was governed by article 145. SIKHER CHUND *v.* DULPUTTY SINGH

**[I. L. R., 5 Calc., 363 : 5 C. L. R., 374**

**79.** ——————— **and art. 11.**—*Suit for possession.—Civil Procedure Code (Act VIII of 1859), s. 246.—Limitation Act (XV of 1877), sch. II, art. 11.*—Where, in consequence of an adverse order passed under the provisions of Act VIII of 1859, section 246, a suit is [since the Limitation Act (XV of 1877) came into force] instituted to establish the plaintiff's right to certain property and for possession, such suit is not governed by the provisions of article 11, schedule II of Act XV of 1877, but by the general limitation of twelve years. *Koylash Chunder Paul Chowdhry* v. *Preonath Roy Chowdhry, I. L. R., 4 Calc., 610; Matonginy Dassee* v. *Chowdhry Junmunjoy Mullick, 25 W. R., 513; Joyram Loot* v. *Paniram Dhoba, 8 C. L. R., 54;* and *Raj Chunder Chatterjee* v. *Shama Churn Garai, 10 C. L. R., 435,* cited. GOPAL CHUNDER MITTER *v.* MOHESH CHUNDER BORAL

**[I. L. R., 9 Calc., 230 : 11 C. L. R., 363**

BISSESSUR BHUGUT *v.* MURLI SAHU

**[I. L. R., 9 Calc., 163 : 11 C. L. R., 409**

**80.** ——————— **and art. 136.**—*Suit to obtain possession of land from vendor who has been dispossessed and subsequently recovered possession.—Possession, Suit for.*—A vendor who was at the time out of possession of certain immoveable property

**LIMITATION ACT, 1877, art. 144**—*continued.*

2. ADVERSE POSSESSION—*continued.*

——————— **and art. 136**—*continued.*

sold a share in it to a purchaser by a kobala. After the date of the sale the vendor recovered possession, and the purchaser, within twelve years of the vendor's having so recovered possession, but more than twelve years after he had been originally dispossessed, instituted a suit to obtain possession of the share covered by the kobala. *Held* that the suit was governed by article 144 and not article 136 of schedule II of the Limitation Act (XV of 1877), and was not barred by limitation. Article 136 does not apply to a suit brought against a vendor himself when he recovers possession. RAM PROSAD JANNA *v.* LAKHI NARAIN PRADHAN . . . **I. L. R., 12 Calc., 197**

**81.** ——————— *Suit by auction purchaser to set aside alienation by judgment-debtor.*—An auction-purchaser can sue to set aside any alienation made by the judgment-debtor previously to the sale in execution which he thinks to be collusive. BAICHOO *v.* HOWARD . . . . . **3 Agra, 15**

The cause of action in such a suit runs from the date of transfer, and the suit is barred after the expiration of twelve years, unless the transfer was actually fraudulent. NARAIN DASS *v.* NIDDHA LALL

**[3 Agra, 19**

**82.** ——————— *Purchaser at sale for arrears of revenue.—Shikmi talook.*—*A.* purchased a zemindari of which certain mouzahs were claimed and taken possession of by *B.* and *C.*, as mokurrari holders of a shikmi talook created by the former zemindar before the Decennial Settlement. To a suit by *A.* for the recovery of the lands, *B.* and *C.* pleaded limitation, calculating the period from the time of the purchase in 1833. *Held* that limitation must be computed, not from the time of the purchase, but from the time when possession was taken from the purchaser. WISE *v.* BHOOBUN MOYE DEBIA

**[3 W. R., P. C., 5 : 10 Moore's I. A., 165**

**83.** ——————— *Suit by purchaser to compel zemindar to register transfer.*—Where a zemindar refuses to register a transfer on the application of a purchaser, the latter's cause of action in a suit to compel him to do so arises from the time of such refusal, and not from the time when his title accrued by his purchase. RADHIKA PERSHAD SHADHOO *v.* GOOROO PROSUNNO ROY . **20 W. R., 125**

**84.** ——————— *Rights of.—Limitation.*—One of four children set up a deed of gift and a will, in virtue of which he was, in 1842, placed, by a summary proceeding of the Courts, in possession of the whole estate left by his deceased father. The rights and interests of two other children were subsequently sold in execution of a decree for debt, and purchased by the present plaintiffs. A fourth child instituted a suit against the first-mentioned one, to set aside the deed of gift and will, the result of which was that, in 1855, the will, which affected two thirds of the estate, was set aside as having been made without due consent of heirs, the consent alleged in the will being

**LIMITATION ACT, 1877, art. 144**—*continued.*

2. ADVERSE POSSESSION—*continued.*

held to be no consent. The plaintiffs now sued to get possession of the shares of the two children whose rights and interests they had bought. *Held*, reversing the decision of the High Court, that the plaintiffs, as purchasers at an execution sale, were in no better position than claimants under any other conveyance or assignment, and their cause of action arising in 1842 they were barred by limitation. ENAYET HOSSEIN *v.* GRIDHARI LALL

[2 B. L. R., P. C., 75: 11 W. R., P. C., 29
12 Moore's I. A., 366

85. ——————— *Suit to recover land sold in execution of decree.—Possession.*—The purchaser at a sale held on the 14th September 1881 in execution of a decree in the form of a money-decree, obtained upon a mortgage bond executed by the father of a Mitakshara joint family during the minority of his only son, having failed to obtain possession of the property mortgaged, brought a suit for possession, and under a decree made in that suit obtained possession in November 1866. In July 1878 the wife and son of the judgment-debtor brought a suit to recover possession from the purchaser of two thirds of the property, on the ground that the auction-purchaser was entitled only to the share of the mortgagor. *Held* that the suit, having been brought within twelve years from the date on which the defendant obtained possession, was not barred by limitation. MUNBASI KOER *v.* NOWRUTTON KOER . 8 C. L. R., 428

86. ——————— *Settlement by revenue authorities.*—Where the defendants, who were, at the settlement in 1841, when the estate was farmed out, recorded as proprietors by the revenue authorities, did not hold proprietary and adverse possession till the expiry of the farming lease. *Held* that the plaintiffs' suit was not barred by limitation as not having been brought within twelve years after 1841. RAMAISHER SINGH *v.* SAIVA ZALIM SINGH

[2 Agra, 8

87. ——————— *Settlement by revenue authorities.—Co-sharer.*—In a case in which, after resumption, one of several shareholders, for himself and the others, took a settlement from Government, the right of any other shareholder to the property under the settlement accrued from the date of settlement; and a suit within twelve years of that time was not barred. BUNWAREE SINGH *v.* RAMANOOGRA SINGH

[10 W. R., 14

88. ——————— *Suit for confirmation of partition.—Cause of action.—Limitation.*—Where there had been a private partition of an estate, and the several shareholders had held their lands in accordance therewith, an application was made by some of the shareholders to the Collector to have a fresh partition made as if the whole lands were held jointly. Plaintiff, who was also a shareholder, objected, but his objection was overruled. Thereupon he brought a suit for confirmation of the partition, and for an injunction to stay the partition pending before the Collector. *Held* that the plaintiff's cause of action against the defendants arose upon their moving the Collector to interfere with the first partition, and that the period of limitation in respect of such cause of action was the same as in any other suit for determining the rights of parties to immoveable property. KHOOBUN *v.* WOOMA CHURUN SINGH

[3 C. L. R., 453

89. ——————— *Cause of action.—Suit for possession and declaration of right to participate in permanent settlement of a mehal resumed under Beng. Reg. II of 1819.*—Chur land was held by the proprietors of the adjoining estate. The chur was resumed by Government in 1835, and declared to be liable to assessment under Regulation II of 1819. The recorded proprietors of the adjoining permanently-settled estate, to which the chur was a contiguous accretion, refused to make a permanent settlement with Government at the rent demanded. The chur was then held khas by Government for some time, and subsequently leased out for temporary periods to strangers. In these temporary leases Government reserved the proprietor's rights to come in and take a permanent settlement on the expiry of the temporary settlements, and also reserved an allowance of ten per cent. on the rent as malikana on their account, which sum had been kept in deposit in the Collectorate treasury. In 1867 Government made a permanent settlement with the defendant, one of the recorded proprietors of the contiguous estate, of the entire chur, and refused the application of other shareholders in the estate to be joined in the settlement. The Collector, at the request of the defendants, applied the deposit in his treasury in satisfaction of the Government revenue. An unsuccessful shareholder brought a civil suit against the defendant for possession and a declaration of his right to participate in the settlement. *Held* that the suit was not barred, as the period of limitation commenced from the date of the settlement with the defendant. KRISHNA CHANDRA SANDYAL CHOWDRY *v.* HARISH CHANDRA CHOWDRY

[8 B. L. R., 524

S. C. KRISTO CHUNDER SANDYAL *v.* KASHEE KISHORE ROY CHOWDHRY . 17 W. R., 145

KRISTO CHUNDER SANDEL CHOWDHRY *v.* SHAMA SOONDUREE DEBIA CHOWDHRAIN

[22 W. R., 520

90. ——————— and art. 113.—*Suit for possession of land based on compromise.—Specific performance.*—A suit for recovery of possession of land, based on a compromise effected in the course of previous litigation between the parties, is not a suit for specific performance of contract, but a suit for "immoveable property," and would be covered, not by section 113 of the schedule to the Limitation Act, but by section 145. In a suit for recovery of possession based on an agreement to surrender possession, the possession of defendants at the time when they made the agreement to deliver over the land to the plaintiff cannot be taken as hostile to the plaintiff, but can only be considered adverse to

**LIMITATION ACT, 1877, art. 144**—*continued.*

2. ADVERSE POSSESSION—*continued.*

——————— **and art. 113**—*continued.*

plaintiff from and after the date of the agreement by reason of defendant's refusal to carry out the promise. BETTS *v.* MAHOMED ISMAEL CHOWDHRY [25 W. R., 521

**91.** ——————— *Vendor and purchaser.—Transfer of immoveable property—Specific performance of contract.—Limitation Act, 1877, arts. 113, 136.*—On the 27th October 1865 the vendor of certain immoveable property executed a conveyance of such property to the purchasers. On that date the vendor was not in possession of the property, although his title to it had been adjudged by a decree against which an appeal was pending. The conveyance did not contain any express promise or undertaking on the vendor's part to put the purchasers into possession. On the 24th February 1870 the vendor obtained possession of the larger portion of the property, and on the 23rd August 1872 of the remainder. On the 5th October 1877 the purchasers sued the vendor for the possession of the property, stating that "possession was agreed to be delivered on the receipt of possession by the vendor," and that the cause of action was that the vendor had not put them into possession. *Held* that the suit was not one for the specific performance of a contract to deliver possession, to which article 113 of schedule II of Act XV of 1877 was applicable, but one to obtain possession in virtue of the right and title conveyed to the purchasers, to which either article 136 or 144 of schedule II of that Act was applicable; and that, whichever of them was applicable, the suit was within time. SHEO PRASAD *v.* UDAI SINGH [I. L. R., 2 All., 718

**92.** ——————— *Suit to declare will invalid.—Reversioner.*—Suit by *A.*, a Hindu lady and daughter of *B.*, to declare invalid a will of *B.* made in favour of *C.*, a relative. It appeared that *D.*, the widow of *B.*, instituted proceedings against *C.*, the devisee, in which she claimed the property of *B.* Subsequently the widow, by a deed of compromise, admitted the rights of *C.* and abandoned her own. *Held* (*per* SETON-KARR, *J.*) that limitation in the present suit by *A.* against *C.*, the devisee, ran from the date on which the widow admitted the devisee's rights, and not from any prior date, as during the period of the widow's dispute with the devisee she was protecting the interests of *C*, who claimed to be the reversioner, who would not have been heard in the matter, and had no right to sue during the pendency of such litigation. SOUDAMINEE DOSSEE *v.* BISTOO NARAIN ROY . . 8 W. R., 323

——————— **art. 145 (1871, art. 147; 1859, s. 1, cl. 15).**

*See* ART. 62 (1871, ART. 60). [25 W. R., 415

*See* ART. 148 . I. L. R., 10 Calc., 73

1. ——————— *Deposit.—Demand.—Cause of action.*—The plaintiff, on leaving Calcutta in 1850, deposited a sum of money with *A.*, *B.*, and *C.*, on which they were to pay him R9 monthly, and return the principal on his demanding it. R9 were paid to him monthly, until within twelve months of this suit. *A.* and *B.* had died since the date of the deposit. This suit was brought against *C.* and the representatives of *A.* and *B.* to recover the amount deposited, and a decree was passed against *C.* on his own admission. But the representatives of *A.* and *B.* set up that the suit was barred. *Held* that it was not a deposit under section 1, clause 15 of Act XIV of 1859. But held also, in accordance with the English cases (from which, however, the learned Judge dissented), that the cause of action arose from the date of the agreement to repay the money on demand, and not from the date of the demand, and therefore the suit was barred. PARBATI CHARAN MOOKERJEA *v.* RAMNARAYAN MATILAL [5 B. L. R., 396 : 16 W. R., 164, note

But *see* BRAMMAMAYI DASI *v.* ABHAI CHARAN CHOWDHRY . 7 B. L. R., 489 : 16 W. R., 164

2. ——————— *Deposit of Government revenue with Collector pending partition.—Account, Adjustment of.*—During the pendency of a butwara, the plaintiff purchased a share in an ijmali mehal; and as the proportion of the Government revenue of each shareholder had not been ascertained, the shareholders, including the plaintiff's vendor, and subsequently the plaintiff, paid to the Collectorate what they thought due from them on account of Government revenue. Upon an account stated in 1857 it was ascertained that, after all necessary deductions, a sum of R655 was due to the plaintiff, who in 1864 applied to the Collector for payment of the amount; but the application was rejected, as the money had been previously drawn away by certain creditors of his vendor. In 1867 he sued the Collector for recovery of the amount. The defence set up was that the suit was barred by lapse of time. *Held* that the Collector was not a depositary under the meaning of clause 15, section 1, Act XIV of 1859; that the cause of action did not arise on the demand for and refusal of payment, but on adjustment of the account; and that the case came under clause 16, section 1. GABIND CHANDRA *v.* COLLECTOR OF DACCA [3 B. L. R., Ap., 57 : 11 W. R., 491

In another case the Collector was held to be a depositary within clause 15 of section 1, Act XIV of 1859, as to a claim for malikana. GOVERNMENT *v.* RHOOP NARAIN SINGH . . . 2 W. R., 162

——————— **art. 146.**—*Suit to recover possession of mortgaged property.—Demand.*—In 1842 *H. C.* executed in favour of the plaintiff, his brother, who was in possession of the family property as kurta and administrator of the estate of their father, a mortgage of his (*H. C.'s*) share of the estate in consideration of R3,700 advanced to him by the plaintiff. In the mortgage-deed the money was expressed to be payable "on demand." In 1847 an amicable partition of the family property was proposed, and it was agreed that a certain portion should be allotted to the plaintiff in satisfaction of the debt due to him by

**LIMITATION ACT, 1877, art. 146**—*continued.*

*H. C.*, but this arrangement was never carried out. In a suit brought in 1876 against the representative of *H. C.* for foreclosure of the mortgage, the plaintiff, who had admittedly been since 1842 in possession of the family property, alleged that no payment had ever been made in respect of the mortgage, nor any demand for payment, until 1876. The defendant contended that the suit was barred by lapse of time. *Held*, on the construction of the mortgage-deed, and under the circumstances of the case, *per* GARTH, *C. J.*, that a demand was necessary; *per* MARKBY, *J.*, that the words "on demand" did not postpone the date of payment, and that the mortgage-money became payable at once. *Per* GARTH, *C. J.*, and MARKBY, *J.*—A demand was made in 1847 on the agreement to partition the property. The suit, therefore, was barred by Act XIV of 1859, as being brought more than twelve years after the cause of action arose. That Act not only barred the remedy, but extinguished the right, and therefore the plaintiff could derive no advantage from the extended period of limitation given by article 149 of Act IX of 1871, which repealed the Act of 1859. Article 149 of Act IX of 1871, moreover, only applies to cases in which some part of the principal or interest of the mortgage-debt has been paid. RAM CHUNDER GHOSAUL *v.* JUGGUTMONMOHINEY DABEE

**[I. L. R., 4 Calc., 283: 3 C. L. R., 336**

——— **and arts. 144, 132.**—*Suit for foreclosure.*—The period of limitation prescribed for a suit for foreclosure by the Limitation Act (IX of 1871) is either twelve years under article 132, or sixty years under article 149 of schedule II of that Act. GANPAT PANDURANG *v.* ADARJI DADABHAI . . . **I. L. R., 3 Bom., 312**

——— **art. 147.**

*See* ART. 132 . **I. L. R., 9 Mad., 218**
**[I. L. R., 10 Bom., 519**

1. ——— *Mortgage.—Sale or foreclosure.—Adverse possession.*—In 1823 the trustees of a marriage settlement invested the trust-funds in the mortgage of a house and premises at Entally, in the neighbourhood of Calcutta. The mortgagor was the first tenant-for-life under the settlement, and it was agreed that he should be entitled to remain in the house as long as he pleased, the rent of the premises being set-off against the income of the trust-funds to which he was entitled under the settlement. In execution of a money-decree against the mortgagor, his right, title, and interest in the premises were purchased by the judgment-creditor, a lady who, at the time of execution and sale, lived in the mortgagor's house. After the purchase, all parties continued to live in the house as before. The mortgagor died on the 14th of August 1867, and on the 13th of August 1879 the present suit for sale or foreclosure was instituted by the plaintiff, in whom the legal and beneficial interest in the trust-funds had become vested. *Held* that the position of the judgment-creditor under the sale of 1866 was not adverse to the plaintiff or those under whom he claimed; that the suit was not barred by limitation;

**LIMITATION ACT, 1877, art. 147**—*continued.*

and that plaintiff was entitled to a decree for sale. *Anandmayi Dasi* v. *Dharendra Chandra Mukerji, 8 B. L. R., 122*, distinguished. MANLY *v.* PATTERSON . . . . **I. L. R., 7 Calc., 394**

2. ——— **and art. 132.**—*Suit to enforce payment of money charged upon immoveable property.—Suit by a mortgagee for sale.*—A suit upon a bond for money payable on demand by which immoveable property is hypothecated as security for the debt, wherein the relief prayed is recovery of the amount with interest by establishment of the right to enforce the hypothecation by auction-sale of the interest of the obligor in such property, is governed by article 147, and not by article 132 of Act XV of 1877 (Limitation Act). SHIB LAL *v.* GANGA PARSAD

**[I. L. R., 6 All., 551**

3. ——— *Mortgagor and mortgagee.—Suit to follow mortgaged property.—A.* mortgaged his property to *B.* in 1867, by a simple mortgage. In 1868 *A.* sold the property to *C.* In 1870 *B.* brought a suit on his mortgage against *A.* only and obtained a mortgage decree. In 1883 *A.* brought a suit against *C.* to enforce his lien against the mortgaged property. *C.* pleaded that the suit was barred by limitation, under clause 132 of the Limitation Act, Act XV of 1877. *Held* that the suit was governed by article 147, schedule II of Act XV of 1877, and therefore was not barred by limitation. BROJO LAL SINGH *v.* GOUR CHARAN SEN . **I. L. R., 12 Calc., 111**

4. ——— *Mortgage.—Mortgagee, Suit by a, to realise mortgage-debt by sale of mortgaged property, under power of sale.—Cause of action.—Construction.*—By a mortgage-bond the first defendant mortgaged, on the 1st January 1864, certain property to plaintiffs' deceased father, with an implied power to sell the same if the debt was not satisfied at the expiration of seven years from that date. On the 2nd January 1883, the first plaintiff filed a suit in his own name, as manager of the family, to have the debt realised by the sale of the mortgaged property. The third defendant insisted upon plaintiff's other two brothers being joined as co-plaintiffs, and they were so joined on the 1st March 1883, at which date both the lower Courts were of opinion that the suit was barred under section 22 and article 132 of the Limitation Act, XV of 1877. On appeal by the plaintiffs to the High Court,—*Held*, reversing the lower Courts' decrees, that plaintiffs' suit was governed by article 147 of the Limitation Act, XV of 1877, and, therefore, not barred. By the instrument sued on, the property in question was mortgaged to the plaintiffs' father with an implied, if not express, power to sell the same in the event of the mortgage, debt not being paid at the expiration of seven years from the date of the mortgage. The period of limitation was sixty years from the 1st January 1871. GOVIND BHAICHAND *v.* KALNAK

**[I. L. R., 10 Bom., 592**

——— **art. 148 (1871, art. 148; 1859, s. 1, cl. 15).**

*See* s. 2 . . **I. L. R., 9 Bom., 475**

**LIMITATION ACT, 1877, art. 148**—*continued.*

*See* s. 10 (1859, s. 2).
[7 Bom., A. C., 149

*See* CASES UNDER S. 19—ACKNOWLEDGMENT OF OTHER RIGHTS.

1. ——— *Suit for redemption.*—*Nature of title of mortgagee.*—The period of limitation for a suit to redeem a mortgage of immoveable property is sixty years, and this apparently without reference to the nature of the title the mortgagee in possession is asserting. *Semble,*—It makes no difference that the hostile possession is supposed to have commenced on a claim of the defendant to a title altogether inconsistent with the mortgage. TANJI *v.* NAGAMMA . . . . . 3 Mad., 137

2. ——— *Relation of trust.*—Clause 15, section 1, Act XIV of 1859, applied when there was some relation of trust, whether the property was given in mortgage or pawn, or simply deposited for safe custody. RUTTON MONEE DEBIA *v.* GUNGA MONEE DEBIA CHOWDHRAIN . . 3 W. R., 94

3. ——— *Suit by mortgagor for possession of mortgaged property.*—In a suit by a mortgagor after a mortgage has been satisfied, for the recovery of the mortgaged property, the period of limitation applicable is that prescribed by clause 15 of section 1 of Act XIV of 1859. LALL DOSS *v.* JAMAL ALI . . . B. L. R., Sup. Vol., 901
[S. C. 9 W. R., 187

4. ——— *Laches.*—*Estoppel.*—The *laches* of a mortgagor in taking no steps for many years to enforce his alleged rights may afford evidence against the existence of those rights, but cannot estop him from asserting them, if they do exist, at any time within the period of sixty years allowed by section 1, clause 15, Act XIV of 1859. JUGGERNATH SAHOO *v.* MAHOMED HOSSEIN
[14 B. L. R., 386 : 23 W. R., 99
L. R., 2 I. A., 49

5. ——— *Permissive occupation of house.*—*Suit to recover house from heirs of tenant.*—About twenty-five years before suit brought,—*R.*, being possessed of a house, allowed *K.* to occupy it without paying rent, on condition that *K.* would keep it in repair, and restore it to *R.* on demand. Nine years afterwards, and without any demand having been made by *R.*, *K.* died, and his heirs continued to occupy the house, apparently on the same terms as *K.* had done. In a suit brought by *R.* against the heirs of *K.* to recover possession of the house, it was held that *K.* could not be deemed to have been a depositary of the house within the meaning of section 1, clause 15 of Act XIV of 1859, and the case was therefore governed by section 1, clause 12 of that Act. RADHABHAI *v.* SHAMA
[4 Bom., A. C., 155

6. ——— *Conditional sale.*—*Suit for redemption.*—Redemption by the mortgagor of mortgaged premises held by a mortgagee under a gahan lahan mortgage is not barred by the mortgagee's possession of the premises for the period of twelve years after the date on which, according to the terms of the mortgage-deed, the mortgage is to be converted into a sale. Such a case is governed by the provisions of Act XIV of 1859, section 1, clause 15. KRISHNAJI *alias* BABAJI KESHAV *v.* RAVJI SADASHIV . . . . . 9 Bom., 79

*See* SHANKARBHAI GULABBHAI *v.* KASSIBHAI VITHALBHAI . . . . 9 Bom., 69

RAMJI BIN TUKARAM *v.* CHINTO SAKHARAM
[1 Bom., 199

RAMSHET BACHASHET *v.* PANDHARINATH
[8 Bom., A. C., 236

7. ——— *Suit for redemption.*—*Adverse possession.*—A mortgagor sued his mortgagee to redeem, joining as defendant the person in possession of the mortgaged land, who claimed to hold adversely to both the mortgagor and the mortgagee. *Held* that the possession of the last defendant being a trespass, not on the possession of the mortgagor, who had only the equitable estate, but on the possession of the mortgagee, in whom the legal estate was vested, and the person in possession not pretending to be a *bonâ fide* purchaser from the mortgagee, he did not come within the exception in section 5 of Act XIV of 1859; that the trespasser could only succeed to such estate as the mortgagee possessed; and consequently that the limitation applicable to the suit as against him was sixty years, according to section 1, clause 15 of Act XIV of 1859, the effect of which was not altered by any hostile possession commenced on a title independent of the mortgage. VITHOBA BIN CHABU *v.* GANGARAM BIN BIRAMJI
[12 Bom., 180

8. ——— *Right of purchaser.*—Where *B.*, an old judgment-creditor of *K.'s* father, took out execution against *K.*, whose rights in an estate were accordingly sold and bought by *B.* himself, *B.* bought, not *K.'s* right of suit (which as against a mortgagee would be governed by a limitation of sixty years), but a right determined by a decree to which clause 15, section 1, Act XIV of 1859, would not apply. RAM SARUN SINGH *v.* MAHOMED AMEER
[13 W. R., 78

9. ——— *Mad. Reg. II of 1802, s. 18, cl. 4.*—*Right of redemption of otti mortgage.*—In 1841 *A.* established her proprietary right to lands as against *B.* and an otti mortgagee then in possession. In 1844 *B.* obtained a decree against the mortgagee in a suit to which *A.* was not a party, and assigned his rights under the mortgage to *C.*, who continued to hold as *B.'s* assignee down to 1860. *Held* that unless *A.* was aware, or might by ordinary diligence have been aware, of the suit of 1844, her right to redeem the lands was not barred by the lapse of twelve years from the decree in that suit. PUDIYAKOVILAGALLA *v.* ALLUNANNALATTA KADINNI
[1 Mad., 146

10. ——— *Suit for redemption.*—*Assertion of adverse title.*—It was held (in accord-

**LIMITATION ACT, 1877, art. 148**—*continued.*

ance with the opinion of the Full Bench) that the mere assertion of an adverse title will not enable a mortgagee in possession to abbreviate the period of sixty years which the law allows to a mortgagor to prosecute his right to redeem and seek his remedy by suit. *Ramdyal* v. *Jawahir Ram, S. D. A., N. W., 1861, 22nd of April 1861,* overruled. SHEOPAL *v.* KHADIM HOSSEIN . . . **7 N. W., 220**

**11.** ——————— *Suit for redemption, 456 (a), of mortgage.—Adverse possession.—Title, Assertion of.*—The mere assertion of an adverse title by a mortgagee in possession does not make his possession adverse, or enable him to abbreviate the period of sixty years which the law allows to a mortgagor to prosecute his right to redeem and seek his remedy by suit. *Sheopal* v. *Khadim Hossein, 7 N. W., 220,* followed. Where, accordingly, certain immoveable property was mortgaged in June 1854 for a term which expired in June 1874, and in July 1863 the equity of redemption of such property was transferred by sale to the mortgagees by a person who was not competent to make such transfer, and the mortgagees set up a proprietary title to such property in virtue of the sale,—*Held* in a suit to redeem such property instituted in March 1877, that such suit was not barred because it was not instituted within twelve years from the date of the deed of sale. ALI MUHAMMAD *v.* LALTA BAKHSH **[I. L. R., 1 All., 655**

**12.** ——————— *Suit for redemption.*—Article 148, shedule II of the Limitation Act, 1871, applies to suits for redemption, and to such suits instituted against mortgagees, or persons claiming under them, except purchasers for value; but it does not apply to suits against strangers, nor to suits which are not suits for redemption. AMMU *v.* RAMAKRISHNA SASTU . . **I. L. R., 2 Mad., 226**

**13.** ——————— **and art. 145.**—*Right to officiate as priest, Nature of suit to establish.—Immoveable property.*—A right to officiate as priest at funeral ceremonies of Hindus is in the nature of immoveable property, and a suit for redemption of such right therefore falls under article 148 and not under article 145 of the Limitation Act. RAGHOO PANDEY *v.* KASSY PAREY **[I. L. R., 10 Calc., 73 : 13 C. L. R., 263**

**14.** ——————— *Mortgage.—Subsequent agreement conveying to mortgagee for a term of years.—Effect of such agreement.—"Once a mortgage always a mortgage."—Suit by heirs of mortgagor to recover the property.—Usufructuary mortgage.*—Where, after the expiration of the period prescribed for redemption, the mortgagor and mortgagee agreed that the mortgagee should continue in absolute possession for a fixed term, and then restore the property free from the mortgage lien,—*Held* that the agreement was distinct from the original mortgage, and was not intended to be a mortgage, but a conveyance for a term of years, and a suit to recover the property must be brought within twelve years from the expiration of the term stipulated in the agreement. GOPAL SITARAM GUNE *v.* DESAI . . . **I. L. R., 6 Bom., 674**

**15.** ——————— **and art. 134.**—*Joint mortgage.—Redemption by one mortgagor.—Suit by other mortgagor for his share.—Suit for redemption.—Transfer of property Act (IV of 1882), ss. 95, 100.*—*K.* and *J.* jointly mortgaged 36 sihams or shares of an estate to *C.* giving him possession. *C.* transferred his rights as mortgagee to *T.* and *M.* In execution of a decree for money against *K.* held by *M.*, *K.'s* rights and interests in the mortgaged property were sold, and were purchased by *P.*, whose heirs paid the entire mortgage-debt. *R.* an heir of *J.*, sued the heirs of *P.* to recover from them possession of *J.'s* sihams in the mortgaged property, on payment of a proportionate amount of the mortgage-money paid by *P.* The plaintiff alleged that the mortgage to *C.* had been made forty years before suit. The defendants contended that a much longer period had expired since the date of the mortgage; that forty-one years had elapsed since *C.* transferred his rights as mortgagee; that they had redeemed the property twenty-one years ago and had been since its redemption in proprietary and adverse possession of the sihams in suit; and that the suit was barred by limitation. Neither party was aware of the date of the mortgage, and neither adduced any proof on the point. *Held,* applying the equitable principle adopted in sections 95 and 100 of the Transfer of Property Act (IV of 1882), that the owner of a portion of a mortgaged estate, which has been redeemed by his co-mortgagor, has the right to redeem such portion from his co-mortgagor, and a suit brought for that purpose would be in the nature of a suit for redemption, and would naturally fall within the definition of No. 148, schedule II of the Limitation Act (XV of 1877); and it was not possible for one of two mortgagors, redeeming the whole mortgaged property behind the back of the other, to change the position of that other to something less than that of a mortgagor, or to abridge the period of limitation within which he ought to come in to redeem. *Held,* therefore, that article 148 and not article 134 of schedule II of the Limitation Act was applicable to the suit. *Umrunnissa* v. *Muhammad Yar Khan, I. L. R., 3 All., 24,* distinguished. *Pancham Singh* v. *Ali Ahmad, I. L. R., 4 All., 58,* referred to. NURA BIBI *v.* JAGAT NARAIN . . **I. L. R., 8 All., 295**

——————— **art. 149 (1871, art. 151; 1859, s. 17).**

*See* ART. 130 . **I. L. R., 8 Calc., 230**

**1.** ——————— *Suit to establish right to julkur.—Beng. Reg. II of 1805, s. 2.*—A suit by Government to establish its right and title to a julkur was barred by limitation under section 2, Regulation II, 1805, if brought after the expiration of sixty years' adverse possession against Government. COLLECTOR OF RUNGPORE *v.* PROSUNNO COOMAR TAGORE . . . . . **5 W. R., 115**

**2.** ——————— *Suit for costs.—Public right.—Exemption from limitation.*—In a suit for the recovery of costs incurred by the Government of

**LIMITATION ACT, 1877, art. 149**—*continued.*

Bengal, in virtue of the Statutes 3 and 4 William IV, Cap. 41, authorising the Crown to appoint the East India Company to take charge of appeals and bring them to a hearing,—*Held*, the recovery of such costs did not constitute a "public right" exempting from limitation within Regulation II of 1805. GOVERNMENT OF BENGAL *v.* SHURRUFFUTOONISSA . . . . . **3 W. R., P. C., 31 [8 Moore's I. A., 225**

3. ——————— *Suit by Government for maintenance of a ghatwali tenure in which alteration has been effected by fraud of the zemindar.*—Where a zemindar sold a ghatwali mehal as a mal mehal, and not merely his right to receive the quit-rent from the ghatwal, and the vendee in collusion with the former ghatwal granted him a mokurrari tenure, thus changing the nature of the tenure from a ghatwali into a mal tenure,—*Held* that the Government had a right to sue so as to maintain its own nominee in possession of the land as ghatwal, and that the limitation of sixty years was applicable to such a suit. PETUMBER DEY *v.* JUGGUNNATH ROY . . . . . **18 W. R., 130**

4. ——————— **and s. 28.**—*Suit by Crown for declaration of title and possession of forest land.—Mad. Reg. II of 1802.—Survival of right.—Limitation Act, 1859.*—In a suit instituted in March 1879 by the Crown for a declaration of title to certain forest land and for possession of a portion thereof, the defendants alleged that the land has been in their possession for more than sixty years. *Held* that it was incumbent on the Crown, under article 149 of schedule II of the Indian Limitation Act, 1877, to show possession of the proprietary rights claimed within sixty years, or, if the defendants proved possession, that such possession commenced or became adverse within such period. The District Court having held that, up to April 1st, 1873, when the Limitation Act of 1871 came into force, the limitation for such a suit was twelve years from the time when the cause of action arose, and that the suit was barred by adverse possession for twelve years prior to April 1st, 1873,—*Held* that, even if Regulation II of 1802 applied to claims by the Crown, inasmuch as the Regulation only barred the remedy and did not extinguish the right, and Act XIV of 1859 did not extend to such a claim, the right subsisted when the Limitation Act of 1871 came into operation, and as long as that Act was in force; and that the Crown, being entitled under that Act to sue within sixty years from the date of the cause of action, and under section 28 of the Limitation Act of 1877 to sue within two years from the 1st of October 1877, the suit was not barred. SECRETARY OF STATE FOR INDIA *v.* VIRA RAYAN . . . **I. L. R., 9 Mad., 175**

5. ——————— *Suit by Government for recovery of stamp duty in pauper suit.*—Five years after the dismissal of a pauper suit, from the decree in which no appeal had been preferred, Government sought recovery of the stamp duty by attachment and sale of the pauper plaintiff's property. *Held* that the claim, being a "public claim" within section

**LIMITATION ACT, 1877, art. 149**—*continued.*

17, Act XIV of 1859, was not barred. COLLECTOR OF SOUTH ARCOT *v.* THATHA CHARRY . **8 Mad., 40**

SHAMI MAHOMED *v.* MAHOMED ALI KHAN **[2 B. L. R., Ap., 22 : 11 W. R., 67**

6. ——————— *Suit after dispossession.—Disputes of private owners.—Right of Government.*—A dispute between two private owners, whether as to boundaries or lands, cannot divest the title of either to possession in favour of the Government, if the Government have merely a rent or jumma. The title to sue for dispossession of the lands belongs in such a case to the owner whose property is encroached upon. If he suffers his right to be barred by limitation, the practical effect is the extinction of his title in favour of the party in possession, but his cause of action cannot be kept alive longer than the legal period of limitation of twelve years by the expedient of inducing the Collector to make common cause with him. GUNGA GOBIND MUNDUL *v.* COLLECTOR OF THE 24-PERGUNNAHS **[7 W. R., P. C., 21 : 11 Moore's I. A., 345**

7. ——————— *Lessee under Government.*—The mere fact that the plaintiff claims as a lessee under Government does not entitle him to the benefit of section 17, Act XIV of 1859. ASU MIA *v.* RAJU MIA . . **1 B. L. R., A. C., 34 : 10 W. R., 76**

8. ——————— *Suit by purchase of Government rights in a khas mehal.*—A suit by the purchaser of the rights of Government in a khas mehal to obtain possession is governed, not by the limitation of sixty years, but by that of twelve years HOSSEIN BUKSH *v.* AMEENA KHATOON **[20 W. R., 231**

BOONDI ROY *v.* BUNSEE THAKOOR **[24 W. R., 64**

9. ——————— *Suit by mutwalli for endowed property.*—Since the passing of Act XX of 1863, a mutwalli, or manager of a Mahomedan endowment, cannot be considered to be an officer of Government (a position he was held to have in the Privy Council case of *Jewan Doss Sahoo* v. *Kubeeroddeen, 6 W. R., P. C., 3 : 2 Moore's I. A., 390*), and therefore the ordinary rules of limitation apply to a suit by him for endowed property. LALL MAHOMED *v.* LALL BRIJ KISHORE . . **17 W. R., 430**

——————— **art. 151.**

*See* s. 12 . **I. L. R., 10 Calc., 652**

——————— **art. 155 (1871, art. 153).**

*See* APPEAL IN CRIMINAL CASES—ACQUITTALS, APPEALS FROM— **[I. L. R., 2 Calc., 436**

——————— **art. 156.**—*Burma Courts Act, 1875, ss. 49, 97.—Appeal from Recorder of Rangoon.*—An appeal from the Court of the Recorder of Rangoon to the High Court is an appeal under the Civil Procedure Code, and must be made within the time prescribed by article 156, schedule II of the Limitation Act. AGA MAHOMED HAMADANI *v.* COHEN **[I. L. R., 13 Calc., 221**

**LIMITATION ACT, 1877**—*continued.*

——— **art. 158.**—*Application to set aside award.—Ground for setting aside award.—Civil Procedure Code, ss. 521, 522.*—Where, in accordance with an award irregularly made, a decree was passed by the Court from which the defendant appealed,—*Held* that the defendant was not precluded from appealing to the Judge from the first Court's decree because he had not applied to set aside the award within the ten days allowed by article 158, schedule II of the Limitation Act, inasmuch as that article applied to applications referred to in section 522 of the Civil Procedure Code,—*i.e.*, applications to set aside an award on any of the grounds mentioned in section 521,—and the defendant did not contest the award on any of those grounds. MUHAMMAD ABID *v.* MUHAMMAD ASGHAR . . . **I. L. R., 8 All., 64**

——— **art. 162.**

*See* DIVORCE ACT, s. 16.
**[I. L. R., 6 Bom., 416**

——— **art. 164 (1871, art. 157; Civil Procedure Code, 1859, s. 119).**

1. ——— *Obligation on defendant against whom ex parte decree has been passed.*—The object of section 119, Act VIII of 1859, was to make it imperative on a defendant against whom an *ex parte* decree had been passed, and who desired to come in and set aside that decree, to apply to the Court as soon as possible after he had notice of the passing of the decree,—*i.e.*, within a reasonable time not exceeding thirty days from the first actual execution of process to enforce the judgment. GOLAM AHYAH *v.* SHAM SOONDER KOONWAREE . **7 W. R., 375**

2. ——— *Meaning of "executing" process of judgment.*—Process of enforcing a judgment (within thirty days from which a defendant may apply to set aside an *ex parte* decree) has not been executed within the meaning of section 119, Act VIII of 1859, until the proceedings in execution have been brought to a termination by a sale of the property attached. RADHA BINODE CHOWDHRY *v.* MUDHOO SOODUN SIRCAR . . **7 W. R., 198**

3. ——— *Act X of 1859, s. 58.—Ex parte decree, Application to set aside.*—Process for enforcing judgment was executed within the meaning of section 119 of Act VIII of 1859 and section 58 of Act X of 1859, when an attachment of the property of the defendant had taken place; and any application by the defendant under those sections to set aside an *ex parte* decree must be made within thirty and fifteen days respectively from the date of the attachment. RADHA BINODE CHOWDHRY *v.* DIGAMBUREE DOSSEE. NUND KISHORE DOSS *v.* MAHARAJA OF BURDWAN
**[B. L. R., Sup. Vol., 947: 9 W. R., 236**

4. ——— The thirty days "after any process for enforcing the judgment has been executed," within which a defendant might apply under section 119, Code of Civil Procedure, for an order to set aside an *ex parte* decree, meant thirty days after the execution of any process against the person or property of the defendant. SHIB CHUNDER BHADOOREE *v.* LUCKHEE DEBIA CHOWDHRAIN
**[6 W. R., Mis., 51**

Not process only against the person. BRUHM PARGASH *v.* DUMREE LALL
**[1 N. W., Ed. 1873, 133**

*See* SOOKH MOYEE DOSSEE *v.* NURMOODA DOSSEE
**[15 W. R., 210**

And KALEE PROSAD *v.* DIGAMBUR CHATTERJEE
**[25 W. R., 72**

5. ——— *Notice of ex parte decree.*—It is not necessary that the judgment-debtor should have special notice of any process for enforcing an *ex parte* decree; he is bound to seek the remedy provided by section 119, Act VIII of 1859, within thirty days after execution of any process to enforce the judgment. SHUMBOO CHUNDER HOLDAR *v.* RAM LALL GHOSE . . **13 W. R., 436**

6. ——— *Application for setting aside ex parte judgment after expiration of time limited.*—A Judge has no jurisdiction to grant an application, made by a defendant against whom an *ex parte* judgment has been passed, to set aside the judgment after the expiration of the thirty days allowed by section 119 of the Code of Civil Procedure for making such applications. Such an application must be made within thirty days after the first process for enforcing the judgment against such defendant has been executed. KESHAVRAM VALAD HIRACHAND *v.* RAMCHANDRA TRIMBAK
**[8 Bom., A. C., 44**

ANORAGEE KOOER *v.* ABDOOLLAH KHAN
**[26 W. R., 99**

7. ——— *Application to set aside ex parte decree after 30 days have expired.*—An application by a party to set aside an *ex parte* decree, which application he has had an opportunity of making within time and has neglected to do so, should not be entertained on the supposition that there has been collusion to defeat the defendant's rights. ANORAGEE KOER *v.* ADOOLLAH KHAN
**[26 W. R., 99**

8. ——— *Application to restore suit after dismissal of ex parte case.*—Where the suit was dismissed in accordance with the terms of an order that the Official Assignee should give security for the costs of the defendant within fourteen days and should be made a party to the suit within one month, and that, in default of such security, the suit should be set down for dismissal within eight days after the expiration of the time so limited, and the Official Assignee did not apply, within thirty days of the passing of the order of dismissal, either to the Court making the order or to the Appellate Court, for its reversal,—*Held* that an application to the Appellate Court for the reversal of an order discharging a rule *nisi* for the reversal of the order of dismissal, and for the restoration of the suit to the board for hearing, was barred. IBRAHIM BIN MAHASIN *v.* ABDUR RAHI-

**LIMITATION ACT, 1877, art. 164**—*continued.*

MAN BIN ALLI. GAMBLE *v.* ABDUR RAHIMAN BIN ALLI . . . . . **12 Bom., 257**

**9.** ——————— *Execution of ex parte decree.—Notice of execution.*—Notice of execution of decree is not sufficient "process for enforcing" it within the meaning of article 157, schedule II, Act IX of 1871. Such process means actual process by attachment in execution of the person or property of the debtor. POORNO CHUNDER COONDOO *v.* PROSONNO COOMAR SIKDAR . . . **I. L. R., 2 Calc., 123**

**10.** ——————— Where property had been attached in execution of a decree,—*Held* that the date on which the property was attached, and not the date of the sale in execution, being the date of executing the first process for enforcing the decree, was the date from which limitation should be computed under article 164, schedule II of Act XV of 1877. *Pachu* v. *Jaikishen, Weekly Notes, All., 1884, p. 322,* referred to. HAR PRASAD *v.* JAFAR ALI **[I. L. R., 7 All., 345**

**11.** ——————— *Ex parte judgment, Application for an order to set aside.—Civil Procedure Code, s. 108.—"Execution of process for enforcing the judgment."*—An *ex parte* order was made against *S.*, to whom a certificate under Act XL of 1858 had been granted, revoking such certificate, and granting it to *A.*, and directing *S.* to deliver the property of the minor to *A.* and to render an account of all moneys received and disbursed within thirty days. In pursuance of this order a precept or injunction was served on *S.* informing her that the certificate granted to her had been revoked and had been granted to *A.*, and directing her to deliver the property of the minor to *A.* and to render him accounts of all moneys realised and expended within one month. *Held* that such precept or injunction was a "process for enforcing" such *ex parte* order, and that it was "executed" when it was served on *S.*, within the meaning of article 164 of the Limitation Act, 1877. SUNRAJ KUARI *v.* AMBIKA PRASAD SINGH . . . . . **I. L. R., 6 All., 14**

**12.** ——————— *Code of Civil Procedure (Act X of 1877), s. 108.—Ex parte decree.—Setting aside ex parte decree.*—An *ex parte* decree was obtained against a defendant who applied to have it set aside under section 108 of the Civil Procedure Code. The application was made more than thirty days from the date of attaching the defendants' property in execution of the decree, but within thirty days of the service of the sale proclamation. *Held* that the application was barred by limitation under article 164, schedule II, Act XV of 1877. IN THE MATTER OF BHAOBUNESSURY. BHAOBUNESSURY *v.* JUDOBENDRA NARAIN MULLICK **[I. L. R., 9 Calc., 869**

——————— **art. 165 (1871, art. 158).**

**1.** ——————— *Application for restitution by person dispossessed.—Holiday.*—In calculating the period of limitation prescribed in schedule II of Act IX of 1871 for applications as well as for suits and appeals, the day on which the order or decree appealed against was made should be excluded. Consequently, where a person, having been dispossessed of property held by him under a mortgage on the 14th of December 1875, applied on the 14th January of 1876 for restitution, the 13th having been a Court holiday, it was held that his application was within the limitation of thirty days prescribed by article 158, schedule II of Act IX of 1871. GURJAR *v.* BARVE **[I. L. R., 2 Bom., 673**

**2.** ——————— *Dispossession under sale in execution of decree.—Summary order.*—A person purchased certain property at a sale in execution of a decree in November 1878: his purchase was confirmed and he obtained a certificate of sale on the 23rd May 1879, from which date he remained in possession. The judgment-debtor applied unsuccessfully to have the sale set aside for irregularity. He had applied, before the sale took place, to stay the sale on the ground that the right to apply for execution was barred. This application was dismissed, but was allowed on appeal. It did not appear that the auction-purchaser was a party to the proceeding, or that he was cognizant of the application. Two years from the date of the sale, and one and a half years from its confirmation, the judgment-debtor on a summary application obtained an order setting aside the sale and putting the auction-purchaser out of possession. *Held* that the order was erroneous, the Judge having no power, after the sale had been confirmed, to set aside the sale by a summary order, and that under article 165 of Act XV of 1877 the application for such an order was barred. MAHOMED HOSSEIN *v.* KOKIL SINGH **[I. L. R., 7 Calc., 91: 9 C. L. R., 53**

——————— **art. 166 (1871, art. 159).**

——————— *Execution.—Sale in execution, the judgment-debtor being ignorant of the execution proceedings through the fraud of the decree-holder.—Setting aside proceedings in execution.—Civil Procedure Code (XIV of 1882), ss. 294, 311.*—In 1879 *D.* obtained a decree against *S.* *S.* gave security for the satisfaction of the decree, whereupon *D.* agreed not to take proceedings in execution. In breach of this agreement, *D.* in the same year applied for execution and sold certain immoveable property belonging to *S.*, of which *K.* became the purchaser. *K.* did not apply for possession until 1883, in which year he applied for and obtained possession of the property. *S.* alleged that he then for the first time became aware of the sale, and that by the fraud of *D.* and *K.* he had been kept in ignorance of the execution proceedings taken by *D.* in breach of the above-mentioned agreement, and within thirty days after *K.* obtained possession, he (*S.*) applied for a reversal of the orders which had been passed in the aforesaid fraudulent proceedings. The Subordinate Judge held that the application was barred by article 166 of schedule II of the Limitation Act, XV of 1877, and referred the applicant to a separate suit to set aside the sale. On application to the High Court,—*Held,* also, that article 166 of schedule II of the Limitation

**LIMITATION ACT, 1877, art. 166**—*continued.*

Act, XV of 1877, did not apply. That article, as amended by section 108 of Act XII of 1879, only applies to applications made under section 311 or section 294 of the Civil Procedure Code, seeking to set aside a sale on the ground of a material irregularity in publishing or conducting the sale, or on the ground that the decree-holder has purchased without the permission of the Court. SAKHARAM GOVIND KALE *v.* DAMODAR AKHARAM . **I. L. R., 9 Bom., 468**

**——— art. 167 (1871, art. 160).**

1. ——— *Symbolical possession.*—A purchaser of immoveable property, sold in execution of a decree, must, under Act XV of 1877, schedule II, article 167, if obstructed or resisted in endeavouring to obtain possession, apply, within thirty days, to the Court under the directions of which the execution sale was held, to be put into actual possession; and if he omits to do so within thirty days from the time when his taking possession was first obstructed or resisted, his only remedy is by a civil suit. The plaintiffs, on the 31st January 1863, purchased a half share in a certain house at a sale in execution of a decree, but took no steps at the time to take possession of it. In 1869 the Nazir of the Court was directed to put them into possession, and gave them symbolical possession. Afterwards, in 1871, the plaintiffs, again with the assistance of the Nazir, entered upon, and for the space of about a minute remained in, possession of one of the rooms in the house, until they were turned out by the defendants. On the 18th of November 1876, the plaintiffs filed a suit, praying for a declaration of right and for a partition, and to be put into separate possession of the share that might be allotted to them on such partition. *Held* that neither the symbolical possession given to them in 1869 by the Nazir, nor the momentary and partial possession which they had obtained in 1871, was sufficient to to save limitation; and that as their suit was brought on the 18th November 1876, more than twelve years after the 31st January 1863, when they first became entitled to possession, it was now barred by limitation. SHOTERNATH MOOKERJEE *v.* OBHOY NUND ROY **[I. L. R., 5 Calc., 331**

2. ——— *Warrant for possession.—Obstruction in getting possession.—Civil Procedure Code, 1877, s. 328.*—Where a warrant for possession of land in execution of a decree was not executed owing to the resistance of the judgment-debtors in September 1880, and no complaint was made under section 328 of the Code of Civil Procedure, 1877, but a fresh warrant for possession was applied for by and granted to the decree-holders and resistance was again made in January 1881,—*Held* that a complaint by the decree-holders as to the second obstruction, made within thirty days of the second obstruction, was not barred by reason of aarticle 167 of schedule II of the Limitation Act. RAMASEKARA PILLAI v. DHARMARAYA GOUNDAN . **I. L. R., 5 Mad., 113**

**——— art. 168 (1871, art. 161; Civil Procedure Code, 1859, s. 347).**

1. ——— *Time for appeal.—Civil Procedure Code, 1859, s. 347.*—To bring an appellant within the terms of section 347 of the Code of Civil Procedure, 1859, so as to give the Court jurisdiction, his application for re-admission of the appeal dismissed for default of prosecution had to be made within thirty days from the date of the dismissal. MITTOO KHAN *v.* RUHMAN KHAN . **8 W. R., 361**

In such an application the Judge is bound to see whether the reasons set forth for re-admission are satisfactory or not. SHOMAED ALI SOWDAGUR *v.* EUSOOF KHAN CHOWDHRY . . **15 W. R., 80**

2. ——— *Application for re-admission of appeal.*—The time allowed by section 347 of Act VIII of 1859 within which to apply for the re-admission of an appeal dismissed for default of prosecution, should not, where the appellant's pleader has died without his hearing of it, be counted as commencing until the appellant has an opportunity of coming in under the provision of Regulation II of 1827, section 54, clause 2. EX PARTE ALIKHAN UMARKHAN . . . **4 Bom., A. C., 92**

**——— art. 170 (1871, art. 162).**

*See* s. 5 . . **I. L. R., 2 Mad., 230**

**——— arts. 171, 171A, and 171B.**

*See* ART. 178 . **I. L. R., 8 Calc., 420, 837 [10 C. L. R., 449 12 C. L. R., 421**

*See* ABATEMENT OF SUIT—SUITS. **[I. L. R., 5 Calc., 139 : 4 C. L. R., 374**

*See* ABATEMENT OF SUIT—APPEALS. **[I. L. R., 7 All., 693, 734**

1. ——— **art. 171.**—*Death of appellant.—Civil Procedure Code, 1877, ss. 365 and 587.—Application for substitution of heir to allow execution to proceed.*—A suit was instituted and a decree obtained in the Court of first instance while Act VIII of 1859 was in force, but the second decree was made and the second or special appeal preferred after Act X of 1877 became law. Pending the hearing of such special appeal, on the 21st April 1878, the plaintiff, who was also appellant, died, and on the 16th August in the same year, or more than sixty days after his father's death, his son and sole heir applied to the Court to be substituted as appellant in place of the deceased, for the purpose of prosecuting the appeal. *Held* that the application was not made under section 365, but under section 587 of Act X of 1877, as incorporated with the former section, and was therefore not barred by article 171, schedule II of Act XV of 1877. Where the language of an Act of Limitation specifies the particular cases for which a period of limitation is provided, the Court ought not to interpret that language so as to include cases not falling within the strict meaning of the words used. IN THE MATTER OF RAM SUNKER BHADOORY **[3 C. L. R., 440**

2. ——— *Abatement of suit.—Death of sole plaintiff after decree.—Civil Procedure Code,*

**LIMITATION ACT, 1877, art. 171**—*continued.*

*1877, ss. 365, 372.*—A sole plaintiff having died after decree, an application was made more than sixty days after his death by his legal representative for an order that his name might be substituted on the record for that of the original plaintiff, and that a sum of money, to which the original plaintiff, if alive, would have been entitled might be paid to him, the legal representative,—*Held* that section 372 of the Civil Procedure Code did not apply to the case, that section contemplating a proceeding before the determination of the suit; and, further, that the application was barred by Act XV of 1877, schedule II, article 171. *Held*, also, that section 232 had no application. Section 365 of the Civil Procedure Code (amended by Act XII of 1879, section 61) does not apply to the case of a sole plaintiff dying after decree, the right to sue being merged in the decree. CALLY CHURN MULLICK *v.* BHUGGOBUTTY CHURN MULLICK . . . . . **5 C. L. R., 108**

**3.** ——————— *Death of plaintiff and substitution of his representatives as party to suit.*—If a plaintiff dies after decree, his representatives are not bound to apply within sixty days to be made parties to the suit, but have the same time to file an appeal as the plaintiff would have had. The Civil Procedure Code, sections 363, 365, and the Limitation Act, schedule II, article 171, do not apply to the case of a plaintiff dying after decree. RAMANADA SASTRI *v.* MINATCHI AMMAL . **I. L. R., 3 Mad., 236**

**4.** ——————— *Civil Procedure Code, 1877, ss. 363, 365.—Abatement of execution proceedings.—Representative.*—The provision of the Limitation Act (XV of 1877), schedule II, article 171, which gives a period of sixty days to a person claiming to be the legal representative of a deceased plaintiff under section 363 or 365 of the Code of Civil Procedure, does not apply to the representative of a deceased judgment-creditor claiming admission to continue execution proceedings commenced by him. Such a representative may come in at any time, subject always to the same conditions as would have applied to the plaintiff himself. GULABDAS *v.* LAKSHMAN NARHAR . **I. L. R., 3 Bom., 221**

**5.** ——————— **and art. 171B.**—*Act XII of 1879, ss. 60 and 108.—Deceased defendant.—Application to make legal representative defendant.*—Subsequently to the institution of the plaintiffs' suit, one of the defendants died, and his son, as his legal representative, was made a defendant in his stead. The new defendant objected (*inter alia*) that his father had been dead more than six months before the application of the plaintiffs to make him a defendant, and that, therefore, the suit should abate, as provided by the last clause of section 368 of the Civil Procedure Code, Act X of 1877 (introduced by the amending Act XII of 1879) and article 171B of the Limitation Act XV of 1877, which prescribes a period of sixty days within which an application should be made to have the representative of a deceased defendant made a defendant to a suit. When the amending Act XII of 1879 was passed,—that is, on the 29th of July 1879,—

**LIMITATION ACT, 1877, art. 171**—*continued.*

——————— **and art. 171B**—*continued.*

the original defendant had been dead more than six months; but the plaintiff made an application to have the representative of the deceased defendant made a defendant before the publication of the Act in the local Gazette. *Held* that the provisions of article 171B of the Limitation Act should not have retrospective effect, and that the plaintiffs' application was not time-barred. KHUSALBHAI *v.* KABHAI **[I. L. R., 6 Bom., 26**

**6.** ——————— *Civil Procedure Code (Act XIV of 1882), ss. 3, 368, 582.—Respondent, Death of.—Practice.—Substitution of parties.*—Having regard to section 3 of Act XIV of 1882, it is clear that the word "Code" in schedule II, article 171B of Act XV of 1877, applies to the present Code of Civil Procedure, Act XIV of 1882; and that, therefore, the word "defendant" in section 368 of that Code, when read with section 582, must be held to include "respondent." IN THE MATTER OF THE PETITION OF SOHSI BHUSAN CHAND, SOSHI BHUSAN CHAND *v.* GRISH CHUNDER TALUKDAR . . . . **I. L. R., 11 Calc., 694**

**7.** ——————— **and arts. 171A, 171B.**—*Civil Procedure Code (Act XIV of 1882), s. 582.—Respondent, Decease of, after appeal filed.—Defendant.—Held*, by the Full Bench, the word "defendant" in article 171B of the Limitation Act does not include a respondent. Section 582 of Act XIV of 1882 affects only proceedings under the Code, and does not extend the operation of any portion of the Limitation Act. UDIT NARAIN SINGH *v.* HAROGOURI PROSAD . . . **I. L. R., 12 Calc., 590**

**8.** ——————— **and art. 171B.**—*Application to sue in formâ pauperis.—Death of opponent. Substitution of heirs.—Subsequent granting of application.—Code of Civil Procedure, 1882, ss. 48, 368, and 410.*—Neither article 171B of schedule II of Act XV of 1877 nor any other section of the Law of Limitation applies to an inquiry into a claim to sue *in formâ pauperis*, and there is no limitation of time within which a mere applicant to sue as a pauper is bound to apply for the substitution of the name of a deceased opponent's heir in place of such opponent. Article 171B applies to applications made under section 368 of the Code of Civil Procedure, which section only applies to the case of the death of a party to a suit, presupposing therefore the institution of a suit; and in the case of an application to sue *in formâ pauperis*, no suit is instituted until the application is granted, when by section 410 it is deemed the plaint in the suit. JANARDAN VITHAL *v.* ANANT MAHADEV . . . **I. L. R., 7 Bom., 373**

**9.** ——————— *Appeal, Abatement of.—Application for declaration of insolvency.—Appeal from order rejecting application.—Death of decree-holder-respondent.—No application by appellant for substitution of deceased's representative.—Civil Procedure Code, ss. 344-348, 350, 351, 368.*—The decree-holder-respondent, in an appeal from an order refusing an application by the judgment-debtor for

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**LIMITATION ACT, 1877, art. 171**—*continued.*

declaration of insolvency under section 344 of the Civil Procedure Code, died, and the judgment-debtor, appellant, took no steps to have the legal representative of the deceased substituted as respondent in his place. *Held* that article 171B, schedule II of the Limitation Act (XV of 1877) applied to the case, and that, as no one had been brought on the record to represent the deceased respondent within the period prescribed, the appeal must abate. *Per* MAHMOOD, *J.*, that whatever the position of the parties might have been in the regular suit, in the insolvency proceedings the judgment-debtor occupied a position analogous to that of a plaintiff, and the decree-holder occupied the position of a defendant. *Narain Das* v. *Lajja Ram, I. L. R., 7 All., 693*, in which MAHMOOD, *J.*, differed from the decision of the Full Bench, distinguished. RAMESHAR SINGH *v.* BISHESHAR SINGH . **I. L. R., 7 All., 734**

10. ——————— **and art. 171B.**—*Per curiam* (KERNAN *J.*, dissenting).—An application by an appellant to make the representative of a deceased respondent party to the appeal does not fall under article 171B, but under article 178 of schedule II of the Limitation Act, 1871. LAKSHMI *v.* SRI DEVI **[I. L. R., 9 Mad., 1**

11. ——————— *Civil Procedure Code (XIV of 1882), ss. 368, 582.—Decease of respondent after appeal filed.*—The word "defendant" in article 171B of schedule II of the Limitation Act (XV of 1877) does not include "respondent." BALKRISHNA GOPAL *v.* BAL JOSHI SADASHIV JOSHI **[I. L. R., 10 Bom., 663**

12. ——————— *Application by representative of judgment-creditor to continue execution of decree.*—The provision of the Limitation Act (XV of 1877), schedule II, article 171, which gives a period of sixty days to a person claiming to be the legal representative of a deceased plaintiff under section 363 or 365 of the Code of Civil Procedure, does not apply to the representative of a deceased judgment-creditor claiming admission to continue execution proceedings commenced by him. The Code of Civil Procedure (Act X) of 1877 does not provide that applications for execution shall, like suits, abate by the death of the judgment-creditor; such representative may, therefore, come in at any time, as his coming in is contemplated in article 179, explanation I of schedule II of the Limitation Act, subject always to the same conditions as would apply to his principal. GULABDAS *v.* LAKSHMAN NARHAR **[I. L. R., 3 Bom., 221**

——————— **art. 173 (1871, art. 164).**

1. ——————— *Mofussil Small Cause Courts Act, XI of 1865, s. 21.—New trial.—Review.*—Where the circumstances of a case in a mofussil Small Cause Court admit of a new trial, an application for such new trial is governed by section 21 of Act XI of 1865 which is still in force notwithstanding the right of review given by section 623 of the Civil Procedure Code. But where the circumstances of a case do not admit of a new trial, but do admit

**LIMITATION ACT, 1877, art. 173**—*continued.*

of a review, then the time within which an application for review should be made is to be governed by article 173, schedule II of Act XV of 1877. MADON MOHON PODDAR *v.* PURNO CHUNDRA PURBOT . . . **I. L. R., 10 Calc., 297**

2. ——————— *Amendment of decree by orders in execution.*—Where the first Court's decree in favour of the plaintiff was upheld in appeal, but in the course of the execution proceedings the lower Appellate Court held that its judgment did not mean to uphold that decree in its entirety, it was held that this order was in the nature of an amendment of the decree, and that the ninety days allowed for an application for review should count from the date of such order. BULOBHUDDUR MAHANTEE *v.* MUDHOOSOODUN PANDEY . . **23 W. R., 433**

——————— **art. 176 (1871, art. 165).**—*Application.—Filing award by arbitrators.—Civil Procedure Code, 1877, s. 516.*—The act of an arbitrator, in handing in an award to the proper officer of the Court, for the purpose of the award being filed, cannot be considered as an "application" within the meaning of the Limitation Act. ROBARTS *v.* HARRISON **[I. L. R., 7 Calc., 333 : 9 C. L. R., 209**

——————— **art. 177 and s. 12.**—*Application for leave to appeal to Privy Council.—Time requisite for obtaining copy of judgment.—Held* (*per* STUART, *C. J.*, SPANKIE, *J.*, dissenting) that, in computing the period of limitation prescribed by article 177, schedule II of Act XV of 1877, for an application for leave to appeal to Her Majesty in Council, the time requisite for obtaining a copy of the judgment on which the decree against which leave to appeal is sought is founded, cannot be excluded under the provisions of section 12 of Act XV of 1877. JAWAHIR LAL *v.* NARAIN DAS . . **I. L. R., 1 All., 644**

——————— **art. 178.**

Applications to enforce a "summary decision" were provided for in section 22 of Act XIV of 1859, and this was continued in article 166 of Act IX of 1871, the period of limitation being one year. The provision was omitted in the present Act, but this article (178) including "applications for which no period of limitation is provided elsewhere in the schedule" has been inserted. Applications formerly coming under section 22 of the Act of 1859 and article 166 of the Act of 1871, if not otherwise expressly provided for, would presumably, therefore, now come under article 178.

1. ——————— *Act XIV of 1859, s. 22.—Summary decision.*—The words "summary decision," as used in section 22, Act XIV of 1859, meant a decision of the Civil Court not being a decree made in a regular suit or appeal. Under section 22, Act XIV of 1859, the period for enforcement of such decision was one year from the time it was passed. RAMDHAN MANDAL *v.* RAMESWAR BHATTACHARJEE **[2 B. L. R., A. C., 235 : 11 W. R., 117**

**LIMITATION ACT, 1877, art. 178**—*continued.*

2. ——————— *Act XIV of 1859, s. 22.*—*Decree under Act XIX of 1841.—Summary order.*—A decree passed under Act XIX of 1841 on a claim to a certain share of property by right of succession was a summary order, and therefore subject to the limitation of one year provided by section 22, Act XIV of 1859. MAZEDOONISSA BEEBEE *v.* FUEZUN BEEBEE . . . . **4 W. R., Mis., 6**

3. ——————— *Summary decision under Beng. Reg. VII of 1799.*—To a process of execution to enforce a summary decision of the revenue authorities under Regulation VII of 1799, Act XIV of 1859, is held applicable; and no proceeding in execution having been taken out to enforce such decision or to keep the same in force within one year next preceding the application for such execution, it was held barred by limitation. LUCHMEE KANT GHOSE *v.* BAMUN DASS MOOKERJEE . **17 W. R., 472**

4. ——————— *Act XIV of 1859, s. 22.*—*Summary decision.—Semble,*—An order under section 246 of the Civil Procedure Code was a summary decision within the meaning of section 22 of the Limitation Act. MANCHARAM KALLIANDAS *v.* RATILAL LALSHANKAR . . **6 Bom., A. C., 39**

5. ——————— *Act XIV of 1859, s. 22.*—*Summary decision.*—An order awarding possession under section 15, Act XIV of 1859, was a summary award to which the provisions of section 22 were applicable. A summary decision is not a final one on the matter at issue between the parties. IN THE MATTER OF NUBOO KISHEN MOOKERJEE **[11 W. R., 188**

6. ——————— *Act XIV of 1859, s. 22.*—*Order for costs in execution of decree.*—An order for costs made as a contested matter in execution of a decree, was not a "summary decision or award" within section 22, Act XIV of 1859, but an "order" under section 20. *Puresh Narain Roy* v. *Dalrymple, 9 W. R., 458,* followed. MOHAN LALL SUKUL *v.* ULFUTUNNISA **[5 B. L. R., 164, note : 11 W. R., 98**

7. ——————— *Act XIV of 1859, s. 22.*—*Order dismissing application for execution.*—An order of a Court dismissing an application for execution of a decree, on the ground that it was barred by the Law of Limitation, was not a "summary decision" within the meaning of section 22. It was an order within the meaning of section 20 of that Act. DHIRAJ MAHTAB CHAND BAHADOOR *v.* BACHARAM HAZRA . **5 B. L. R., 162 : 13 W. R., F. B., 74**

8. ——————— *Act XIV of 1859, s. 22.*—*Summary order.*—A judgment-creditor having in execution taken possession of lands in excess of his decree, objection was raised and a case instituted in which adjudication was made in favour of the judgment-debtor, the order for restoration of the excess land being confirmed in appeal. *Held* that this order was not a summary one within the meaning of section 22, and that an application for its execution was governed by the three years' limitation. ROOP MUNGUL SINGH *v.* CHOORAMUN SINGH . **16 W. R., 182**

9. ——————— *Act XIV of 1858, s. 22.*—*Decree under Registration Act, 1866, s. 53.—Quære,*—Whether a decree passed under section 53 of the Registration Act was or was not a summary decree within the meaning of Act XIV of 1859, section 22. HURNATH CHATTERJEE *v.* FUTTICK CHUNDER SUMADAR . . . . **18 W. R., 512**

10. ——————— *Act IX of 1871, art. 166.*—*Application for execution of decree.—Registration Act, 1866, s. 53.*—An application for the execution of a decree made under section 53 of Act XX of 1866 fell within article 166, and not within article 167, schedule II of Act IX of 1871. *Jai Shankar* v. *Tetley, I. L. R., 1 All., 586,* dissented from. A proceeding under section 53 of Act XX of 1866, though in the nature of a suit, was not a regular suit, and a decree made in such a proceeding was a decision of a Civil Court other than a decree passed in a regular suit. On the 13th July 1872 the appellant obtained a decree, under section 53, Act XX of 1866, on a bond specially registered under section 52 of that Act. He applied for the execution of it,—first on the 2nd September 1872, and again on the 18th August 1875. The Court made an order on the 15th November 1875 dismissing the proceedings on his second application for execution. The decree not being fully satisfied, he again applied for its execution on the 11th September 1878. *Held* that the application of the 11th September 1878 was barred both under section 22 of Act XIV of 1869 and article 166 of schedule II of Act IX of 1871, no proceeding having been taken to enforce the summary decree within one year next preceding the said application. BHIKHAMBHAT *v.* FERNANDEZ . **I. L. R., 5 Bom., 673**

*See contra,* JAI SHANKAR *v.* TETLEY. **[I. L. R., 1 All., 586**

11. ——————— *Act XIV of 1859, s. 22.*—*Registration Act (XX of 1866), s. 53.—"Decree" made upon a registered obligation.—Summary decision.*—A summary decision means a decision arrived at by a summary proceeding, and a "decree" made under section 53 of Act XX of 1876 was a summary decision. Section 20 of Act XIV of 1859 was intended to apply to decisions, whether called judgments, decrees, or orders, made in a regular suit; and section 22 of the same Act was intended to apply to all other decisions. A decree made in 1867 under section 53 of Act XX of 1866 held to be subject, as regards its execution, to the law of limitation provided in Act XIV of 1859, s. 22. MINA KONWARI *v.* JUGGAT SETANI **[I. L. R., 10 Calc., 196: 13 C. L. R., 385 L. R., 10 I. A., 119**

12. ——————— *Application to pass judgment in terms of an award.—Civil Procedure Code 1859, s. 327; 1877, s. 526.*—At the request of the applicants, the lower Court filed an award on the 20th December 1866, but no judgment was passed in terms of it. Several applications for execution of

**LIMITATION ACT, 1877, art. 178**—*continued.*

the award were subsequently made and granted. The last application was made in 1880, and was rejected on the ground that there was no decree to execute. The order was confirmed by the High Court on appeal. The applicants then applied to the lower Court to pass judgment in terms of the award. The Court rejected the application as barred under the Limitation Act, XV of 1877, schedule II, article 178. The applicants appealed. *Held*, by SARGENT, *C. J.*, and KEMBALL, *J.*, that, looking to the provisions of the Codes of Civil Procedure of 1859 and 1877 with respect to the filing of awards in Court and the proceedings thereon, it appeared to be the duty of the Court, under both Codes, to proceed to pass judgment according to the award as soon as it was ordered to be filed, without waiting for any application that that should be done, though such application was, as a matter of practice, usual; and that being so, such an application was one which, under the authority of *Kylasa Goundan* v. *Ramasami Ayyan, I. L. R., 4 Mad., 172*; and *Vithal Janardan* v. *Vithojirav Putlajirav, I. L. R., 6 Bom., 586*, was not within the contemplation of the Limitation Act. *Held*, further, that the same effect should be given to the language of section 327 of Act VIII of 1859 and section 526 of Act X of 1877. The expression "may be enforced" in the concluding part of section 327 ought to be read as "shall be enforced" as far as it applies to the Court, although the enforcement by execution of the decree must always, of course, be permissive, as regards the plaintiff. IHSWARDAS JAGJIVANDAS *v.* DOSIBAI
**[I. L. R., 7 Bom., 316**

**13.** ——————— *Application for certificate to collect debts of deceased person.*—Article 178 of schedule II of the Limitation Act, 1877, does not affect an application under Act XXVII of 1860 for a certificate to collect debts due to the estate of a deceased person. JANAKI *v.* KESAVALU
**[I. L. R., 8 Mad., 207**

**14.** ——————— *Application for certificate of sale.—Civil Procedure Code, 1859, s. 259.*—The provisions of the Limitation Act relating to applications do not extend to an application by a purchaser of land at a Court sale under a decree to obtain a certificate. KYLASA GOUNDAN *v.* RAMASAMI AYYAN
**[I. L. R., 4 Mad., 172**

**15.** ——————— *Certificate of sale, application for.*—Article 178, schedule II of the Limitation Act XV of 1877, is not applicable to applications for certificates of sale. The provisions of the Limitation Act (No. XV of 1877) do not apply to applications to a Court to do what it no has discretion to refuse, nor to applications for the exercise of functions of a ministerial character. VITHAL JANARDAN *v.* VITHOJIRAV PUTLAJIRAV . . . **I. L. R., 6 Bom., 586**

DEVIDAS JAGJIVAN *v.* PORJADA BEGAM
**[I. L. R., 8 Bom., 377**

**16.** ——————— *Certificate of sale, Application for.*—Where an application for a certificate of sale was made five years and a half after the confirmation of the sale,—*Held* that it was barred by article 178 of schedule II of Act XV of 1877. TUKARAM *v.* SATVAJI KHANDAJI . **I. L. R., 5 Bom., 206**

**17.** ——————— *Application for a certificate of sale.—Accrual of cause of action.*—The applicant purchased certain land at a Court sale on the 17th February 1876. The sale was confirmed on the 20th March of the same year. The purchaser did not apply for a certificate of sale until the 10th March 1880. *Held* that the application was barred by the Limitation Act, XV of 1877, schedule II, article 178. *Held*, also, that the purchaser's right to a certificate of sale accrued to him under sections 256, 257, and 259 of the Civil Procedure Code, Act VIII of 1859, on the 20th March 1876, when the sale was confirmed. IN RE KHAJA PATTHANJI
**[I. L. R., 5 Bom., 202**

**18.** ——————— *Insolvent judgment-debtor.—Application by creditor to prove claim.*—In July 1878 a person was declared an insolvent under the provisions of Chapter XX of the Civil Procedure Code. Only one creditor then proved his debt, and no schedule was framed. This creditor having applied for the sale of property belonging to the insolvent, another creditor, in May 1883, applied to prove his debt and to have his name inserted in the schedule which the Court then ordered to be framed. *Held* that the application was governed by article 178 of the Limitation Act, 1877; and that the right to apply having accrued at the date of the declaration of insolvency, the application was beyond time. PARSHADI LAL *v.* CHUNNI LAL
**[I. L. R., 6 All., 142**

**19.** ——————— *Application to amend decree.—Act X of 1877 (Civil Procedure Code), s. 206.*—An application to amend a decree, which is found to be at variance with the judgment, in accordance with the provisions of section 206 of the Civil Procedure Code, is an application of the kind mentioned in article 178 of schedule II of Act XV of 1877, and as such subject to the limitation of three years. IN THE MATTER OF THE PETITION OF GAYA PRASAD *v.* SIKRI PRASAD . **I. L. R., 4 All., 23**

**20.** ——————— **and art. 179.**—*Application for recovery of whole amount of decree under agreement.—Civil Procedure Code, s. 257A.*—On the 27th August 1878 the holder of a decree for money and the judgment-debtor agreed that the amount of the decree should be payable by instalments, and that, if default were made in payment of any one instalment, the whole decree should be executed. The Court executing the decree sanctioned this agreement. On the 28th November 1881, default having been made, the decree-holder applied for recovery of the whole amount of the decree. *Held* that the application was not one to which article 179, schedule II of the Limitation Act, 1877, was applicable, but article 178, and the period of limitation began to run from the date of default. The principal recognised in *Raghubans Gir* v. *Sheosaran Gir, I. L. R., 5 All., 243*; and *Kalyanbhai Dipchand* v. *Ghanashamlal Jadunathji, I. L. R., 5 Bom., 29*, applied. SHAM KARAN *v.* PIARI . . . . **I. L. R., 5 All., 596**

**LIMITATION ACT, 1877, art. 178**—*continued.*

**21.** ——————— *Decree prohibiting execution till the expiration of a certain period.* — A decree, which was passed on the 8th December 1881, in a suit on a simple mortgage-bond contained the following provision: "If the judgment-debt is not paid within four months, the decree-holder shall have the power to recover it by a sale of the mortgaged property." On the 17th February 1885 the decree-holder applied for execution of the decree. *Held* that, inasmuch as the decree provided expressly that the decree-holder might not apply for its execution till after the expiry of four months from its date, the limitation of article 178, schedule II of the Limitation Act, and not of article 179, should be applied to the case; and the application for execution having been made within three years from the 8th April 1882, when the right to ask for execution accrued, was not barred by limitation. THAKAR DAS *v.* SHADI LAL . . . **I. L. R., 8 All., 56**

**22.** ——————— *Application for execution of decree.*—An application for execution of a decree, made on the 29th May 1874, having been rejected, an appeal was preferred to the High Court, which reversed the order of the lower Court. The property of the judgment-debtor had been attached previously to the application for execution, and part of it was afterwards sold on the 6th September 1875. A subsequent application to have a further portion of the attached property sold was rejected on the 17th September 1875, on the ground that not only part of the property but the whole of it might have been sold on the 6th September. There being nothing to show that the attachment had ever been withdrawn, on the 31st December 1877 the judgment-creditor applied that the property of his debtor might be sold in execution of the decree. *Held* that nothing had been done by the judgment-creditor since his application for execution, of the 29th May 1874, "to enforce the decree or kept it in force" (as defined by the Full Bench decision in *Chunder Coomar Roy* v. *Bhogobutty Prosunno Roy, 1 C. L. R., 23 : S. C. I. L. R., 3 Calc., 235*); that the right to apply to have the property sold accrued upon the attachment, and accordingly that the present application, inasmuch as it had been made more than three years from the date of the attachment, was barred by limitation under article 178, schedule II of Act XV of 1877. JOOBRAJ SINGH *v.* BUHOORIA ALUMBASEE KOER **[7 C. L. R., 424**

**23.** ——————— *Application for execution.—Intermediate suit.—Fresh application.—Revival of application.*—On the 27th March 1878 the holder of a decree applied for execution. On the 27th May 1878 the Court made an order directing that the application should be struck off, as the record of the former execution proceedings was in the Appellate Court, and that the decree-holder should make a fresh application when such record was returned. On the 28th May 1881 the decree-holder renewed the application in accordance with such order. *Held*, on the question whether this application was barred by limitation, that it was not an application within the meaning of article 179, schedule II of Act XV of 1877, but one to which article 178 would apply; that limitation began to run when the record was returned; and that, therefore (three years not having elapsed from that time), the application in question was within time. *Kalyanbhai Dipchand* v. *Ghanashamlal Jadunathji, I. L. R., 5 Bom., 29*; and *Paras Ram v. Gardner, I. L. R., 1 All., 355*, referred to. RAGHUBANS GIR *v.* SHEOSARAN GIR **[I. L. R., 5 All., 243**

**24.** ——————— *Application for revival of execution stayed by injunction.*—A decree was made against *B.*, *K.*, and *Z.* On the 13th May 1879 application was made for execution of the decree against *B.* and *K.* In August 1879 *Z.*, who had preferred an appeal in the suit, applied on that ground for the stay of execution, and on the 22nd August 1879 the Court on the same ground ordered execution to be stayed. On the 16th December 1879 *Z.'s* appeal was dismissed. On the 24th June 1882 an application for execution of the decree against *B.* and *K.* was made. *Held* that such application might be regarded as one for revival of the proceedings in execution which had been stayed by injunction, to which article 178, schedule II of the Limitation Act, 1877, was applicable, and such application was therefore within time. The principle of decision in *Raghubans Gir* v. *Sheosaran Gir, I. L. R., 5 All., 243*; and *Kalyanbhai Dipchand* v. *Ghanashamlal Jadunathji, I. L. R., 5 Bom., 29*, followed. BUTI BEGAM *v.* NIHAL CHAND . . . . **I. L. R., 5 All., 459**

**25.** ——————— *Application for execution of decree by revival of proceedings after removal of injunction.*—On the 28th May 1878, application was made for execution of a decree, in pursuance of which certain property was attached and proclaimed for sale. On the day fixed for the sale the Court issued an injunction to stay the same until a suit, which certain persons who claimed the property had instituted, had been decided. On the 14th September 1882, the suit having been finally decided on the 24th January 1881, the decree-holder applied for execution. *Held* that the application might properly be considered to be for revival of the former proceedings after removal of the injunction, to which article 178 of the Limitation Act, 1877, rather than article 179, was applicable, and was within time from the date of accrual of the right to apply on the final decision of the suit. BASANT LAL *v.* BATUL BIBI **[I. L. R., 6 All., 23**

**26.** ——————— *Application under s. 411, Civil Procedure Code, 1877.—Court fees payable to Government under decree.*—Government is not entitled to any exemption from the provisions of the Limitation Act, 1877, relating to applications. *Held*, therefore, that an application by Government under section 411 of the Code of Civil Procedure to recover the amount of Court fees from a party ordered by the decree to pay the same was subject to the provisions of article 178 of the Limitation Act, 1877. APPAYA *v.* COLLECTOR OF VIZAGAPATAM **[I. L. R., 4 Mad., 155**

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27. ——————— *Application for possession after sale in execution of decree.—Period from which limitation runs.*—The right to apply for possession after a sale in execution of a decree accrues on the date the certificate of sale is issued, not on that on which the sale was confirmed; the period of limitation, therefore, counts from the former date. BASAPA *v.* MARYA . . **I. L. R., 3 Bom., 433**

28. ——————— *Application for possession by purchaser at a Court sale.—Civil Procedure Code, Act XIV of 1882, s. 318.*—An application by a purchaser at a Court sale to be put into possession is barred under article 178, schedule II of the Limitation, Act XV of 1877, if made more than three years after the grant of the certificate of sale. *Vithal Janardan* v. *Vithogirav Patlagirav, I. L. R., 6 Bom., 586,* distinguished. HANMANTRAV PANDURANG JOGLEKAR *v.* SUBAJI GIRMAJI **[I. L. R., 8 Bom., 257**

29. ——————— *Application for probate.*—The Limitation Act is not applicable to an application for probate; such an application, therefore, is not barred by article 178 of schedule II of that Act. IN THE MATTER OF THE PETITION OF ISHAN CHUNDER ROY . **I. L. R., 6 Calc., 707 : 8 C. L. R., 52**

30. ——————— *Application for probate or letters or certificate of administration.*—Article 178 of schedule II of Act XV of 1877 has reference only to applications under the Civil Procedure Code (Act X of 1877), and does not apply to applications for probate or letters or certificates of administration. BAI MANEKBAI *v.* MANEKJI KAVASJI **[I. L. R., 7 Bom., 213**

31. ——————— *Application for refund of excess payment.—Accrual of right to apply.*—The judgment-debtors against whom a decree had been executed applied for a refund of money which they alleged had been recovered in execution by the decree-holders in excess of what was actually due under the decree. Upon this application an account was taken by order of the Court. *Held* that the limitation applicable to the case was that provided by article 178, schedule II of the Limitation Act, and that the right to apply for the refund of the excess amount paid in execution accrued at the time when the account was taken and stated on the application of the judgment-debtors in the course of the proceedings in execution. MULA RAJ *v.* DEBI DIHAL **[I. L. R., 7 All., 371**

32. ——————— *Application to revive a case and restore it to the board.*—After a decree had been made in a suit, the case was, in 1875, struck out of the board for want of prosecution. No steps were taken to have it restored. In 1879 both the plaintiff and defendant died. In the same year the heirs of the plaintiff instituted a suit against the administrator of the defendant for the purpose of having the decree in the original suit carried out. This suit was dismissed by the Court of first instance under section 13 of the Code of Civil Procedure, but the Appellate Court, holding that the original suit was subsisting and might be reconstituted, directed that the plaintiffs should be allowed to amend their plaint by putting it into the form of a petition under section 372 of the Code. On a petition by the plaintiffs praying that the original suit might be revived and restored to the board,—*Held* that the application was not barred under article 178 of schedule II to the Limitation Act of 1877. Even if article 178 was applicable, the application would not be barred, limitation running from the time when the suit was allowed to be reconstituted. The Legislature did not intend to include in the Limitation Act every application to a Court with reference to its own list of causes, such as applications to transfer a case from one board to another, to transfer a case to the bottom of the board, change of attorneys, and so forth. GOVIND CHUNDER GOSWAMI *v.* RUNGUNMONEY . **I. L. R., 6 Calc., 60 : 6 C. L. R., 345**

33. ——————— **and arts. 171 and 171A.**—*Application to revive suit.—Right to apply.—Pending suit.*—The right to apply in a pending suit,—*i.e.,* a suit in which no final order has been made,—is a right which accrues from day to day, and therefore the periods of limitation provided in articles 171, 171A, and 178 do not apply in an application to revive such a suit. KEDARNATH DUTT *v.* HARA CHAND DUTT . . **I. L. R., 8 Calc., 420**

34. ——————— *Revival, Application for.—Civil Procedure Code, 1877, s. 371.*—An application by the legal representative of the plaintiff to revive a suit which has abated on the death of the plaintiff may be granted if made within three years from the time when the right to apply accrued, if the applicant can show that he was prevented from sufficient cause from continuing the suit. BHOYRUB DOSS JOHURRY *v.* DOMAN THAKOOR **[I. L. R., 5 Calc., 139 : 4 C. L. R., 374**

35. ——————— **and art. 179.**—*Injunction restraining execution.—Revival of proceedings by representative of decree-holder.—Substitution of name of representative on the record.*—*J.* obtained a decree against the firm of *M. R.* in 1863, and on the 16th September 1869 applied for execution by attachment and sale of certain immoveable property. The property was attached, but the sale was delayed by various causes until the 5th February 1876, when it was ordered to take place on the 18th March 1877. Meanwhile *P.* brought a suit against *J.*, and on 14th March 1876 he obtained an injunction restraining *J.* from proceeding, *pendente lite,* to the sale of the attached property. *J.* appealed against the order granting the injunction, which, however, was confirmed on the 26th June 1878. Meanwhile, on the 22nd January 1877, *J.* had died, and thereupon the proceedings in the matter of the injunction as well as in *P.'s* suit were carried on by *G.* as his representative. On the 19th January 1880, *P.'s* suit was dismissed, and with it the injunction of the 14th March 1876 fell to the ground. On the 5th February 1880 *G.* applied to have his name substituted for that of *J.* in the application for execution of the

**LIMITATION ACT, 1877, art. 178**—*continued.*

**——————— and art. 179**—*continued.*

16th September 1869, and to proceed with the case; and on the 19th February 1880 this application was granted, and an order made that execution should be proceeded with on *J.'s* application of September 1869. *K.*, as representing the firm of *M. R.*, appealed. *Held* that *G.* was entitled to execution. Where an application for execution has been made and granted, but the right to execute has been subsequently suspended by an injunction or other obstacle, the decree-holder may apply for a revival of the proceedings within three years from the date on which the right to apply accrues,—*viz.*, the date on which the injunction or other obstacle is removed (article 178 of schedule II of Act XV of 1877). Where a decree-holder, whose right of execution has been thus temporarily suspended, dies, his representative has the same rights as he had himself to apply for and obtain a revival of the proceedings. It was contended in the above case that *G.* had no right to apply for a revival of proceedings, unless his name was substituted on the record as *J.'s* representative; that as his right to apply for such substitution accrued immediately upon *J.'s* death, which had happened more than three years previously, so much of his application of 3rd February 1880 as related to the substitution of names was barred by article 178 of schedule II of Act XV of 1877; and that, consequently, the other portion of his application which related to execution was necessarily inadmissible, inasmuch as it depended upon the substitution of *G.'s* name, which it was too late to effect. *Held* that, under the circumstances of the case, *G.'s* right to apply for the entry of his name in the place of that of *J.* could not be regarded as having accrued immediately upon *J.'s* death. At that time, *J.'s* application for execution, being suspended by the injunction, was to all intents and purposes non-existent. It could not be revived until the injunction was removed. During the continuance of the injunction, an application by *G.* for the entry of his name could not have been entertained by the Court, inasmuch as *J.'s* application for execution was in abeyance and would never be revived at all in the event of *P.* succeeding in his suit; and even if *P.* failed, it might also happen that *J.'s* application would not be revived in favour of *G.*, for, even if he were *J.'s* representative at the date of his application, he might be dead before the decision of *P.'s* suit. KALYANBHAI DIPCHAND *v.* GHANASHAMLAL

**[I. L. R., 5 Bom., 29**

**36.** ——————— *Death of sole defendant.—Legal representative.—Civil Procedure Code, (Act X of 1877), ss. 368, 372.*—In a suit for the recovery of land against a sole defendant, the latter died before the hearing. Sixty-three days after the death of the defendant, the plaintiff applied to the Court to enter on the record the legal representative of the deceased defendant. On the 22nd of November 1880, the Court rejected the application under the provisions of Act XV of 1877, schedule II, article 171*b*, and ordered the suit to abate. On the same day the plaintiff applied to the Court to set aside the order directing the suit to abate, but this application was also rejected on the 20th of September 1881. On appeal to the High Court,—*Held* that the application which was rejected on the 22nd of November 1880 was an application under section 372, and not under section 368, of the Code of Civil Procedure; and that the applicant was entitled to make the application within three years, as allowed by Act XV of 1877, schedule II, article 178. *Gocool Chunder Gossamee* v. *Administrator General of Bengal, I. L. R., 5 Calc., 726,* referred to. BENODE MOHINI CHOWDHRAIN *v.* SHARAT CHUNDER DEY CHOWDHRY

**[I. L. R., 8 Calc., 837: 10 C. L. R., 449**
**12 C. L. R., 421**

**37.** ——————— *Application for fresh summons.—Filing of plaint.*—A plaint was filed on 12th March 1875, and the summons to the defendant to appear and answer issued on 13th March 1875. With the exception of an application for substituted service made on 20th March 1875, and which was refused, no further steps were taken in the matter until 21st March 1878, when the plaintiff applied for a fresh summons to issue, the time for the return of the first summons having long since expired. *Held* that the mere filing of a plaint, or the naked fact that a plaint is on the file, will not of itself prevent the operation of the law of limitation, and that as no steps had been taken to renew the summons for three years, and as no sufficient case to excuse the delay had been made out, the application was out of time, and should be refused. RAMKISSEN DOSS *v.* LUCKEYNARAIN . . . . **I. L. R., 3 Calc., 312**

**38.** ——————— *Application for summons after period of limitation had expired.—Rules of High Court (4th December 1875), 1, 2, 5.*—In a suit upon a promissory note, dated the 4th June 1873, payable three months after date, the plaint was filed on the 22nd November 1873, but no summons to appear was issued until the 13th September 1878, when a Judge's order for the issue of a summons was obtained *ex parte*. *Held* that the suit was not barred by limitation. GERENDER COOMAR DUTT *v.* JUGGADUMBA DABEE . **I. L. R., 5 Calc., 126**

**39.** ——————— *Per curiam* KERNAN, *J.* dissenting).—An application by an appellant to make the representative of a deceased respondent party to the appeal does not fall under article 171B, but under article 178 of schedule II of the Limitation Act, 1871. LAKSHMI *v.* SRI DEVI

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**——————— art. 179 (1871, art. 167; 1859, s. 20).**

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## 1. LAW APPLICABLE TO APPLICATION FOR EXECUTION.

1. ——————— *Application for execution of decree on specially registered bond under Registration Act, 1866, ss. 52, 53.*—*Held* that article 167, and not article 166, schedule II of Act IX of 1871, applied to an application for the execution of a decree made under the provisions of section 53 of Act XX of 1866 upon a bond specially registered under the provisions of section 52 of that Act. JAI SHANKAR *v.* TETLEY . . . . I. L. R., 1. All., 586

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**LIMITATION ACT, 1877, art. 179**—*continued.*

## 1. LAW APPLICABLE TO APPLICATION FOR EXECUTION—*continued.*

High Court on appeal came within the scope of article 167 of the Limitation Act of 1871, schedule II. HURBUNS LALL *v.* SHEO NARAIN SINGH
[21 W. R., 391

3. ——————— *Application for execution of decree for costs when rejecting petition to appeal to Privy Council.*—The period of limitation within which application must be made for execution of an order for costs passed by the High Court, when rejecting a petition for leave to appeal to the Privy Council is that specified in schedule II, article 167 of Act IX of 1871. HURRO PERSHAD ROY CHOWDHRY *v.* BHUPENDRO NARAIN DUTT
[I. L. R., 6 Calc., 201: 7 C. L. R., 79

4. ——————— *Application to ascertain how much judgment-creditor has been paid.*—An application asking the Court to ascertain and determine how much a judgment-creditor has been overpaid is not barred by the lapse of the time allowed for execution of a decree if the applicant has not been guilty of *laches*, and if he has come with due diligence. MUTHOORA PERSHAD SINGH *v.* SHUMBOO GEER . . . . . 22 W. R., 211

5. ——————— *Decree in force at passing of Act XIV of 1859.*—Where a decree was in force at the passing of Act XIV of 1859 it would be barred after three years; but if steps had been taken, and an application made within that period, a second application would fall within the rule laid down in section 20 of that Act. GREGORY *v.* JOYCHUNDER BANERJEE . . 1 Ind. Jur., N. S., 80

6. ——————— *Decree in force at passing of Act XIV of 1859.*—In 1845 *K.* and *M.* obtained a joint decree for possession and mesne profits against *N.* In 1846 possession was taken, and the case was struck off in 1847. In 1850 *K.* alone applied for execution and was refused, he not being the sole decree-holder. *K.* disappeared in June 1851, and was never afterwards heard of. In February 1852 *S. S.*, wife of *K.*, and *R.*, uncle of *K.*, applied to execute the decree, alleging that it had been transferred in gift to them by *K.*; but their application was rejected because *M.* had not joined; and, secondly, because no order could be passed in the absence of *K.* On 28th December 1861 *S. S.* again applied for execution of the whole decree, claiming her husband's share as his heir, and *M.'s* under a deed of gift, and her application was rejected on the ground that, as twelve years from the disappearance of her husband had not expired, and she had not performed the ceremony of kooshaputra, she could not claim as his representative. An appeal from this order was rejected on 6th December 1862. In 1863 *S. S.* applied for a certificate, under Act XXVII of 1860, to collect the debts due to her husband, which was granted in July 1864. The present application was made by *S. S.* and *M.* on the 23rd August 1864, *S. S.* having performed kooshaputra on 18th June 1863. The Court found that the various attempts

**LIMITATION ACT, 1877, art. 179**—*continued.*

1. LAW APPLICABLE TO APPLICATION FOR EXECUTION—*continued.*

to execute were made *bonâ fide*. *Held*, first, that the decree was in force at the time of the passing of Act XIV of 1859; secondly, that the present application, having been made within three years of the proceedings in 1861, was in time, under section 20 of that Act. POGOSE *v.* BOISTUB LALL
**[2 Ind. Jur., N. S. 1: 6 W. R., Mis., 104**

7. ——————— *Application for execution of decree.*—Application for execution of a decree passed on 13th May 1869, and for which the period of limitation was three years, was made on 13th May 1872. *Held*, the execution was barred by article 167, schedule II of Act IX of 1871, notwithstanding the suit had been instituted before 13th April 1873. NUNDO COOMAR MOOKERJEE *v.* ISSUR CHUNDER BHUTTACHARJI . . . **12 B. L. R., Ap., 9**

8. ——————— *Period from which limitation runs.—Payments since that date.*—Limitation Act, No. IX of 1871, governs applications to execute decrees made before the Act, and, in computing the period of limitation, the Act directs the date of the prior application to be taken, and that date cannot be altered because intermediate payments may have been made on account of maintenance. NARANAPPA AIYAN *v.* NAMA AMMAL *alias* PARVATHY AMMAL
**[8 Mad., 97**

*See* KRISHNA CHETTY *v.* RAMI CHETTY
**[8 Mad., 99**

MAHALAKSHMI AMMAL *v.* LAKSHMI AMMAL
**[8 Mad., 105**

COLLECTOR OF SOUTH ARCOT *v.* THATACHARRY
**[8 Mad., 40**

9. ——————— *Application for execution of decree.—General Clauses Consolidation Act, 1868, s. 6.*—An application for execution of a decree being made on the 27th September 1871,—*Held* not to be a suit within the meaning of section 1 clause (*a*) of Act IX of 1871, and, therefore, barred under schedule II, article 167 of that Act, as having been made more than three years after the date of the last preceding application. The application of the 27th September 1871 could not be regarded as a mere continuation of a proceeding pending—*viz.*, of a former application of the 7th January 1868—within the meaning of Act I of 1868, section 6, at the time when the new Limitation Act came into operation, though the order on the latter application, having been made on the 31st March 1870, would possibly have been a sufficient proceeding within the 20th section of Act XIV of 1859 to constitute a fresh terminus whence time might run under that Act. GOVIND LAKSHUMAN *v.* NARAYAN MARESHVAR . . . . . **11 Bom., 111**

BALKRISHNA *v.* GANESH . **11 Bom., 116, note**

10. ——————— *Act IX of 1871, s. 1.—Execution of decree in suit instituted before 1st April 1873.*—An application for execution of a decree is an application in the suit in which that decree has been obtained. From this, and from the enactment in section 1 of Act IX of 1871, that nothing contained in section 2, or in Part II of that Act, shall apply to suits instituted before the 1st April 1873, it follows that nothing contained in schedule II of that Act extended to an application for execution of a decree in a suit instituted before that date. No such application was barred by section 20 of Act XIV of 1859, if made within three years from the date of a proceeding within the meaning of that section. Although the execution of a decree may have been actually barred by time at the date of an application made for its execution, yet, if an order for such execution has been regularly made by a competent Court, having jurisdiction to try whether it was barred by time or not, such order, although erroneous, must, if unreversed, be treated as valid. MUNGUL PERSHAD DICHIT *v.* GRIJA KANT LAHIRI
**[I. L. R., 8 Calc., 51: 11 C. L. R., 113**
**L. R., 8 I. A., 123**

Reversing, on appeal, MUNGUL PERSHAD DICHIT *v.* SHAMA KANT LAHIRI CHOWDWRY
**[I. L. R., 4 Calc., 708**

11. ——————— *Applications for execution.—Act IX of 1871, s. 1.*—The time prescribed by the Limitation Act (IX of 1871) within which applications for execution may be made, governs all such applications made during the time that Act was in force. UNNODA PERSAD ROY *v.* KOORPAN ALI
**[I. L. R., 3 Calc., 518: 1 C. L. R., 408**

12. ——————— *Application for execution.—Law in force at time of application.*—The law of limitation applicable to proceedings in execution is not the law under which the suit was instituted, but the law in force at the date of the application for execution, in absence of a legislative provision to the contrary (such as that contained in section 1 of Act IX of 1871). GURUPADAPA BASAPA *v.* VIRBHADRAPA IRSANGAPA . . **I. L. R., 7 Bom., 459**

13 ——————— *Execution of decree.—Limitation applicable to execution of a decree passed previous to the 1st October 1877.—Limitation Act, XV of 1877, art. 179.—General Clauses Consolidation Act (I of 1868), s. 6, Effect of.*—In execution of a decree, dated the 17th January 1877, the judgment-creditor applied on the 13th May 1878 to have the property of his judgment-debtor sold on the 16th September, 1878. Subsequently, on the 2nd June 1881, he made a further application to have the decree executed. *Held* that the case was governed by the provisions of article 167 of Act IX of 1871, and not by those of article 179 of Act XV of 1877; and that, as the application had not been made within any one of the periods given in the third column of article 167, it was barred by limitation. *Held*, also, following *Mungul Pershad Dichit* v. *Grija Kant Lahiri, I. L. R., 8 Calc., 51*, that although there is no corresponding provision in Act XV of 1877 to that contained in section 1 of Act IX of 1871, all applications for execution of a decree are applications in the suit

**LIMITATION ACT, 1877, art. 179**—*continued.*

1. LAW APPLICABLE TO APPLICATION FOR EXECUTION—*continued.*

which resulted in that decree. BEHARY LALL *v.* GOBERDHUN LALL

[I. L. R., 9 Calc., 446 : 12 C. L. R., 431

14. ——— *Execution of decree, Application for.—Step in aid of execution.—Repeal, Effect of.*—On the 28th September 1877 an application was made for execution of a decree. On the 8th July 1878 the decree-holder deposited R2 as nilamee fees,—that is to say, costs for bringing certain property to sale in execution of the decree. On the 28th March 1881 a further application for execution of the decree was made. *Held* that the deposit of R2 as nilamee fees on the 8th July 1878 was a step in aid of execution of the decree, and that the application of the 28th March 1881, being within three years from the date of the deposit, was not barred by limitation. *Quære,*—Whether, inasmuch as Act IX of 1871 is repealed by Act XV of 1877, and the later Act contains no provision similar to that contained in section 1 of Act IX of 1871, Act XIV of 1859 can be said to have been repealed in respect of suits instituted before the 1st of April 1873. RADHA PROSAD SINGH *v.* SUNDUR LALL . . I. L. R., 9 Calc., 644

15. ——— *Act IX of 1871, s. 1.—Application for execution of decree passed before Act of 1877 came into force.—Application to keep alive decree.*—The plaintiff obtained a decree against the defendant in 1872. He first applied for its execution in 1874, and his application was disposed of on the ground that the requisite Court fee had not been paid. His next application was in 1876, and it was disposed of because no property could be found to satisfy the decree. His third application, made on the 10th of March 1879, was one asking merely that the decree might be kept alive. He now applied for the fourth time on the 26th of November 1881, and sought execution of the decree. *Held* that the law of limitation applicable to proceedings in execution is not the law under which the suit was instituted, but the law in force at the date of the application for execution, in absence of a legislative provision to the contrary (such as that contained in section 1 of Act IX of 1871). The law of limitation, therefore, to be applied to the application of the 10th March 1879, was Act XV of 1877; and inasmuch as that application did not ask for any step to be taken towards executing the decree, it was not in accordance with article 179, schedule II of Act XV of 1877, and did not save the present application from being barred. *Mungul Pershad Dichit* v. *Grija Kant Lahiri, I. L. R., 8 Calc., 51,* explained. GURUPADAPA BASAPA *v.* VIRBHADRAPA IRASANGAPA

[I. L. R., 7 Bom., 459

16. ——— *Proceeding to enforce judgment.*—Act XV of 1877 operates from the date on which it came into force as regards all applications made under it. *Behary Lall* v. *Goberdhun Lall, I. L. R., 9 Calc., 446,* dissented from. An application for execution was made on the 2nd of March 1872. In the execution proceedings certain properties were attached and a sale proclamation was issued. A claim to a portion of the properties was then preferred by third parties, and allowed on the 17th of June 1872. The decree-holder failed to take necessary measures to bring the remainder of the property to sale, and the case was struck off on the 4th of July 1872. A subsequent application for execution was made on the 14th of June 1875. *Held* that the subsequent application was not barred by the provisions of section 20, Act XIV of 1859. BECHARAM DUTTA *v.* ABDUL WAHED . . I. L. R., 11 Calc., 55

2. PERIOD FROM WHICH LIMITATION RUNS.

(*a*) CONTINUOUS PROCEEDINGS.

17. ——— *Order refusing execution operating as stay of process.*—A decree-holder applied for the sale of certain property then under attachment in the suit. The Court refused to issue process for the sale, on the ground that the property could not be sold, as certain claims and suits respecting it were still pending. The claims and suits having been determined, the application was renewed. More than three years had elapsed between the date of the order on the first application and the date of the renewed application. *Held* that the second application was not barred, the order on the first application operating simply as a temporary stay of process for the sale of the property, and there being a pending proceeding to enforce the decree during the stay. RAGAVA PISHARDI *v.* AYUMANJIRI MANKAR THUPAN *alias* VLLIA THAMBRAKLE . . . . 4 Mad., 261

18. ——— *Continuing attachment.—Process to enforce decree.*—An attachment of property in execution of a decree operates *de die in diem* as process of execution upon a decree. Where, therefore, the late Sudder Court, by an order, dated 25th July 1855, directed that the judgment-debtor should be allowed to remain in the enjoyment of property then under attachment, that an order for the sale of the property should be stayed, but that the attachment should continue in force until the further order of the Court; and on 10th May 1868 the High Court made on order setting aside the order of the Sudder Court, and stated that the assignee of the execution-creditor should be left at liberty to apply for execution of the decree,—*Held,* on an application made reversing the decision of the Court below, that the right to enforce payment of the amount due under the decree was not barred. BROOKS *v.* PATTAMMARI NANJAPPA NAICK . . 4 Mad., 316

But *see* RADHIKA CHOWDHRAIN *v.* LUKHEE CHUNDER GHOSE . . 18 W. R., 513

19. ——— *Continued proceeding.—Application struck off.*—The effect of an order striking off execution proceedings in consequence of an adverse decision against the decree-holder under Act VIII of 1859, section 246, is not to dispose finally of

**LIMITATION ACT, 1877, art. 179**—*continued.*

2. PERIOD FROM WHICH LIMITATION RUNS—*continued.*

(*a*) CONTINUOUS PROCEEDINGS—*continued.*

the application for attachment and sale: and if the result of a regular suit prosecuted with due diligence is a final decree in his favour, and he makes an application for the execution of this decree, such application, whatever its form, is in substance one for the continuation of the former proceedings, and is therefore not an application to execute the decree within the meaning of Act IX of 1871, schedule II, article 167. PYAROO TUHOVILDARINEE *v.* NAZIR HOSSEIN [23 W. R., 183

20. ——————— *Decree-holder, Refund by, of money paid to satisfy decree.—Revival of original decree.—Application to execute.*—A decree having been satisfied by the decree-holder obtaining an order for the payment to him of a certain sum of money which was deposited in Court in his judgment-debtor's name, the decree-holder, owing to subsequent proceedings of the son of the judgment-debtor, had to refund the money which he had received. He then applied again for execution, but, many years having elapsed since the last proceedings, was met with the objection that his decree was barried by limitation. *Held* that, on a proceeding such as this, the old decree, which had been satisfied, could not revive. ABDOOL JULEEL *v.* KANCHUN DOSSEE . . . . . 24 W. R., 143

21. ——————— *Separate decrees.—Continued application.*—Where a plaintiff obtained separate decrees against several persons in respect of several duties which they were to perform separately, and the plaintiff chose to proceed in the first instance against some, and not against others, in taking out execution,—*Held* that the proceedings in taking at different times were not continuous proceedings in execution, and that limitation would run separately from the date of the latest action in each case. CHOWDHRY HUREEHUR SINGH *v.* HRIDOY NARAIN [25 W. R., 310

22. ——————— *Application for execution of decree.—Decree barred by lapse of time.*—In a decree for possession passed on 19th December 1874, the inquiry into the mesne profits was reserved for the execution stage. Possession having been taken, execution was taken out for costs, but owing to disputes among the judgment-creditors the amount deposited in Court was not paid out till 7th February 1868. After this, on 1st June 1870, application for further execution was made by assessment of mesne profits, upon which attachment was effected. *Held* that, as the application of 1st June 1870 was not for a continuation of the original suit, but for execution of the decree, the judgment-creditor was bound by the rules relating to execution; but that, even if treated as an application for adjustment of the wasilat, it was rightly rejected by reason of the great and needless delay. WODOY TARA CHOWDHRANI *v.* ABDOOL JUBBUR CHOWDHRY . 24 W. R., 339

23. ——————— *Application for execution of decree.—Continued application.*—An application which is pending must be looked upon as a continuous proceeding until it is disposed of. SHURUT CHUNDER SEN *v.* ABDOOL KHYR MAHOMED MOHUTESUR BILLAH . . . . 23 W. R., 327

24. ——————— *Continued application.—Proceeding to enforce decree.*—It was the object of the Legislature in Act XIV of 1859, section 14, with regard to the limitation for the commencement of a suit, to exclude the time during which a party to the suit may have been litigating, *bonâ fide* and with due diligence, before a Judge whom he has supposed to have had jurisdiction, but who yet may not have had it. The same principle prevails in the construction of section 20 with regard to executions. *Held*, accordingly, that a proceeding, taken *bonâ fide* and with due diligence, before a Judge whom the judgment-creditor believed, *bonâ fide*, though erroneously, to have jurisdiction,—in this case the Judge himself, also, having believed that he had jurisdiction, and having acted accordingly,—was a proceeding to enforce the decree within the meaning of section 20. HIRA LAL *v.* BADRI DAS . I. L. R., 2 All., 792

25. ——————— *Application for execution of decree*—On the 26th June 1867 a decree-holder applied for execution of his decree. A notice was thereupon issued to the judgment-debtor to show cause, on the 13th of July 1867, why the decree should not be executed against him. The judgment-debtor not appearing to show cause on the 13th July 1867, the Subordinate Judge of Surat ordered a warrant to be issued. Subsequently, on the same day (13th July 1867), the decree-holder applied to the Court to stop all further proceedings in the case, on the ground that the judgment-debtor had promised to satisfy the decree. The decree, however, remaining unsatisfied, the judgment-creditor, on the 12th July 1870, presented a second application for execution. The Subordinate Judge rejected it as barred under section 20 of Act XIV of 1859, as it was beyond three years from the 26th June 1867, the date of the previous application. On appeal the District Judge confirmed the order. On special appeal the High Court reversed the orders of both the lower Courts and held the proceedings to have commenced on the 26th June 1867, and continued till the 13th July 1867, on which day the judgment-debtor was to show cause, and up to which day, therefore, the judgment-creditor must be considered as going on with one and the same proceeding, as the first Court actually made an order for a warrant to issue on that day. DAMODHAR LAKHMIDAS *v.* GULABDAS LALCHAI . . . . . 9 Bom., 254

26. ——————— *Decree remaining under attachment.*—The period during which a decree remains under attachment should not be deducted from the time within which proceedings must be taken for the execution of the decree. *Chandi Prosad Nandi* v. *Raghunath Dhar, 3 B. L. R., Ap.,*

**LIMITATION ACT, 1877, art. 179**—*continued.*

2. PERIOD FROM WHICH LIMITATION RUNS—*continued.*

(*a*) CONTINUOUS PROCEEDINGS—*continued.*

52, dissented from. AZMUDDIN *v.* MATHURADAS GOVARDHANDAS GULABDAS . **11 Bom., 206**

27. ——————— *Application for execution of decree.—Continuing proceedings.*—A decree-holder applied for execution on the 10th of October 1871. On the 24th of February 1872 he made an application to the Court executing the decree, that the case should be taken off the file for the present, but that the attachment which had been issued should be kept in force. The application was granted, but the formal order, as drawn up, though it recited the application, was merely to take the case off the file. On the 6th of February 1875 the decree-holder applied for further execution. It was objected that execution of the decree was barred by limitation, but it was held that limitation did not apply, as the petition was for the continuance of the suspended proceedings and not for fresh execution. GOLAMI SAHU *v.* CHUTTER BHOOJ PATUCK

**[3 C. L. R., 261**

28. ——————*Application for execution of decree.—Reversal of sale in execution.*—*A.* obtained a decree against *B.* on the 21st of June 1871, and applied for execution on the 10th of July following. On the 2nd of October of the same year property attached under such execution was sold, and, the sale-proceeds being paid over to *A*, the execution proceedings were struck off the file on the 28th of July 1872. On the 14th of May 1873 *B.* obtained an order setting aside the sale and for refund of the sale-proceeds. *A.* thereupon, on the 22nd of December 1874, again applied to execute his decree. *Held* that such application was in substance one simply to continue the proceedings already set on foot by the first application for execution, and, therefore, the right to execute the decree was not barred by the law of limitation. ISSURREE DASSEE *v.* ABDOOL KHALAK

**[I. L. R., 4 Calc., 415: 3 C. L. R., 46**

29. ——————— *Execution of decree.—Proceedings to enforce decree.—Held* by a Full Bench (PEARSON, *J.*, dissenting) that an application to execute a decree against a judgment-debtor's property, made more than three years after the last application for execution, was not barred by limitation under article 167, schedule II, Act IX of 1871, when the last application was interrupted by a successful objector against whom the decree-holder had to bring a regular suit and succeeded in obtaining a decree; and that the renewed application to execute within three years from the date of the decree in the said suit was not a fresh application for execution against the judgment-debtor, but a continuance or revival of the previous application interrupted by the objector. *Per* PEARSON, *J.*, *contra*, that under article 167, schedule II, Act IX of 1871, execution of decree was barred. PARAS RAM *v.* GARDNER

**[I. L. R., 1 All., 355**

**LIMITATION ACT, 1877, art. 179**—*continued.*

2. PERIOD FROM WHICH LIMITATION RUNS—*continued.*

(*a*) CONTINUOUS PROCEEDINGS—*continued.*

30 ——————— *Application for execution of decree.—Revival.—Dekkan Agriculturists' Relief Act, 1879 and 1881, s. 48*—On 20th July 1871 the plaintiffs obtained a decree against the defendants for the sum of R4,083 and for the sale of their mortgaged property. On the 16th July 1877 the plaintiffs applied for execution. The application was granted, the property was attached, and the sale was fixed for the 30th November 1878. On the 18th November 1878 one of the defendants applied for a postponement of the sale until harvest time, when he said he would pay the amount of the decree. The sale was accordingly, with the plaintiffs' consent, postponed to the 31st May 1879. On the 13th June 1879 the plaintiffs informed the Court that negotiations were proceeding between themselves and the defendants for the settlement of the decree, and prayed that their application of the 16th July 1877 might be struck off; adding that, if the negotiations failed, they would present a fresh application. The negotiations for settlement proved abortive, and the case being one to which the Dekkan Agriculturists' Relief Act (XVII of 1879) applied, the plaintiffs took steps to obtain a conciliator's certificate. These proceedings occupied the period from 3rd July 1880 to the 19th January 1881. The certificate was granted on the 1st December 1881. On the 13th December 1881, more than three years after the date of the previous application,—*viz.*, 16th July 1877,—the plaintiffs made the present application for execution. The defendants contended that it was barred by limitation. *Held* that the application was not barred. As it was understood between the parties when the application of the 16th July 1877 was struck off on the 13th June 1879, that, if negotiations failed, a fresh application should be presented, the application of the 13th December 1881 was to be regarded as an application for the revival of the old execution proceedings. But, in any case, the application by the defendant, of the 18th November 1877, for a postponement of the sale of his property when he promised to pay the amount of the decree, was an admission of the plaintiff's right to execute the decree within the contemplation of section 19 of the Limitation Act (XV of 1877), and created a new period of limitation, which would ordinarily have expired on the 18th November 1881. As, however, by the provisions of the Dekkan Agriculturists' Relief Act the period during which the conciliator was endeavouring to effect an amicable settlement—*viz.*, from 8th July 1880 to 1st December 1881—would have to be deducted, the present application was within time. VENKATRAV BAPU *v.* BIJESING VITHALSING . . . **I. L. R., 10 Bom., 108**

31. ——————— *Civil Procedure Code, s. 583.—Execution of decree.—Decree enforcing the right of pre-emption.—Non-payment of purchase-money decreed by Appellate Court.—Restitution of purchase-money paid under lower Court's decree.—Application for restitution.—Revival of applica-*

**LIMITATION ACT, 1877, art. 179**—*continued.*

2. PERIOD FROM WHICH LIMITATION RUNS—*continued.*

(*a*) CONTINUOUS PROCEEDINGS—*continued.*

*tion.*—A decree for pre-emption was passed conditionally upon payment by the decree-holder of R1,139, and in July 1880 the plaintiff paid this amount into Court, and it was drawn out by the defendant in August 1881. Meanwhile, in July 1881, the High Court in second appeal raised the amount to be paid by the plaintiff to R2,400, but the plaintiff allowed the time limited for payment of the excess difference to elapse without paying it, and the decree for pre-emption thereupon became dead. In May 1883 the plaintiff applied in the execution department for the refund of the deposit which had been drawn and retained by the defendant. This application was granted, and the defendant ordered to refund, and this order was confirmed on appeal in January 1885, and by the High Court in second appeal in May 1885. Meanwhile the first Court had suspended execution of the order pending the result of the appeal, and in December 1884 removed the application temporarily from the "pending" list. In February 1885 the plaintiff applied for restitution of the amount deposited, asking for attachment and sale of property belonging to the defendant. This application was dismissed as barred by limitation. *Held* that this application was only a revival of the application of May 1883 which was within time. *Held*, also, that the plaintiff was, in the sense of section 583 of the Civil Procedure Code, "a party entitled to a benefit by way of restitution under the decree" of the High Court of July 1881; that it was a necessary incident of that decree that he was entitled to restitution of the sum which he had paid as the sufficient price under the decree of the lower Appellate Court; that he was competent under section 583 to move the local Court to execute the appellate decree in this respect in his favour "according to the rules prescribed for the execution of decree in suits;" that he did this in May 1883 by an application made according to law in the proper Court in the sense of article 179 of the Limitation Act; and that his present application to the same effect, being within three years from that application, was within time. NAND RAM *v.* SITA RAM

[I. L. R., 8 All., 545

32. ——————— *Application for execution of decree.—Step in aid of execution.*—*G.* sued *K.*, as the legal representative of her deceased husband, *S.*, on a bond executed by *S.* in his favour, and obtained a decree. Subsequently he sued *K.* on a bond which she had personally executed in his favour, and obtained a decree. On the 7th September 1875 he applied for execution of both these decrees, and *S.'s* landed estate, which stood recorded in *K.'s* name, was attached. This estate was sold on the 20th February 1877, being put up for sale in one lot, in satisfaction of both decrees, in accordance with an application made by *G.* on the 16th February, and was purchased by *G.* for the amount of the decrees. This sale was subsequently confirmed, and on the 10th December 1877, satisfaction of the decrees was entered

**LIMITATION ACT, 1877, art. 179**—*continued.*

2. PERIOD FROM WHICH LIMITATION RUNS—*continued.*

(*a*) CONTINUOUS PROCEEDINGS—*continued.*

up, and the execution proceedings struck off the file. Subsequently three of the heirs of *S.* in one case, and two in another, instituted suits against *G.* claiming to recover from him such portion of the proceeds of the sale of *S.'s* property as had been appropriated to the discharge of *G.'s* decree against *S.*, and such heirs obtained decrees for certain sums, which *G.* was obliged to pay. *G.* thereupon, on the 16th May 1879, applied for execution of his decree against *S.* *Held* that such application was not one in continuation of that made on the 7th September 1875, but was a fresh application, and the application made by *G.* on the 16th February 1877 was not one for a step in aid of execution, within the meaning of article 179, schedule II of Act XV of 1877, from which limitation could be computed, and the application of the 16th May 1879 was barred by limitation. *Pyaroo Tuhobildarinee* v. *Nazir Hossein, 23 W. R., 183; Paras Ram* v. *Gardner, I. L. R., 1 All., 355;* and *Issurree Dassee* v. *Abdool Khalak, I. L. R., 4 Calc., 415,* distinguished by STRAIGHT, *J.* KHAIR-UN-NISSA *v.* GAURI SHANKAR . I. L. R., 3 All., 484

33. ——————— *Futile attachment of property.—Subsequent application for arrest.*—In 1874 the appellant attached certain immoveable property of his judgment-debtor, the respondent. The attachment was disputed, and ultimately, on the 16th July 1875, was raised. In the same year the appellant brought a suit for a declaration that the property in question was liable to attachment, which was finally rejected on the 8th July 1880. On the 30th November following, the appellant applied for the arrest of the respondent. The lower Court rejected the application as not being made within three years of the decree, as provided by Act XV of 1877, schedule II, article 179. On appeal to the High Court, —*Held* that the execution process last applied for was distinct in its nature from, and in no way a continuance or revival of, the previous proceedings in execution, and was, therefore, made too late, more than three years having elapsed since the passing of the decree. KRISHNAJI RAGHUNATH *v.* ANANDRAV BALLAL KOLHALKAR . I. L. R., 7 Bom., 293

34. ——————— *Application for execution of decree.*—On the 16th September 1879, *A.*, in execution of a decree against *V.*, applied for attachment and sale of certain land, and on the 8th of January 1880 the sale was confirmed. The purchaser, having learnt that *V.* had no title to the land, brought a suit and obtained a decree cancelling the sale on the 2nd April 1881, and on the 2nd of November 1881 obtained an order for restitution of the purchase-money, which was thereupon paid to him by *A.* On the 2nd March 1883 *A.* applied for execution of the decree by arrest of *V.* *Held* that this application was barred by limitation. *Khair-un-nissa* v. *Gauri Shankar, I. L. R., 3 All., 484,* followed. *Paras Ram* v. *Gardner, I. L. R., 1 All., 355,* distinguished. VIRASAMI *v.* ATHI

[I. L. R., 7 Mad., 595

**LIMITATION ACT, 1877, art. 179**—*continued.*

2. PERIOD FROM WHICH LIMITATION RUNS—*continued.*

(*a*) CONTINUOUS PROCEEDINGS—*continued.*

**35.** ——————— *Application for execution of decree.—Decree for possession upon payment of mortgage amount and value of improvements.—Final decree on ascertaining value of improvements.*—In a decree for redemption of a Malabar kanam (mortgage), it was ordered on the 12th December 1879 that the defendants should put the plaintiff in possession of the land upon payment by plaintiff to defendant No. 1 of the mortgage amount, and of the value of improvements, to be determined in execution, to such of the defendants as should be found entitled. On the 12th August 1880 the plaintiff applied for execution, and on the 23rd September 1881 an order was passed that execution should issue on payment into Court by the plaintiff of the mortgage amount and the value of improvements which had then been ascertained. The plaintiff having failed to deposit the said amount, the application for execution was struck off the file on the 10th November 1881. On the 8th December 1883 the plaintiff applied again for execution, and objection was taken that the application was barred by limitation. *Held* that the application was not barred by limitation. *Dildar Hossein* v. *Mujeedunnissa, I. L. R., 4 Calc., 629,* approved. KRISHNAN *v.* NILAKANDAN
**[I. L. R., 8 Mad., 137**

(*b*) WHERE THERE HAS BEEN AN APPEAL.

**36.** ——————— **cl. 2.**—*Period from which limitation runs.*—The words "judgment, decree, or order" in section 20 meant a judgment, decree, or order which could be enforced by execution. BIPRO DOSS GOSSAIN *v.* CHUNDER SIKUR BHUTTACHARJEE
**[B. L. R., Sup., Vol., 718 : 2 Ind. Jur., N. S., 248 : 7 W. R., 521**

The three years' limitation prescribed by section 20, Act XIV of 1859, counted from the date of the final decree of the Appellate Court, in a case in which the judgment-debtor had appealed against the original decree. HUREE BUNGSHO BANERJEE *v.* RAMESSUR BANERJEE . . **6 W. R., Mis., 38**

SHAMI MAHOMED *v.* MAHOMED ALI KHAN
**[2 B. L. R., Ap., 22 : 11 W. R., 67**

GRISH CHUNDER BANERJEE *v.* BHANOO MOTEE CHOWDHRAIN . . . **11 W. R., 329**

MAHOMED BUSSEEROOLLAH *v.* RAM KANT CHOWDHRY. . . . . **16 W. R., 266**

BULDEO *v.* GUJ SINGH
**[1 N. W., Ed. 1873, 240**

Provided (as was held under Act XIV of 1859) the decree-holder had opposed the appeal. BUKBONATH CHUCKERBUTTY *v.* NILMONEE SINGH DEO
**[18 W. R., 7**

RAM RUTTUN BANERJEE *v.* AMEEROOLMOLK BUNWAREE GOBIND . . **6 W. R., Mis., 95**

Where the appeal was dismissed for default, it was

**LIMITATION ACT, 1877, art. 179, cl. 2**—*continued.*

2. PERIOD FROM WHICH LIMITATION RUNS—*continued.*

(*b*) WHERE THERE HAS BEEN AN APPEAL—*continued.*

held the order was not a new decree from which limitation began again to run. VIRASAMY MUDALI *v.* MANOMMANYAMMAL . . **4 Mad., 32**

BIPRO DOSS GOSSAIN *v.* CHUNDER SIKUR BHUTTACHARJEE
**[B. L. R., Sup. Vol., 718 : 2 Ind. Jur., N. S., 248 : 7 W. R., 521**

Under the present Act it expressly counts from the date of the order made on appeal, which is in accordance with the cases of ARUNA CHELLA THUDAYAN *v.* VELUDAYAN . . . **5 Mad., 215**

and BAPURAV KRISHNA *v.* MADHAVRAV RAMRAV
**[5 Bom., A. C., 214**

**37.** ——————— *Period from which limitation runs.*—Where a contest is raised between a decree-holder and a judgment-debtor as to service of notice, execution proceedings cannot be carried on further till the question is decided, and limitation in respect to future proceedings must run from the date of such decision. SUROOP CHUNDER ROY *v.* GOLUCK CHUNDER DHUR . **14 W. R., 477**

**38.** ——————— *Final decision of Court where proceedings are contested.*—So long as an actual contest is going on between a decree-holder and judgment-debtor as to the judgment, limitation must be computed from the final decision of the Court. DHIRAJ MAHTAB CHUND BAHADUR *v.* BULRAM SINGH BABOO
**[5 B. L. R., 611 : 14 W. R., P. C., 21 13 Moore's I. A., 479**

CHOTAY LAL *v.* RAM DYAL . **2 N. W., 482**

MODHOOSOODUN MOOKERJEE *v.* KIRTEE CHUNDER GHOSE . . . . . **18 W. R., 7**

**39.** ——————— *Date of final decree.*—A suit was dismissed with costs in a Court of Small Causes, after which an application for a new trial was rejected, and subsequently another application was made for a new trial and referred by the Judge to the High Court, the result being the rejection of the application. After this defendant applied for execution for the costs. *Held* that the decree became final and conclusive when the Judge rejected the last application in accordance with the decision of the High Court, limitation beginning to run from the date of such rejection. PRAN KISTO BANERJEE *v.* NUZIMOODDEEN . **9 W. R., 397**

**40.** ——————— *Decree of Small Cause Court.*—Where a Court of Small Causes delivered final judgment and decree on the whole matter in dispute, and more than a year, but less than three years, had elapsed from the date of the decree without any proceeding having been taken upon it,—*Held* that section 20, Act XIV of 1859, applied and not section 22, and that the plaintiff's

**LIMITATION ACT, 1877, art. 179, cl. 2—** *continued.*

2. PERIOD FROM WHICH LIMITATION RUNS—*continued.*

(*b*) WHERE THERE HAS BEEN AN APPEAL—*continued.*

application for a warrant in execution of the decree was not barred by lapse of time. PUNCHANADA CHETTI *v.* RAMAN CHETTI . . **1 Mad., 446**

41. ——————— *Application for execution recognising decree on appeal.*—An application for execution of the decree in the original suit and proceedings thereon, which, without formally and expressly asking for execution of the decrees in regular and special appeal, recognised those decrees, and sought relief consistent with the final decree, can be judicially recognised as a proceeding for the purpose of executing the final decree. AZMUDDIN *v.* MATHURADAS GOVARDHANDAS GULABDAS **[11 Bom., 206**

42. ——————— *Application for execution of decree.*—A decree was passed in June 1851. Application was made for execution on the 21st July 1861, and from that date applications were made, at various intervals, each less than three years, up to 1868. Upon different grounds all the applications were rejected, but the last order was reversed on appeal by the Civil Judge. *Held* that the last application was not barred by the Limitation Act. KARUPPANAN *v.* MUTHUNNAN SERVEY **[5 Mad., 105**

43. ——————— *Execution of decree.*—The words "where there has been an appeal" in clause 2, article 167 of schedule II of Act IX of 1871, contemplate and mean an appeal from the decree, and do not include an appeal from an order dismissing an application to set aside a decree under section 119 of Act VIII of 1859. SHEO PRASAD *v.* ANRUDH SINGH. . . **I. L. R., 2 All., 273**

44. ——————— *Application for execution of decree for refund of costs.—Proceedings to determine whether exemption from costs was personal or in representative character.*—On an application for refund of money deposited as costs, which was alleged to be barred by limitation,—*Held* that, as litigation was protracted between the parties for many years, and the question of liability for costs remained unsettled all that time, limitation would run, not from the date of the original order entitling applicant to a refund, but from the date of the conclusion of the proceedings in the final appeal. MULLICK MAMOMED YAKOOB *v.* CHOWDHRY SHAIKH ZUHOORUL HUQ . . . **25 W. R., 309**

45. ——————— *Date of final decree.*—*A.* obtained a joint and several money-decrees against four defendants on the 12th November 1872. One of the defendants preferred an appeal, and the decree, as against him, was set aside by the High Court on the 19th February 1875. Subsequently, on the 1st of August 1876, *A.* sued out execution against the three defendants who had not appealed. *Held* that *A.'s* suit was not barred by limitation, as the final decree in the original suit within the meaning of article 167 of Act IX of 1871 was the decree as amended by the High Court on the 19th of February 1875. GUNGAMOYEE DASSEE *v.* SHIB SUNKUR BHUTTACHARJEE . . . **3 C. L. R., 430**

46. ——————— *Execution of decree.—Final decree of Appellate Court.*—The Munsif gave the plaintiffs in a suit for possession of land and for mesne profits a decree for possession, but dismissed the claim for mesne profits. An appeal was preferred to the Judge, who affirmed the decree for possession and remanded the case to the Munsif, under section 351 of Act VIII of 1859, to determine the mesne profits due to the plaintiffs. The Munsif gave the plaintiffs a decree for certain mesne profits. Subsequently a special appeal was preferred to the High Court against the Judge's decree. While this was pending, an appeal was preferred to the Judge against the decree of the Munsif for mesne profits, and on the 7th June 1873 the plaintiff again obtained a decree for mesne profits. Finally, on the 6th March 1874, the High Court modified the Judge's decree for possession, but did not interfere with the order of remand. *Held*, on the plaintiffs applying for execution of the Judge's decree, dated 7th June 1873, that the limitation for the execution of such decree ran, not from the date of such decree, but from the date of the High Court's decree, which was the "final decree of the Appellate Court," and the only "final decree," within the meaning of article 167, schedule II of Act IX of 1871. IMAM ALI *v.* DASAUNDHI RAM . . . **I. L. R., 1 All., 508**

47 ——————— *Execution of decree.—"Where there has been an appeal."*—The words "where there has been an appeal" in clause 2, article 179 of schedule II of Act XV of 1877, do not contemplate and mean only an appeal from the decree of which execution is sought, but include, where there has been a review of the judgment on which such decree is based, and an appeal from the decree passed on such review, such appeal. *Held*, therefore, where there had been a review of judgment, and an appeal from the decree passed on review, and such decree having been set aside by the Appellate Court, application was made for execution of the original decree, that time began to run, not from the date of that decree, but from the date of the decree of the Appellate Court. *Sheo Prasad* v. *Anrudh Singh, I. L. R., 2 All., 273*, distinguished. NARSINGH SEWAK SINGH *v.* MADHO DAS . **I. L. R., 4 All., 274**

48. ——————— *Execution of joint decree against two or more defendants.*—In a suit for possession of land brought by *A.* against *B.*, *C.* and *D.*, a decree was passed on the 14th of April 1874 for possession and costs against *B.*, *C.*, and *D.* jointly. This decree was afterwards reversed on an appeal by *B.*, who alone claimed the property. *A.*

**LIMITATION ACT, 1877, art. 179, cl. 2—** *continued.*

2. PERIOD FROM WHICH LIMITATION RUNS—*continued.*

(*b*) WHERE THERE HAS BEEN AN APPEAL—*continued.*

then preferred a special appeal to the High Court, and on the 29th June 1877 the decision of the Judge was reversed, and the decree of the Court of first instance restored. On the 30th December 1878 *A.* applied to the Court of first instance for execution to issue against *C.* and *D.* for the costs specified in the decree passed on the 14th April 1874. *C.* and *D.* successfully objected in the Court of first instance and the lower Appellate Court that more than three years having elapsed since the date of the decree, the decree for costs could not be executed, the application for execution being barred by article 179 of schedule II of Act XV of 1877. *Held*, on appeal to the High Court, that, inasmuch as *B.'s* appeal had related to the whole case, and the decree obtained by him dismissing the suit would, if not reversed, have deprived *A.* of his right to any costs at all, *A.*, upon succeeding in getting the original decree restored upon special appeal to the High Court, was entitled to execute such restored decree at any time within three years of the order of the High Court. MULLICK AHMED ZUMMA *alias* TETUR *v.* MAHOMED SYED . **I. L. R., 6 Calc., 194 : 6 C. L. R., 573**

**49.** ——— *"Appellate Court."—Execution of decree.*—The meaning of paragraph 2 to article 179 of the second schedule of Act XV of 1877 is, that where there has been an appeal, the period of limitation is to run from the date when the Court to which that appeal has been preferred passes an order disposing of the appeal. The words "Appellate Court" signify the Court or Courts to which the appeal, mentioned in the article, has been preferred. WAZIR MAHTON *v.* LULIT SINGH **[I. L. R., 9 Calc., 100**

**50.** ——— *Execution of decree.—Rejection of appeal as not being properly stamped.—"Where there has been an appeal," &c.*—Where an application for appeal was presented to the High Court, but rejected owing to the memorandum of appeal being insufficiently stamped,—*Held* that, under such circumstances, there had not been an appeal or a final decree or order of an Appellate Court within the meaning of article 179 (2) of the Limitation Act, so as to give a period from which limitation for execution of the decree appealed from could run. DIANAT-ULLAH BEG *v.* WAJID ALI SHAH **[I. L. R., 6 All., 438**

**51.** ——— *Application for execution of decree.—B.*, the mortgagee of certain property, sued *N.*, the mortgagor, and *T.*, to whom a part of the mortgaged property had been transferred by sale, for the mortgage-money, and the sale of the mortgaged property. On the 24th September he obtained a decree, which directed *N.* to pay the money, and that it might be realised by the sale of the mortgaged property. *T.* appealed, contending that as the instrument of mortgage was not registered, it was not receivable as evidence of the mortgage, and therefore the sale of the property had been improperly ordered. *N.* did not appeal. The Court of first appeal allowed this contention and set aside the order for the sale of the property. The mortgagee preferred a second appeal, and on the 15th January 1880 the Court of last appeal modified the decree of the lower Court, directing that a part of the mortgage-money might be recovered by the sale of the mortgaged property. On the 14th September 1882 *B.* applied for execution of the decree against *N.* *Held* that the period of limitation for the application was governed by article 179 of the Limitation Act, and such period would run from the final decree of the Appellate Court. BASANT LAL *v.* NAJMUNNISSA BIBI . . **I. L. R., 6 All., 14**

**52.** ——— *Date from which limitation runs.—Application to take money out of Court.*—Plaintiff obtained a decree against defendant on the 24th November 1875, and on the 14th October 1876 he got execution and sold some lands of the defendant. On 9th February 1877 he applied to the Court for payment thereout of moneys lodged by the purchaser, and on that day got the money. In the meantime an appeal was presented by the defendant and dismissed on the 28th March 1877. The present application for execution was made on the 7th February 1880. *Held* that article 179, clause 2 of the Limitation Act of 1877, which fixes the date of the order of the Appellate Court, when there is an appeal, as the point from which the three years is to count, applied and that the plaintiff was therefore in time. When there is no appeal, the date of the decree or of application is the point from which limitation counts, but not when there is an appeal. *Held*, further, that the application by plaintiff to the Court (9th February 1877) for the money paid in by the purchaser was a step taken to aid in the execution of the decree. VENKATARAYALU *v.* NARASIMHA . . . **I. L. R., 2 Mad., 174**

**53.** ——— *Decree of High Court confirmed by Privy Council, Application for execution of.*—Where a judgment-debtor who has appealed to the Privy Council obtains a rule *nisi* from the High Court suspending execution until security is given, and this rule is subsequently made absolute, it does not operate against the decree-holder in the matter of time: limitation not running against him until the result of the appeal is known, or the rule otherwise falls to the ground. GUNESH DUTT SINGH *v.* MUGNEERAM CHOWDHRY **[19 W. R., 186**

**54.** ——— *Application for execution of decree.—Order of Privy Council.—Held* that the words "appeal" and "Appellate Court," article 179 (2), schedule II of Act XV of 1877, include an appeal to Her Majesty in Council. *Held*, therefore, where an appeal had been preferred to Her Majesty in Council from a decree of the High

**LIMITATION ACT, 1877, art. 179, cl. 2—** *continued.*

2. PERIOD FROM WHICH LIMITATION RUNS—*continued.*

(*b*) WHERE THERE HAS BEEN AN APPEAL—*continued.*

Court dated the 18th August 1871, and the High Court's decree was affirmed by an order of Her Majesty in Council dated the 12th August 1876, and application for execution of the High Court's decree was made on the 15th July 1879, that, under article 179 (2), schedule II of Act XV of 1877, the limitation of such application must be computed from the date of the order of Her Majesty in Council. NARSINGH DAS *v.* NARAIN DAS . . **I. L. R., 2 All., 763**

**55.** ——————— *"Appeal."—"Appellate Court."—Order of Privy Council.—Application for execution of decree.*—The term "appeal" in article 167 of schedule II of the Limitation Act (IX of 1871) includes an appeal to the Privy Council; and the term "Appellate Court" in the same article includes the Judicial Committee of the Privy Council sitting for the purpose of hearing appeals from orders passed by British Courts in India. Where an appeal had been preferred to Her Majesty in Council from a decree of the High Court reversing the decree of the Court of first instance, and the High Court's decree was affirmed by an order of Her Majesty in Council dated the 15th February 1873, and an application for execution for the High Court's decree was made on the 17th November 1875, more than three years after the date of the decree, but within that period of the order of Her Majesty in Council,—*Held* that, under article 167 of schedule II, Act IX of 1871, the limitation for such application must be computed from the date of the order of Her Majesty in Council, and consequently that the application for execution was not barred. GOPAL SAHU DEO *v.* JOYRAM TEWARY **[I. L. R., 7 Calc., 620: 9 C. L. R., 402**

**56.** ——————— *Appeal by one of several defendants.—Execution of decree.—Application for execution against defendant who has not appealed.*—On the 11th July 1877 a decree was made against *B.* and *J.*, the defendants in a suit, against which *J.* alone appealed, such appeal not proceeding on a ground common to him and *B.* The Appellate Court affirmed such decree on the 20th November 1877. On the 23rd September 1880 the holder of such decree applied for execution against *B.* *Held* that, so far as *B.* was concerned, limitation should be computed from the date of such decree, and not from the date of the decree of the Appellate Court, and such application was therefore barred by limitation. SANGRAM SINGH *v.* BUJHARAT SINGH **[I. L. R., 4 All., 36**

**57.** ——————— *Appeal by some only and not all of the defendants.—Amendment of decree.—Review of judgment.*—On the 7th July 1864 a District Court gave the plaintiff in a suit a decree against all the defendants, including *B.* All the defendants appealed to the Sudder Court from such decree, except *B.* The Sudder Court, on the 6th March 1865, set aside such decree and dismissed the

**LIMITATION ACT, 1877, art. 179, cl. 2—** *continued.*

2. PERIOD FROM WHICH LIMITATION RUNS—*continued.*

(*b*) WHERE THERE HAS BEEN AN APPEAL—*continued.*

suit. The plaintiff appealed to Her Majesty in Council from the Sudder Court's decree, all the defendants except *B.* being respondents to this appeal. Her Majesty in Council, on the 17th March 1869, made a decree reversing the Sudder Court's decree and restoring that of the District Court. On the 9th October 1869 the plaintiff applied for execution of the District Court's decree, and such decree was under execution up to July 1872. On the 9th October 1874 the plaintiff applied for amendment of such decree in certain respects, it being incapable of execution in those respects. *B.* was a party to this proceeding. On the 16th August 1876 such decree was amended; and the plaintiff subsequently applied for its execution as amended against all the defendants. *Held* that the application of the 9th October 1869 was within time, computing from the date of the decree of Her Majesty in Council—*Chedoo Lal* v. *Nand Coomar Lal, 6 W. R., Mis., 60.* Also that the application to amend such decree, being substantially one for review of judgment, gave, under article 167, schedule II of Act IX of 1871, a period from which limitation would run in respect of the subsequent application for execution, which was therefore within time. KISHEN SAHAI *v.* COLLECTOR OF ALLAHABAD **[I. L. R., 4 All., 137**

**58.** ——————— *Application for possession and mesne profits after execution of decree is barred.—A.*, as purchaser of a decree against *B.*, applied for execution thereof, and having caused five fields of *B.* to be sold in execution, purchased four of them at the Court sale, and one from an execution-purchaser. On 10th July 1871, however, the High Court, in an appeal by *B.*, held *A.'s* application for execution to have been time-barred, and reversed the orders of the two lower Courts. *A.* having been put in possession of the fields under the orders of lower Courts, *B.*, on a reversal of those orders by the High Court, applied on 9th July 1874 to have the fields restored to him, together with the mesne profits accruing during the time of his dispossession. The first Court awarded the fields to *B.* with mesne profits; but the District Judge on appeal held *B.'s* application barred under Act IX of 1871, schedule II, clause 166. *Held* by the High Court that the exception in clause 166 of schedule II of the Limitation Act, IX of 1871, was not restricted to any particular species of appeal; that *B.'s* application fell within clause 167, and not within clause 166; and, therefore, was not barred. UMIASHANKAR LAKSHMIRAM *v.* CHOTALAL VAJERAM . **I. L. R., 1 Bom., 19**

**59.** ——————— *Application for execution of decree.—A.*, the judgment-debtor, opposed an application made by *B.*, the judgment-creditor, for execution under a decree. This objection was overruled on the 17th January 1876. The appeal by *A.* from this order (*B.* being represented and opposing *A.'s* appeal at the hearing) was dismissed on the 2nd

**LIMITATION ACT, 1877, art. 179, cl. 2—** *continued.*

2. PERIOD FROM WHICH LIMITATION RUNS—*continued.*

(*b*) WHERE THERE HAS BEEN AN APPEAL—*continued.*

October 1877. On a second application for execution made by *B.* on the 18th March 1879,—*Held* that such application was barred under article 179, schedule II, Act XV of 1877. KRISTO COOMAR NAG *v.* MAHABAT KHAN . . **I. L. R., 5 Calc., 595**

60. ——————— *Appellate order in execution.*—The holder of a decree for possession and partition of a share of certain immoveable property, dated the 19th January 1878, applied for execution on the 2nd February 1878. An order was made by the Court of first instance, from which the decree-holder appealed. The Appellate Court, on the 18th September 1878, reversed the order of the first Court and directed that the partition of the property should be effected by lots, and remanded the case for that purpose. The first Court proceeded to carry out the order of the Appellate Court, but eventually struck off the case, on the 15th February 1879, as the decree-holder failed to appear personally when ordered to do so. On the 13th September 1881 the legal representative of the deceased decree-holder, who had meantime died, applied, with reference to the order of the Appellate Court dated the 18th September 1878, to have lots drawn in accordance with that order. *Held,* on the question whether this application was barred by limitation, that, if it were regarded as nothing more than an application for execution of the original decree, it might be barred, inasmuch as it had been made more than three years after the date of the last application, and it was doubtful whether the 2nd clause in the 3rd column of article 179, schedule II of Act XV of 1877, would apply, since the appeal there referred to is probably an appeal from the decree or order of which execution is being taken, referred to in the first clause of that article, and not an appeal in course of execution of that decree or order; that, however, the order of the Appellate Court dated the 18th September 1878 was itself of the nature of a decree and capable of execution, and for the execution of which an application could be made to which that article would apply; that the application in question should be regarded as one for execution of that order; and that therefore, so regarding it, it was within time. HULASI *v.* MAIKU . . . . **I. L. R., 5 All., 236**

61. ——————— *"Decree."—Order rejecting memorandum of appeal for deficiency of Court fee.*—An appeal from a decree, dated the 18th July 1879, was rejected by the High Court on the 11th June 1880, in consequence of the failure of the appellants to pay additional Court fees declared by the Court to be leviable. On the 23rd December 1882 an application was filed by the decree-holder for execution of the decree. *Held,* with reference to Act XV of 1877 (Limitation Act), schedule II, article 179 (2), that the order of the 11th June 1880, rejecting the appeal on the ground of deficient payment of Court fee, was equivalent to a decree, and

**LIMITATION ACT, 1877, art. 179, cl. 2—** *continued.*

2. PERIOD FROM WHICH LIMITATION RUNS—*continued.*

(*b*) WHERE THERE HAS BEEN AN APPEAL—*continued.*

therefore the application, being made not more than three years from the date of that order, was not barred by limitation. RUP SINGH *v* MUKHRAJ SINGH . . . . **I. L. R., 7 All., 887**

62. ——————— *Application for execution of decree.—Order staying execution.*—The plaintiff obtained an *ex parte* decree on 7th of February 1876, of which he applied for execution on the 31st of May 1876. Thereupon the defendant applied to set aside the decree, on the ground that he had had no notice of the suit, and an order was made staying the execution of the decree. The defendant's application was rejected on the 15th of November 1876, and an appeal by the defendant, pending which the stay of execution was continued, was dismissed on the 19th of December 1877. Previously,—*viz.*, on the 21st of February 1877,—the execution case had been struck off the file. *Held* that, notwithstanding the application was made more than three years after the decree, and the plaintiff was not entitled to any deduction of the time during which the execution was stayed by order of Court, an application for execution made on the 10th of December 1880 was, under article 179 of Act XV of 1877, not barred, the decree not being final until the order dismissing the appeal on the 19th of December 1877. LUTFUL HUQ *v.* SUMBHUDIN PATTUCK **[I. L. R., 8 Calc., 248 : 10 C. L. R., 143**

63. ——————— *Execution of decree.*—Article 179, clause (2), of the Limitation Act (XV of 1877), must be construed as intended to apply without any exceptions to decrees from which an appeal has been lodged by any of the parties to the original proceedings, and should certainly be applied to cases where the whole decree was imperilled by the appeal. A suit for pre-emption was decreed against the vendors, the purchaser, and another set of pre-emptors, in March 1882. The last-mentioned defendants alone appealed, and their appeal was dismissed in May 1882. In May 1885 the decree-holders applied for execution of the decree. The application was objected to by the purchaser as barred by limitation, having been filed more than three years from the passing of the decree, and it was contended that article 179, clause (2), did not apply to the case, inasmuch as the purchaser did not appeal from the original decree. *Held* that article 179, clause (2) of the Limitation Act, was applicable, and that the application, being made within three years from the Appellate Court's decree, was not barred by limitation. *Hur Prasad Roy* v. *Enayat Hossein, 2 C. L. R., 471;* and *Sangram Singh* v. *Bujharat Singh, I. L. R., 4 All., 36,* distinguished. *Mullick Ahmed Zumma* v. *Mahomed Syed, I. L. R., 6 Calc., 194;* and *Ram Lal* v. *Jagannath, Weekly Notes, All., 1884, p. 138,* relied on. NUR-UL-HASAN *v.* MUHAMMAD HASAN . . . . **I. L. R., 8 All., 573**

**LIMITATION ACT, 1877, art. 179, cl. 2** —*continued.*

2. PERIOD FROM WHICH LIMITATION RUNS—*continued.*

(*b*) WHERE THERE HAS BEEN AN APPEAL—*continued.*

**64.** ——————— *Adjudication that execution is barred by limitation.—Finality of order.—Civil Procedure Code, s. 206.—Amendment of decree.*—An application to execute a decree passed in April 1880 was made on the 19th February 1884, and rejected on the 26th March 1884 as being beyond time. This order was upheld on appeal in March 1885. While the appeal was pending, the decree-holder in May 1884 applied to the Court of first instance to amend the decree under section 206 of the Civil Procedure Code, and in December 1884 the application was granted. In April 1885 an application was made for execution of the amended decree, the decree-holder contending that limitation should be calculated from the date of the amendment, and that article 178, of the Limitation Act (XV of 1877) applied to the case. *Held* that article 179, and not article 178, was applicable; that the order rejecting the application of the 19th February 1884 became final on being upheld on appeal; that the amendment could not revive the decree or furnish a fresh starting-point of limitation; and that the application was therefore time-barred. *Mungul Persad Dichit* v. *Grija Kant Lahiri, I. L. R., 8 Calc., 51;* and *Ram Kirpal* v. *Rup Kuari, I. L. R., 6 All., 269,* referred to. TARSI RAM *v.* MAN SINGH [I. L. R., 8 All., 492

(*c*) WHERE THERE HAS BEEN A REVIEW.

——————— cl. 3.—The provisions of the article where there has been a review is opposed to the decisions of CHOWDHRY JUNMENJOY MULLICK *v.* BISSAMBHAR PANJAH . 5 W. R., Mis., 45

GOUR MOHUN SHAHA *v.* GOUR MOHUN GHOSE [5 W. R., Mis., 11

but in accordance with most of the decisions.

(*d*) WHERE PREVIOUS APPLICATION HAS BEEN MADE.

**65.** ——————— cl. 4.—*Decree not liable to be enforced.*—Section 20, Act XIV of 1859, was not applicable to a decree until the liability under it has become enforceable by process of execution. GOPALA SETTY *v.* DAMODARA SETTY . . 4 Mad., 173

**66.** ——————— *Application for execution of decree—"Suit."—Per* GARTH, *C. J.,* and MARKBY and AINSLIE, *JJ.* (KEMP and MACPHERSON, *JJ.,* dissenting).—The periods of limitation prescribed in schedule II of Act IX of 1871 are to be computed subject to the provisions contained in the body of the Act. *Per curiam,*—The word "suit" as used in the Act does not include "applications." DHONESSUR KOOER *v.* ROY GOODER SAHOY [I. L. R., 2 Calc., 336

**LIMITATION ACT, 1877, art. 179, cl. 4** —*continued.*

2. PERIOD FROM WHICH LIMITATION RUNS—*continued.*

(*d*) WHERE PREVIOUS APPLICATION HAS BEEN MADE—*continued.*

**67.** ——————— *Application to execute decree.*—Where an application was made and proceedings taken to enforce or keep in force a decree, limitation runs from the date of such application, not from the date of the proceedings. FAEZ BUKSH CHOWDHRY *v.* SADUT ALI KHAN . 23 W. R., 282

The contrary was held under Act XIV of 1859, section 20.

*See* RAMANUJA AIYANGAR *v.* VENKATA CHARRY [4 Mad., 260

**68.** ——————— *Application by Government for execution of decree.*—Under Act IX of 1871 Government is bound to make an application for execution within the same time as any other person. COLLECTOR OF BEERBHOOM *v.* SREEKHURRY CHUCKERBUTTY . . . 22 W. R., 512

**69.** ——————— *Application for execution of decree.—Presentation of application to enforce decree.—Held* by the Full Bench that the date on which an application for the execution of a decree is presented, and not any date on which such application may be pending, is "the date of applying" within the meaning of article 167, schedule II of Act IX of 1871. FAKIR MUHAMMAD *v.* GHULAM HUSAIN . . . . I. L. R., 1 All., 580

**70.** ——————— *Application for execution of decree.*—If a decree has once been allowed to expire, no subsequent application, although made *bonâ fide,* can revive it. MUNGOL PRASHAD DICHIT *v.* SHAMA KANTO LAHORY CHOWDHRY [I. L. R., 4 Calc., 708

S. C. ISHANA DABIA *v.* GRIJA KANT LAHIRY CHOWDHRY . . . 3 C. L. R., 572

But held, by the Privy Council in appeal, that although the execution of a decree may have been actually barred by lapse of time at the date of an application made for its execution, yet if an order for such execution has been regularly made by a competent Court having jurisdiction to try whether it was barred by time or not, such order, though erroneous, must, if unreversed, be treated as valid. MUNGUL PERSAD DICHIT *v.* GRIJA KANT LAHIRI [I. L. R., 8 Calc., 51 L. R., 8 I. A., 123; 11 C. L. R., 113

**71.** ——————— Application for execution of a decree must be made within three years of a previous application as required by Act IX of 1871, schedule II, article 167. *Umiashankar Lakhmiram* v. *Chottalal Vajeram, I. L. R., 1 Bom., 19,* held not to apply. GIRI DHAREE SINGH *v.* RAM KISHORE NARAIN SINGH . . 1 C. L. R., 252

ABDUL HEKIM *v.* ASSEEUTOOLLAH [25 W. R., 94

LIMITATION ACT, 1877, art. 179, cl. 4 —*continued.*

2. PERIOD FROM WHICH LIMITATION RUNS—*continued.*

(*d*) WHERE PREVIOUS APPLICATION HAS BEEN MADE—*continued.*

NILMONEY SINGH DEO *v.* RAMJEEBUN SURKEL [8 C. L. R., 335

WODOY TARA CHOWDHRAIN *v.* ABDOOL JUBBUR CHOWDHRY . . . 24 W. R., 339

72. ——————— *Civil Procedure Code (Act XIV of 1882), s. 230.*—On 15th February 1872 the plaintiff obtained against the defendant a decree for possession upon his mortgage, and in attempting to take possession was obstructed by *N.*, another mortgagee of the defendant, whereupon the plaintiff applied for removal of the obstruction, but his application was rejected on the ground that *N.* was in possession as mortgagee, and that the plaintiff was not entitled to possession until *N.'s* mortgage was redeemed. The plaintiff did not apply for execution any further. In 1884 the defendant paid off *N.'s* mortgage, and on 27th August 1885 the plaintiff presented an application for execution of his decree of 1872. On reference to the High Court,—*Held* that the execution of the decree was barred, no application for execution having been made since 1873. The previous application for execution not having been made under section 230 of the Civil Procedure Code (Act XIV of 1882), the general law of limitation, as laid down in article 179 of Act XV of 1877, governed the case. ANNAJI APAJI *v.* RAMJI JIVAJI [I. L. R., 10 Bom., 348

73. ——————— *Application for execution made within time of a previous barred application in which execution was allowed.*—An application for the execution of a decree, though made within three years from the date of a previous application, was barred, under section 20 of Act XIV of 1859, if the previous application were barred, even though execution was allowed to issue on such application. GOPAL GOVIND *v.* GANESHDAS TEJMAL [8 Bom., A. C., 97

74. ——————— *Application for execution of decree already barred.—Limitation Acts (IX of 1871), sch. II, art. 167; (XV of 1877), ss. 2, 3.*—No process can legally issue upon an application for the execution of a decree already barred by limitation, nor can an application made under such circumstances be a valid application, or one which under the Act would give the execution-creditor a fresh period of limitation. SHUMBHUNATH SHAHA *v.* GURUCHURN LAHIRI . I. L. R., 5 Calc., 894 [6 C. L. R., 437

75. ——————— *Execution of decree declaring right to maintenance.—Annual payment.*—A decree-holder having obtained in 1874 a decree entitling her to a certain sum to be paid annually by the judgment-debtor, applied for execution of the decree on the 11th of March 1875, but made no further application until July 1882. *Held* that this application was barred by limitation. *Semble,*—The decree being a declaratory decree, a suit to enforce the annual right to maintenance would lie. SABHANATHA DIKSHATAR *v.* SUBHA LAKSHMI AMMAL [I. L. R., 7 Mad., 80

76. ——————— *Application within time.*—Where a Judge finds that an application for execution is within time, and there is no appeal from his finding, his successor is not justified in going behind his order. DHEERAJ MAHTAB CHUND *v.* MOORLEEDHUR GHOSE . . . 15 W. R., 67

77. ——————— *Suit on decree.—Steps to enforce decree.*—The plaintiff sued to recover arrears of rent at an enhanced rate, basing the claim on a decree obtained by him in 1866 declaring his right to such rent. *Held* that the right was not extinguished because the plaintiff thought fit not to take any steps to enforce it for some four years subsequent to the date of the decree. JAI CHAND *v.* BEHARI . . . . . 7 N. W., 177

78. ——————— *Application for execution of decree.*—Application for execution of a decree obtained in 1858 under the old law as to limitation was made in January and disposed of in February 1864, and a subsequent application was made in November 1867. *Held* that the first application was in time, but the second application was barred by section 20, Act XIV of 1859. VIRABHADRA RAU *v.* RAMAIYA *alias* BABPAUTULA . 4 Mad., 148

79. ——————— *Obligation to show application is within time.*—A decree-holder applying on December 24th, 1864, to execute his decree passed on December 7th, 1861, was bound, under section 20, to show that he had taken some proceeding within three years next before the application to keep alive the decree. BHARUT SINGH *v.* SADUT ALI . . . . . 6 W. R., Mis., 20

KOOL CHUNDER CHUCKERBUTTY *v.* KUMUL CHUNDER ROY . . 6 W. R., Mis., 17

80. ——————— *Application within time.*—An application made on the 8th January 1875 to execute a decree, the last preceding application having been made on the 8th January 1872, was held to be within the time allowed by article 167, schedule II of Act IX of 1871. DHONESSUR KOOER *v.* ROY GOODER SAHOY . . I. L. R., 2 Calc., 336

3. NATURE OF APPLICATION.

(*a*) GENERALLY.

81. ——————— *"Proceeding" under Act XIV of 1859, s. 20.*—The word "proceeding" in

**LIMITATION ACT, 1877, art. 179, cl. 4** —*continued.*

3. NATURE OF APPLICATION—*continued.*

(*a*) GENERALLY—*continued.*

section 20, Act XIV of 1859, meant a proceeding not barred by the law of limitation, and under which process of execution might lawfully have issued if the proceeding had been opposed. BISSESSUR MULLICK *v.* DHIRAJ MAHATAB CHAND

**[B. L. R., Sup. Vol., 967: 10 W. R., F. B., 8**

RADHOO CHOWDHRAIN *v.* HEET LALL ROY **[11 W. R., 209**

**82.** ——————— *Application to keep decree in force.—Intention to enforce it.*—In order to keep a decree alive, it was, under section 20, Act XIV of 1859, not necessary that the application for execution should be made with the intention of enforcing the decree at that time. All that the section required was that some proceeding should have been taken to enforce the decree or to keep it in force within three years. KONDARAJU VENKATA SUBBAIYA *v.* RAMA KRISHNAMMA *alias* URUPKRISTNAIYA **[4 Mad., 75**

KULLYAN SINGH *v.* BAHADUR SINGH **[Agra, F. B., 163 : Ed. 1874, 122**

The proceeding need not be successful. KALEE KISHORE BOSE *v.* PROSONO CHUNDER ROY **[10 W. R., 248**

AKBAR GAZEE *v.* NUFEEZUN . **8 W. R., 99**

ESHAN CHUNDER BOSE *v.* JUGGOBUNDHOO GHOSE **[8 W. R., 98**

But *see* LALLA BISHEN DYAL SINGH *v.* RAM SUNKUR TEWAREE . **6 W. R., Mis., 38**

And JUNARDUN DOSS MITTER *v.* RAJAH ROOKNEE BULLUB . . . **6 W. R., Mis., 48**

The proceedings could be withdrawn when they appeared to be useless, and it was not necessary to prosecute them to a termination. KULLYAN SINGH *v.* BAHADUR SINGH **[Agra., F. B., 163 : Ed. 1874, 122**

**83.** ——————— *Civil Procedure Code (Act X of 1877,) s. 374.*—The rule laid down in section 374 of the Code of Civil Procedure (Act X of 1877), that where a suit is withdrawn with leave to bring a fresh suit, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been brought, applies to applications for execution; and, therefore, in counting the time of three years prescribed by the Limitation Act XV of 1877, schedule II, article 179, clause 4, an application allowed to be withdrawn must be discarded as if it had never been presented. PIRJADE *v.* PIRJADE **[I. L. R., 6 Bom., 681**

**84.** ——————— *Execution of decree.—Application withdrawn by decree-holder.—Limitation.—Civil Procedure Code, ss. 374, 647.*—The holder of a decree for money, dated the 7th June 1879, applied on the 20th July 1880 for execution thereof, but it appeared that in certain particulars the decree required correction, and it was therefore ordered, at the request of the pleader for the decree-holder, that the application should be dismissed and the decree returned to him for amendment. The next application for execution of the decree was made by the decree-holder on the 19th February 1883. *Held* that the application of the 20th July 1880 having been put in and afterwards taken back by the decree-holder, the proceeding became to all intents and purposes as though no application had been made; that, therefore, it could have no effect as an application made in accordance with law for execution within the meaning of article 179, schedule II of the Limitation Act; that, applying the rule contained in section 374 of the Civil Procedure Code, in accordance with section 647, to the application for execution of the 19th February 1883, the question of limitation must be determined as if the first application had never been filed; and that the application now in question was consequently barred by limitation. *Ramanandan Chetti* v. *Periatambi Shervai, I. L. R., 6 Mad., 250,* dissented from. *Pirjade* v. *Pirjade, I. L. R., 6 Bom., 681,* referred to. KIFAYAT ALI *v.* RAM SINGH . . . . **I. L. R., 7 All., 359**

**85.** ——————— *Application to execute decree.—Abandonment of former application.*—A decree-holder having first asked the Court to attach certain immoveable properties, applied subsequently for the issue of a warrant of arrest, and finally prayed the Court not to proceed with those two applications, but to allow him to attach certain other properties; and this prayer was allowed. *Held* that this was virtually an abandonment of the two original applications which were virtually struck off, and that the last application was the one which came within the meaning of the Limitation Act, 1871, article 167. LALA HUREE SUNKUR SAHOY *v.* KRISHNA KANT DUTT . . . . . **25 W. R., 106**

**86.** ——————— *Application for execution.—Withdrawal of application.—Subsequent application for execution more than three years after date of last proceeding.—Civil Procedure Code (Act XIV of 1882), s. 374.*—The plaintiff obtained a decree in 1874, and applied for its execution, first on the 4th of August 1875, then on the 6th of July 1878, and again on the 23rd of July 1880. The third application was withdrawn with permission to apply again. On the 30th November 1882, the plaintiff made his present application. *Held* that the present application was not time-barred. The rule laid down in section 374 of the Civil Procedure Code (Act XIV of 1882)—that where a suit is withdrawn with leave to bring a fresh suit, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been brought—does not apply to applications for execution. *Pirjade* v. *Pirjade, I. L. R., 6 Bom., 681,* dissented from. TARACHAND MEGRAJ *v.* KASHINATH TRIMBAK **[I. L. R., 10 Bom., 62**

**87.** ——————— An application for execution cannot be thrown out summarily as barred

**LIMITATION ACT, 1877, art. 179, cl. 4** —*continued.*

3. NATURE OF APPLICATION—*continued.*

(*a*) GENERALLY—*continued.*

by limitation, because the decree-holder has failed to find any of his judgment-debtor's property, or been baffled in his endeavours to satisfy his decree. DHEERAJ MAHTAB CHAND *v.* MOORLEEDHUR GHOSE [15 W. R., 67

88. ——————— *Obligations of Court and creditor to issue execution.*—Though it is the duty of the Court to issue process after application has been made for execution, yet the law fully intends that when the decree-holder sees that the Court has taken no steps to issue any process, he shall be diligent and move the Court from time to time, as required, to keep him within the period of limitation. GOOROO DASS DUTT *v.* WOOMA CHURN ROY [13 W. R., 83

89. ——————— *Question of bona fides.* —*Act XIV of 1859, s. 20.*—Under Act XIV of 1859 no proceeding was effectual unless it was *bonâ fide.* RAM SAHAI SING *v.* SHEO SAHAI SING [B. L. R., Sup. Vol., 492: 1 Ind. Jur., N. S., 42

TABBUR SINGH *v.* MOTEE SINGH [8 W. R., 306

S. C. on review . . . 9 W. R., 443

GOLAM ASGAR *v.* LAKHIMANI DEBI [2 B. L. R., Ap., 24

GUNGA NARAYAN CHOWDHRY *v.* PHUL MOHAMMED SIRKAR . . 2 B. L. R., Ap., 45

BHAROTEA DEBEA *v.* KURRONAMOYEE DOSSIA [10 W. R., 229

KALEE KISHORE BOSE *v.* PROSONO CHUNDER ROY . . . . 10 W. R., 248

It was doubted whether the question of *bona fides* was one of law or of fact. TABBUR SINGH *v.* MOTEE SINGH . . . . 9 W. R., 443

The Court generally presumed that proceedings in a suit were *bonâ fide,* and it lay on the party who impugned them to show or suggest something from which the Court could infer that they were not *bonâ fide.* TABBUR SINGH *v.* MOTEE SINGH [9 W. R., 443

DHERAJ MAHTAB CHUND *v.* MODHOO SOODUN BONNERJEE . . . 15 W. R., 162

LOOTF ALI *v.* ABOO BIBEE . 15 W. R., 203

AMEERUN BIBEE *v.* SHIBPERSHAD THAKOOR [8 W. R., 199

SEITH KISHEN CHAND *v.* KOUR ASKUNDER GIR [1 N. W., 95: Ed. 1873, 145

And then of course the decree-holder had an opportunity of explaining fully and clearly all his acts. SEETANATH MUNDLE *v.* ANUND CHUNDER ROY [15 W. R., 5

UDDOYTO CHURN SAHOO *v.* RAM DHUN ROY [16 W. R., 296

**LIMITATION ACT, 1877, art. 179, cl. 4** —*continued.*

3. NATURE OF APPLICATION—*continued.*

(*a*) GENERALLY—*continued.*

As to what was evidence of *bona fides* or the contrary:—

KRIPA MOYEE DOSSEE *v.* POORUN CHUNDER ROY [11 W. R., 403

TITOORAM BOSE *v.* TARINEECHURN GHOSE [15 W. R., 127

RAM SOONDAR *v.* RAM CANTO . 11 W. R., 8

And RAM DHUN GOOR *v.* GOOROODOSSEE DOSSEE [13 W. R., 40

BHAROTEA DEBEA *v.* KURRONA MOYEE DASSIA [10 W. R., 229

TARUCK CHUNDER CHUCKERBUTTY *v.* HURO CHUNDER CHUCKERBUTTY . 15 W. R., 473

RAJ COOMAR BABOO *v.* JUDOO BUNGSHEE [14 W. R., 112

AMEER ALI *v.* SAHIB SINGH . 15 W. R., 530

IN THE MATTER OF KALEEDASS GHOSE [15 W. R., 356

KISTO KANT BURAL *v.* NISTARINEE DEBIA [8 W. R., 268

In judging of the *bona fides* of proceedings to obtain execution of a decree, the whole course of those proceedings was to be regarded. The fact that unexplained delays have occurred during the proceedings in execution of the decree, or that some of the proceedings were ineffectual, is not necessarily evidence of a want of *bona fides.* BENODERAM SEN *v.* BROJENDRO NARAIN ROY [13 B. L. R., P. C., 169: 21 W. R., 97

S. C. in lower Court, BROJENDRO NARAIN ROY *v.* BINODE RAM SEIN . . 11 W. R., 269

Under the present Act no question of *bona fides* arises.

90. ——————— *Sufficiency or otherwise of mere applications.*—*Act XIV of 1859, s. 20.* —Under Act XIV of 1859 there were contrary decisions as to whether a mere application for execution was a proceeding to enforce the decree. Cases which held it insufficient were—

CHUNDER COOMAR ROY *v.* SHURUT SOONDERY DEBIA . . . . 6 W. R., Mis., 37

GOSSAIN GOPAL DUTT *v.* COURT OF WARDS [21 W. R., 418

IDOO *v.* BESHAROOLLA . 2 W. R., Mis., 10

RAJ BULLOB BUYE *v.* TARANATH ROY [3 W. R., Mis., 2

SHEO PERTAB LAL *v.* ISSUR ROY [5 W. R., Mis., 23

*See* also ABDOOL HEKIM *v.* ASEENTOOLLAH [25 W. R., 94

*Contra,* GOUR MOHAN BANDOPADHYA *v.* TARA CHAND BANDOPADHYA [3 B. L. R., Ap., 17: 11 W. R., 567

**LIMITATION ACT, 1877, art. 179, cl. 4** —*continued.*

3. NATURE OF APPLICATION—*continued.*

(*a*) GENERALLY—*continued.*

VARADA CHETTY *v.* VAIYAPURY MUDALI [4 Mad., 151

LUCHMUN SINGH *v.* NARAIN . 2 N. W., 185

CHUMUN BHUGUT *v.* MUDUN MOHAN [2 N. W., 186

HUR SAHOY SINGH *v.* GOBIND SAHOY [21 W. R., 244

*See* also TABBUR SINGH *v.* MOTEE SINGH [9 W. R., 443

MAHOMED BAKER KHAN *v.* SHAM DEY KOER [12 W. R., 2

RAJEEB LOCHUN SAHA CHOWDHRY *v.* MASEYK [18 W. R., 193

An application for execution of a decree followed by issue of notice was held to be a proceeding to keep alive the decree. LUCKEE NARAIN CHUCKERBUTTY *v.* RAM CHAND SIRCAR . 6 W. R., Mis., 63

SHOO CHAND CHUNDER *v.* GRANT . 7 W. R., 10

An application by a decree-holder for issue of notice and for enforcement of the decree by possession was held to be a proceeding to keep the decree in force. MOOKTA KASHEE DABEE *v.* GUNGA DASS ROY [14 W. R., 483

Also an application for execution, and order to deposit tullubana followed by such deposit, and service of notice, was sufficient. TRILOCHUN CHATTERJEE *v.* RADHAMONI DOSSEE . . 6 W. R., Mis., 74

91. ——————— and s. 19.—*Execution of decree, Application for.*—The mere payment of a Court fee in connection with execution proceedings, with a view to obtain leave to bid for property then up for sale in execution of a decree, does not constitute "the taking of some step in aid of execution" within the meaning of article 179, schedule II of the Limitation Act (Act XV of 1877), so as to prevent the execution of the decree being barred within three years from the date of such payment. TORES MAHOMED *v.* MAHOMED MABOOD BUX . I. L. R., 9 Calc., 730 : 13 C. L. R., 91

92. ——————— *Application made to keep in force decree.*—A judgment-creditor, on finding that his judgment-debtor has no property on which he can lay hands for the purposes of execution, can always file an application simply to keep in force his decree. NILMONEY SINGH DEO *v.* NILCOMUL TUFFADAR . . . . 25 W. R., 546

(*b*) IRREGULAR OR DEFECTIVE APPLICATIONS.

93. ——————— *Irregular application for restoration of execution case.*—Where certain execution proceedings had been struck off the file, and the decree-holder applied that they might be restored, his petition containing not one of the particulars set forth in section 207 of the Code of Civil Procedure, it was held that his application was not an application to execute the decree within the meaning of the Procedure Code. RAMDHUN ROY *v.* ABDOOL GUNEE . . . . . 9 W. R., 390

**LIMITATION ACT, 1877, art. 179, cl. 4** —*continued.*

3. NATURE OF APPLICATION—*continued.*

(*b*) IRREGULAR OR DEFECTIVE APPLICATIONS —*continued.*

94. ——————— *Application for execution of decree irregularly made.*—Where an application for execution of a decree was defective in regard to many particulars required by the terms of section 212, Act VIII of 1859, and asked also for execution of a share only of the decree, it was held not to be a proceeding within the meaning of section 20, Act XIV of 1859. Where an application for execution by a party representing himself to be the purchaser of a decree was rejected on account of the applicant's failure to produce evidence, as he was directed to do, in support of his claim, it was held not to be a proceeding properly taken to enforce a decree. OODOYCHAND LUSKUR *v.* NOBOCOOMAR PORAMANICK [10 W. R., 428

95. ——————— *Civil Procedure Code, 1859, s. 212.—Application to execute decree.*—Under Act IX of 1871, schedule II, article 167, an application for executing a decree is not a proper one unless it is in accordance with the Code of Civil Procedure, section 212. *Quære,*—What is the effect of that Act upon the High Court's decision as to the *bona fides* of proceedings to keep a decree in force? GOUREE SUNKUR TRIBEDEE *v.* AMAN ALI CHOWDHRY 21 W. R., 309

96. ——————— *Application for execution of decree.—Proceeding to enforce decree.*—The "application" spoken of in article 167, clause 4 of schedule II to Act IX of 1871, is not merely such an application as is contemplated by section 212 of Act VIII of 1859, but includes an application to keep in force a decree or order. The language of article 167, clause 4 of schedule II to Act IX of 1871, is wide enough to include any application to enforce or keep in force decrees or orders, and, consequently, an application to enforce or keep in force a decree by the attachment of a portion of the property of the defendant, will keep the decree alive against the residue of his property or his person. An order for attachment of a pension in satisfaction of a decree, obtained on the 10th December 1863, was made on 16th April 1869. After the passing of the Pensions Act (XXII of 1871), the Deputy Collector refused to continue paying the pension to the decree-holder, and returned to the Court the warrant of execution issued under the order of 16th April 1869; and an order, finally disposing of the application for attachment, was made on 14th June 1872. On 19th June 1872 the decree-holder presented a fresh application, praying that the attachment of the pension might be continued, and a letter be written to the Collector, directing him to continue to pay the pension to the decree-holder, as directed by the order of 16th April 1869. *Held* that such last-mentioned application came with clause 4 of article 167 of schedule II to Act IX of 1871, and

LIMITATION ACT, 1877, art. 179, cl. 4 —*continued.*

3. NATURE OF APPLICATION—*continued.*

(*b*) IRREGULAR OR DEFECTIVE APPLICATIONS —*continued.*

that, consequently, an application, on 24th July 1874, for execution of the decree of 10th December 1863, was not barred. *Held*, also, that the decree might properly be enforced against property of the defendant, mentioned in the application of 1874, other than the property mentioned in the applications of 1869 and 1872. JAMNA DAS *v.* LALITRAM [I. L. R., 2 Bom., 294

97. ——————— "*Applying to enforce the decree.*"—*Application "to keep the decree in force.*"—*Act VIII of 1859, s. 212.*—The words "applying to enforce the decree" in Act IX of 1871, schedule II, article 167, mean the application (under section 212, Act VIII of 1859, or otherwise) by which proceedings in execution are commenced, and not applications of an incidental kind made during the pendency of such proceedings. In cases governed by Act IX of 1871, a decree-holder who has applied to the Court *simpliciter* "to keep the decree in force," may, within three years from the date of such last-named application, obtain execution of his decree. CHUNDER COOMAR ROY *v.* BHOGOBUTTY PROSONNO ROY . I. L. R., 3 Calc., 235: 1 C. L. R., 23

PRABHACARAROW *v.* POTANNAH [I. L. R., 2 Mad., 1

98. ——————— *Application for execution of decree.*—*Non-compliance with provision of Civil Procedure Code, 1877, s. 235.*—An application for execution of a decree which does not comply in every particular with the requirements of section 235 of the Code of Civil Procedure, and which, having been returned to the judgment-creditor for amendment, has not been proceeded with, may still suffice, under clause 4, article 179 of schedule II of the Limitation Act, to keep the decree alive. RAMANANDAN CHETTI *v.* PERIATAMBI SHERVAI [I. L. R., 6 Mad., 250

99. ——————— *Proceedings to keep alive decree.*—*Irregularities.*—Proceedings in execution originating in illegality, and which have been the subject of contests by the judgment-debtor, and are still under consideration in appeal, cannot be regarded as *bonâ fide* proceedings to keep alive the decree. TILUCK CHUNDER GOOHO *v.* GOURMONEE DEBEE . . . . . 6 W. R., Mis., 91

But *see* GOURMONEE DEBEE *v.* NEEL MADHUB GOOHO . . . . . 5 W. R., Mis., 3

100. ——————— *Application for execution of decree.*—An application for execution of a decree was made in February 1868, and proceedings sufficient to bar limitation under Act XIV of 1859 were going on till 30th September 1871. The next application for execution of the decree, made in October 1872, was held to be barred under Act IX of 1871, as more than three years had elapsed on that day from the date of the application in February 1868. *Held*, following *Gouree Sunker* v. *Arman Ali*, *21 W. R., 309*, that an informal application, made on 30th September 1871, in the nature of a petition to the Subordinate Judge to give effect to the application of February 1868 by overruling certain objections of the Collector and enforcing execution of the decree, was not an application for the execution of a decree such as could bar limitation under Act IX of 1871. JIBHAI MAHIRPATI *v.* PARBHU BAPU . . . . . I. L. R., 1 Bom., 59

101. ——————— *Application for execution.*—A *bonâ fide* application for execution held to be a proceeding within the meaning of section 20, Act XIV of 1859, even though it had to be amended by order of Court. MAHOMED SAMEE BHOOYA *v.* ALAHEE BUKSH CHOWDHRY . 10 W. R., 346

102. ——————— *Proceedings to keep decree in force.*—*Application for execution and notice.*—An application for execution was made by a mooktear, and admitted by the Judge, who ordered a notice to issue to the judgment-debtor. *Held* that such application could not afterwards be set aside for irregularity, and that it was sufficient to keep the decree alive. DHANPAT SING *v.* LILANAND SING [2 B. L. R., Ap., 18: 11 W. R., 28

103. ——————— *Application for execution insufficiently stamped.*—An insufficiently-stamped application for execution of a decree may, under section 179 of schedule II of the Limitation Act, 1877, suffice to keep the decree alive. RAMASAMI AYYAN *v.* SESHAYYANGAR [I. L. R., 6 Mad., 181

104. ——————— *Failure to produce certificate.*—The Civil Judge rejected an application for execution of a decree, on the ground that it was barred by the Law of Limitation (section 20, Act XIV of 1859). A prior application was made in 1864, and less than three years before the present application, but the Civil Judge treated the former application as nugatory, because it was not accompanied by a certificate which the applicant had been directed to produce by an order of Court made upon the petitioner's application for execution in 1862. *Held* by the High Court that the applicant's right to have process of execution issued was not barred. KENDIGA MADI CHETTI *v.* SOOBBAMMA [5 Mad., 453

*See* LAKSHAMMA *v.* VENKATARAGAVA CHARIAR [4 Mad., 89

105. ——————— *Application for execution of decree.*—An application for execution having been made within three years from the date of confirmation of a decree, and notice served, the case was struck off on account of the decree-holder's default to pay the necessary fees. A second application made within three years of the first application was also struck off, because the judgment-creditor did

**LIMITATION ACT, 1877, art. 179, cl. 4** —*continued.*

3. NATURE OF APPLICATION—*continued.*

(*b*) IRREGULAR OR DEFECTIVE APPLICATIONS —*continued.*

not send a person to point out the judgment-debtor. A third application was then made within three years of the second. *Held* that the third application was in time, and that no question of *bona fides* arose in the case. MARACHO KOOER *v.* CHUTOORBHOOJ SAHOY . . . . . **24 W. R., 459**

**106.** ——————— *Application under s. 232, Civil Procedure Code, 1877.*—Where an application for execution of a decree made under section 232 of the Civil Procedure Code was disallowed, on the ground that the applicants had not shown, as they alleged, that they were the persons beneficially interested in a transfer of the decree taken in the benami name of a third person, and within three years from the date of such application a subsequent application was made by them, in which their allegation was proved to be correct,—*Held* that the former application had been a proper application within the meaning of the section, and that the latter was therefore, under article 179, schedule II of the Limitation Act (XV of 1877), within time. ABDUL KUREEM *v.* CHUKHUN . . . . **5 C. L. R., 253**

**107.** ——————— *Application for execution of decree.—Omission to specify mode of execution.—Application to wrong Court.*—A bare request in an application for the execution of a decree that the amount of the decree might be recovered, without any specification of the mode in which the Court was desired to aid in its recovery, is not an application for the execution of, or a proceeding to enforce, or keep in force, the decree, and the defect is not cured by the circumstance that the application asked or suggested that a notice should be issued to the judgment-debtor. FRANKS *v.* NUNEH MAL . **[7 N. W., 79**

**108.** ——————— *Informal application for execution of decree.*—An application for execution of a decree having been made on the 26th September 1879 within time, but not in the form prescribed by the Civil Procedure Code, the Court allowed it to remain on the file until it should have been amended, and it was accordingly amended on the 21st April 1881, more than three years after the date of the decree. *Held* that the former application could not be treated as a nullity, but must, though informal, be taken as a step in execution. MAHOMED *v.* ABEDOOLLAH **[12 C. L. R., 279**

**109.** ——————— *Application in accordance with law.*—In execution of a decree, dated 7th May 1877, an application was made under a general power of attorney from *A.* and *B.*, the decree-holders, on the 19th February 1878. *B.* died on the 12th February, but this fact was unknown to the pleaders who made the application. The next application was made on the 28th July 1880. On an objection taken that the latter application was barred by limitation, on the ground that the former application was a void application,—*Held* that the application of the 19th February 1878 was an application in accordance with law within the meaning of clause 4, article 179, schedule II of the Limitation Act, XV of 1877. AMIRUNNISSA CHOWDHRANI *v.* AHSANULLAH CHOWDHRI . . . . **13 C. L. R., 18**

**110.** ——————— *Execution of decree —Amendment of revenue record.—Application for execution not "in accordance with law."*—The holders of a decree made by a Civil Court, which directed, *inter alia*, that they should be maintained in possession of a share of a village, by cancelment of the order of the settlement officer directing the entry of the judgment-debtor's name in the revenue registers in respect of such share, applied for execution of such decree, improperly asking the Court executing the decree to order the Collector to amend such entry by the substitution of their names for that of the judgment-debtor in respect of such share, instead of asking it to send such officer a copy of such decree for his information, with a view to such amendment. *Held* that such application, not being one in accordance with law, within the meaning of article 179, schedule II of Act XV of 1877, was not one which would keep such decree in force. MUHAMMAD UMAR *v.* KAMILA BIBI . . . **I. L. R., 4 All., 34**

**111.** ——————— *Informal application for execution.*—An application for execution of a decree having been made on the 19th January 1882 within time, but not in the form prescribed by the Civil Procedure Code, inasmuch as it did not contain the right number of the suit in which the decree was passed, an order was made on the 19th January directing the petitioner to amend the application within four days by giving the correct number. That order was not complied with, and the petition was left on the file of the Court without being disposed of in any way till the 21st September 1882, on which date, more than three years having then elapsed since the date of the decree, it was returned to the vakeel of the petitioner for amendment within eight days. The required amendment was made, and the application again placed on the file of the Court on the 22nd September. On an objection being taken that the decree was barred, and the execution could not issue,—*Held*, following the principles laid down in the case of *Mahomed* v. *Abedoollah, 12 C. L. R., 279,—viz.*, that it was the duty of the Court to dismiss the application when it found that it was informal, and thus to give the applicant an opportunity of putting in a proper application, and that the decree-holder should not be made to suffer for such omission on the part of the Court,—that the former application could not, though informal, be treated as a nullity; and that the application on the 22nd September must be taken as having been presented with the object of amending the original informal application; and that it was in continuation of the execution proceeding commenced, however informally, on the 19th January 1882; and that consequently the decree

**LIMITATION ACT, 1877, art. 179, cl. 4** —*continued.*

3. NATURE OF APPLICATION—*continued.*

(*b*) IRREGULAR OR DEFECTIVE APPLICATIONS —*continued.*

was not barred. *Held*, also, that the fact of the application having been returned to the vakeel for amendment instead of being amended while on the file of the Court, made no difference to the application of the above principle. FUZLOOR RUHMAN *v.* ALTAF HOSSEN . . **I. L. R., 10 Calc., 541**

**112.** ——————— *Dekkan Agriculturists' Relief Act, XVII of 1879, s. 22.—Conciliation agreement.—Civil Procedure Code (Act XIV of 1882), s. 261.—Application for attachment of an agriculturist's property.*—A conciliation agreement, dated the 2nd October 1880, between the decree-holder and the judgment-debtor, stipulating that the former should allow a remission of R10 and the latter should execute a document for the remaining sum of R90, to be paid in 1882, was filed in Court on 20th November 1880. In 1883 the decree-holder presented two applications for satisfaction of the agreed debt of R90 by attachment of the debtor's property, which applications were granted, but were not proceeded with through some default of the decree-holder. On 4th June 1885 the decree-holder made the present application, praying that under sections 261 and 262 of the Civil Procedure Code (Act XIV of 1882) an order directing the judgment-debtor to execute a bond in terms of the conciliation agreement might be made, or that the Court might execute one on his behalf. On reference by the Subordinate Judge under section 617 of the Civil Procedure Code (Act XIV of 1882) to the High Court,—*Held* that the applications in 1883 for attachment of the debtor's property were not "in accordance with law," being forbidden by the Dekkan Agriculturists' Relief Act, XVII of 1879, section 22; and that the present application under section 261 of the Civil Procedure Code (Act XIV of 1882) was, therefore, too late under clause 4, article 179 of schedule II of the Limitation Act, XV of 1877. CHATUR KHUSHALCHAND *v.* MAHADU BHAGAJI **[I. L. R., 10 Bom., 91**

**113.** ——————— *Application by pleader for execution after decree-holder's death.*—Where a decree-holder died without taking out execution of his decree, and two days after his death his pleader made an application for execution on his behalf, this being the first application of the kind,—*Held* that, inasmuch as the authority of a pleader ceases at the moment of his client's death, the application was invalid, and was not such an application or step in aid of execution of the decree as could save a subsequent application for execution by the decree-holder's heirs from being barred by limitation. KALLU *v.* MUHAMMAD ABDUL GHANI **[I. L. R., 7 All., 564**

**114.** ——————— *Decree in favour of firm in name of agent.—Application for execution by another agent.*—A decree was passed in favour of a firm in the name of an agent of the firm. The second and subsequent applications for execution were made by an agent of the firm other than the agent named in the decree. Certain persons, alleging that they were the proprietors of the firm, applied for execution of the decree. The application was refused, on the ground that the proceedings in execution taken by the last-mentioned agent were invalid, and execution of the decree was therefore barred by limitation. *Held* that such proceedings, however irregular, were not invalid. LACHMAN BIBI *v.* PATNI RAM . . **I. L. R., 1 All., 510**

**115.** ——————— *Legal representative applying for execution without her name being on the record.*—*A.* obtained a decree against *B.* in June 1879, and in execution thereof some time in 1879 attached certain moneys in Court which belonged to his judgment-debtor, and obtained an order for payment out to him. Before receiving payment *A.* died, and the execution proceedings were struck off on the 31st January 1880. On the 14th June 1880, and on the 22nd June 1881, the widow of *A.*, who had taken out probate, applied to withdraw this money from Court, and on the 1st of April 1882 applied for a copy of the decree obtained by *A.* for the purposes of execution. At the time of these three applications the widow had not applied for substitution of her name on the record in the place of her deceased husband. On the 5th January 1884 the widow applied to have her name substituted on the record, and for execution. *Held* that the application was barred, as the previous applications were not, under the circumstances, steps in aid of execution. GUNGA PERSHAD BHOOMICK *v.* DEBI SUNDARI DABEA **[I. L. R., 11 Calc., 227**

4. STEP IN AID OF EXECUTION.

(*a*) GENERALLY.

**116.** ——————— *Proceeding to enforce decree by interested party.*—In order to enforce, or to keep in force, a decree, it was not necessary that the proceeding alluded to in section 20, Act XIV of 1859, should have been taken by the particular party seeking to execute: it was sufficient if any one interested had taken any proceeding. NARAIN ROY *v.* SREENATH MITTER . . . **9 W. R., 485**

**117.** ——————— *Right to enforce decree.*—In order to keep a decree alive, section 20 of Act XIV of 1859 does not require more than that some actual proceeding should be taken, which, if successful, would result in the discharge or partial discharge of the judgment-debt. The proceeding need not be by a person legally and rightfully entitled to the decree. NADIR HOSSEIN *v.* PEAROO THOVILDARINEE **[14 B. L. R., 425, note: 19 W R., 255**

**118.** ——————— *Application not by decree-holder n the record.—Application to execute*

LIMITATION ACT, 1877, art. 179, cl. 4 —*continued.*

4. STEP IN AID OF EXECUTION—*continued.*

(*a*) GENERALLY—*continued.*

*decree.*—An application not made by the decree-holder at the time on the record, cannot be considered to be an application to execute the decree. DURIAO ROY *v.* DOOLLA ROY . . **24 W. R., 10**

**119.** ——————— *Proceedings to keep decree in force.*—A decree was obtained on 6th June 1861, and in February 1864 a pretended purchaser of it sought execution. On 15th March 1864 the original decree-holder herself applied for execution of the same decree against certain of the judgment-debtors without mentioning the appellant, who was one of them. Subsequent proceedings at different times were taken between her and the alleged purchaser in order to ascertain which of them was really entitled to execution of the decree, and on the 6th March 1867 her representatives got a decree setting aside the alleged purchase, and declaring that they might execute the decree of 6th June 1861. Accordingly, on 31st August 1868, an application was made by her representatives for that purpose. Between the 15th March 1864 and 31st August 1868, no proceedings had been taken in execution. *Held* that the application was not barred by limitation; that no execution could be given till it was ascertained who were the actual decree-holders; and that the intermediate proceedings for that purpose were *bonâ fide* proceedings within section 20, Act XIV of 1859, for the purpose of keeping the decree in force. ABDUL GUNNY *v.* POGOSE **[4 B. L. R., A. C., 1: 12 W. R., 436**

**120.** ——————— *Application for execution of decree by benamidar.*—An application for execution of a decree by a mere benamidar is not an application *in accordance with law* within the meaning of article 179, clause 4 of schedule II of the Limitation Act (XV of 1877), such as to afford a fresh starting-point for limitation. DENONATH CHUCKERBUTTY *v.* LALLIT COOMAR GANGOPADHYA **[I. L. R., 9 Calc., 633: 12 C. L. R., 146**

**121.** ——————— *Proceeding to enforce decree.*—Steps taken towards placing the assignee of a decree in the position of the original decree-holder did not constitute proceedings to enforce, or to keep in force, the decree within the meaning of section 20, Act XIV of 1859. BROJO LALL PURAMANICK *v.* RAM TARUN GOSSAIN . **10 W. R., 127**

**122.** ——————— *Decree.—Application to enforce decree.—Application by heir of deceased decree-holder to substitute his name on the record.*—*G.* obtained a decree against the defendant on the 29th November 1867, and applied for execution of it on the 23rd July 1870. After *G.'s* death, his son made an application, on the 10th March 1871, praying for substitution of his name in the place of his deceased father, and that the money due under the decree should be recovered and paid to him as heir of the original plaintiff. On the 3rd January 1874, and several times subsequently, the son applied for execution of the decree, his last application being in 1878. Both the lower Courts held that the application of the 10th March 1871 was not an application "to enforce or keep in force the decree;" that the application of the 3rd January 1874 was, therefore, barred by limitation, having been made more than three years after the first application of the 23rd July 1870, and that, consequently, the subsequent applications were barred. On appeal to the High Court,—*Held* that the application of the 10th March 1871 was an application "to enforce the decree," and fell within article 167 of schedule II of Act IX of 1871. The High Court accordingly reversed the orders of the Courts below, and directed that the decree should be executed, as prayed by the application of the 3rd January 1874. GOVIND SHANBHOG *v.* APPAYA . . . **I. L. R., 5 Bom., 246**

**123.** ——————— *Dispute between purchaser of decree and third party.*—A dispute between the purchaser of a decree and a third party, and the proceedings connected therewith, cannot be taken to be proceedings within the purview of section 20, Act XIV of 1859. NARAIN ACHARJEE CHOWDHRY *v.* MOHAMOYA DABEE CHOWDHRAIN . **10 W. R., 240**

*See* BRIJONAUTH CHOWDHRY *v.* LALL MERAH MUNNEEPOOREE . . . **14 W. R., 391**

The proceeding must be one against the judgment-debtor. JADO LALL *v.* RADHA KISSEN MITTER **[17 W. R., 99**

(*b*) STRIKING CASE OFF THE FILE, EFFECT OF—

**124.** ——————— *Striking case off the file.—Proceeding to enforce decree.*—Striking a case off the file is not an effectual proceeding to keep a decree in force under the Law of Limitation. MUDUN BHUKUT *v.* DOOAR BHARATEE . **8 W. R., 320**

**125.** ——————— *Striking case off the file.*—The mere pendency of an execution case struck off the file for want of prosecution, or the striking such case off the file, is not a proceeding within the meaning of section 20, Act XIV of 1859. RAM SAHAI SING *v.* SHEO SAHAI SING. GURUDAS AKHULI *v.* GOBIN NAIK **[B. L. R., Sup. Vol., 492 1 Ind. Jur., N. S., 421: 6 W. R., Mis., 98**

**126.** ——————— *Consent to striking case off the file.*—Consent of the decree-holder to the striking off of an attachment is not a proceeding to enforce a decree but a relinquishment. TETLEY *v.* PEET SINGH . . **Agra, F. B., Ed. 1874, 117**

**127.** ——————— *Striking off execution proceedings.*—A District Judge having held that an application to execute a decree did not prevent the operation of section 20 of Act XIV of 1859, it having been struck off, because the applicant did not pay batta; the High Court reversed the order, and directed the Judge to determine whether the former

**LIMITATION ACT, 1877, art. 179, cl. 4** —*continued.*

4. STEP IN AID OF EXECUTION—*continued.*

(*b*) STRIKING CASE OFF THE FILE, EFFECT OF —*continued.*

application to execute the decree was *bonâ fide*, notwithstanding batta was not paid. DALVI *v.* LAKSHUMAN HARI PATIL . . **4 Bom., A. C., 86**

**128.** ——————— *Striking off execution proceedings.*—A decree was passed in 1850, and was in force in 1859, when Act XIV of that year was passed. Between August 1850 and 25th April 1864, nothing effective was done in furtherance of execution. Petitions for execution were filed in May 1861 and August 1862, and the usual orders passed on them, but they were struck off in default. On 25th April 1864 another petition was filed, and notice was served on the debtor. *Held* that at that time the petition for execution was barred by limitation. The decree was not kept alive by the petitions of May 1861 and August 1862, which were struck off in default. SATYASARAN GHOSAL *v.* BHAIRAB CHANDRA BRAHMO

**[2 B. L. R., A. C., 196 : 11 W. R., 80**

Affirming the decision of the High Court in SUTTO CHURN GHOSAL *v.* BHYRUB CHUNDER BROHMO

**[9 W. R., 565**

**129.** ——————— *Striking off execution proceedings.—Bonâ fide proceedings to keep decree in force.*—A decree was obtained on 16th April, 1859 and execution was applied for on 28th December 1861, when the applicant was ordered by the Court to produce a certificate of heirship. On his failing to do so, the case was struck off. He next applied for execution on 13th August 1864. *Held* that the proceedings taken in 1861 were not *bonâ fide* proceedings on the part of the Court such as would keep the decree alive, and that the application was barred. LACHMIPAT SINGH ROY *v.* WAHID ALI . . **2 B. L. R., A. C., 194 : 11 W. R., 70**

**130.** ——————— *Striking off execution proceedings.—Bona fides.*—Where the representatives of a deceased decree-holder applied for execution of his decree, and were directed to furnish proof that they were the representatives of the deceased, and did so, and then their execution case was struck off the file,—*Held* that the steps taken by them were *bonâ fide* steps taken to keep the decree alive. ADINA BIBI *v.* SUBUBUNNISSA BIBI

**[3 B. L. R., Ap., 142**

**131.** ——————— *Striking off execution proceedings.—Proceeding to enforce decree.*—Application for the execution of a decree was made on the 21st December 1864, and in pursuance of such application the notice required by law was issued to the judgment-debtor. On the 7th February 1865 the Court executing the decree called on the decree-holder to produce proof of the service of such notice within four days. On the 23rd February 1865, in consequence of the decree-holder having failed to produce such proof, the Court dismissed the application. There was no proceeding either of the decree-holder or of the Court between the 7th and the 23rd February 1865. On the 18th February 1868 application was again made for the execution of the decree. *Held* that the proceeding of the Court of the 23rd February 1865, striking off the former application for default of prosecution, was not a proceeding to keep the decree alive, and the latter application was therefore beyond time. RAGHU RAM *v.* DANNU LAL

**[I. L. R., 2 All., 285**

**132.** ——————— *Striking off execution proceedings—Application for execution of decree.*—On the 16th January 1875 a decree-holder applied for execution of his decree, and the 3rd of March 1875 was fixed for the sale of the judgment-debtor's property. On the last-mentioned date the debtor applied for two months' time, and the decree-holder assented to postponement for that length of time only. The application was granted, and the Court thereupon struck the case off the file. Nothing further was done until the 25th February 1878, when the decree-holder again applied for execution. *Held* that the application of 3rd March 1875 was in fact a step taken in aid of execution of the decree, and that the application of 25th February 1878 was, therefore, under Act XV of 1877, schedule II, article 179, clause 4, within time. RAJLUKHY DASSEE *v.* RASH MUNJURY CHOWDRAIN . **5 C. L. R., 515**

(*c*) RESISTANCE TO LEGAL PROCEEDINGS.

**133.** ——————— *Proceedings to enforce decree.*—Resistance to legal proceedings taken by another person counted as a proceeding for the purposes of section 20, Act XIV of 1859. KALEE KISHORE BOSE *v.* PROSONO CHUNDER ROY

**[10 W. R., 248**

**134.** ——————— *Continuance of contest between parties.*—So long as an actual *bonâ fide* contest was going on in Court between a decree-holder and the judgment-debtor as to the judgment, there was a pending "proceeding" within section 20, Act XIV of 1859, and the period of limitation was to be computed from the Court's decision. The decision in the case of *Ram Sahai Sing* v. *Sheo Sahai Singh, B. L. R., Sup. Vol., 492,* commented on and approved of. DHIRAJ MAHTAB CHUND *v.* BULRAM SINGH BABOO

**[5 B. L. R., 611 : 14 W. R., P. C., 21**
**13 Moore's I. A., 479**

CHOTAY LAL *v.* RAM DYAL . **2 N. W., 402**

MODHOO SOODUN MOOKERJEE *v.* KIRTEE CHUNDER GHOSE . . . **18 W. R., 7**

**135.** ——————— *Resisting claim to attach property.—Bonâ fide* proceedings in resistance of a claim to attach properties were proceedings to enforce a decree within the meaning of section 20 of Act XIV of 1859. BECHARAM DUTTA *v.* ABDUL WAHED . . . . **I. L. R., 11 Calc., 55**

LIMITATION ACT, 1877, art. 179, cl. 4 —*continued.*

4. STEP IN AID OF EXECUTION—*continued.*

(*c*) RESISTANCE TO LEGAL PROCEEDINGS—*continued.*

136. ——————— *Resisting appeal against decree.*—Resisting an appeal against a decree (which appeal was eventually compromised) was a proceeding, within the meaning of section 20, Act XIV of 1859, taken to enforce or keep alive the decree. SYUD KHAN *v.* JUMAL BIBEE [5 W. R., Mis., 19

*See* BUKRONATH CHUCKERBUTTY *v.* NILMONEE SINGH DEO . . . . 18 W. R., 7

RAM RUTTUN BANERJEE *v.* AMEEROOLMOLK BUNWAREE GOBIND . 6 W. R., Mis., 95

137. ——————— *Opposing application for leave to appeal.*—An appeal prosecuted to a decree was a proceeding to enforce a decree within the meaning of section 20 of Act XIV of 1859. Also held there was such a proceeding where, on the judgment-debtor seeking to obtain leave from the High Court to appeal to the Privy Council, the execution-creditor intervened. KISTO KINKER GHOSE ROY *v.* BURRODA CAUNT SINGH ROY [10 B. L. R., 101: 17 W. R., 292 14 Moore's I. A., 465

S. C. in Court below, KISHEN KISHORE GHOSE *v.* BURODA KANT ROY . . 8 W. R., 470

138. ——————— *Appeals against orders.*—Appeals against orders of the Court charged with the execution of a decree, having the effect of restraining execution or stopping further proceedings, were proceedings coming within the terms of section 20, Act XIV of 1859. NITTYANUND KOONDOO *v.* NUGENDRO CHUNDER GHOSE [16 W. R., 299

139. ——————— *Appeal from order setting aside attachment.*—So also was an appeal from an order setting aside an attachment. KALLYPERSAUD SINGH *v.* JANKEE DEO NARAIN [7 W. R., 9

140. ——————— *Opposing application for review or petition of appeal.*—If, after a decree upon an application for review of judgment or petition of appeal, the person in whose favour the original decree was given appears in person (whether voluntarily or upon service of notice) to oppose the application, and files a vakalutnama, or does anything for the purpose of preventing the Appellate Court or the Court of Review from setting the judgment aside, such an act being an act of the person in whose favour the judgment has been given for the purpose of preventing its being set aside, is an act done for the purpose of keeping the judgment in force. BHUBANESWARI DEBI *v.* MAHENDRANATH CHOWDHRY . . . 3 B. L. R., Ap., 33

KALLA CHAND PAUL *v.* DHIRAJ MAHATAB CHAND [18 W. R., 190

141. ——————— *Opposing application for appeal or review.—Decree for costs.*—Where the original suit is pending in appeal, the decree-holder is not obliged to execute his decree for costs until the proceedings are set at rest by the Appellate Court; and if application is made for a review of the order made in appeal, an attempt made to support the original order must be regarded as a proceeding to keep it alive. MAHOMED BUSSEEROOLLAH *v.* RAM KANT CHOWDRY . . 16 W. R., 266

142. ——————— *Opposing application for review.*—The words "judgment, decree, or order" in section 20, Act XIV of 1859, mean a judgment, decree, or order which can be enforced by execution. An application for a review, or a petition of appeal by the person against whom the judgment was given, is not a proceeding by the decree-holder to keep the decree in force. BIPRO DOSS GOSSAIN *v.* CHUNDER SIKUR BHUTTACHARJEE [B. L. R., Sup. Vol., 718 2 Ind. Jur., N. S., 248 7 W. R., 521

LUTEEFUN *v.* RAJROOP SINGH [10 B. L. R., 361: 19 W. R., 185

143. ——————— *Opposing application for review.*—But there is such a proceeding if he appear to oppose the application, or does any act to prevent the decree being set aside. BIPRO DOSS GOSSAIN *v.* CHUNDER SIKUR BHUTTACHARJEE [B. L. R., Sup. Vol., 718: 2 Ind. Jur., 248 7 W. R., 521

144. ——————— *Appearance as respondent in appeal.*—The appearance of the person in whose favour a judgment was given as respondent on an appeal, was not an act done for the purpose of keeping the judgment in force within the meaning of section 20, Act XIV of 1859. VIRASAMY MUDALI *v.* MANNOMMANY AMMAL . . . 4 Mad., 32

145. ——————— *Decree for moveable and immoveable property.—Appeal in respect of the moveable property.—Application for execution as regards immoveable property.*—*S. M.*, on 24th April 1866, obtained a decree against *B M.* for possession of certain land, and also for certain moveable property. *B. M.* then appealed to the High Court against the decree so far only as it related to the moveable property. *S. M.* appeared as respondent. The High Court modified the decree in respect of the moveable property only on the 6th March 1869. On the 26th April 1869 the decree-holder applied to the Court which gave the original decree for execution in respect of the land only. He was refused execution as barred by limitation under section 20, Act XIV of 1859. *Held*, the appearance of *S. M.*, the decree-holder, as respondent in the appeal preferred by *B. M.* to the High Court (which was in respect of the moveable property only), was no proceeding to enforce the decree in respect of the land or to keep it in force. The execution of the decree in respect of the land was

**LIMITATION ACT, 1877, art. 179, cl. 4** —*continued.*

4. STEP IN AID OF EXECUTION—*continued.*

(*c*) RESISTANCE TO LEGAL PROCEEDINGS—*continued.*

barred. SRINATH MAZUMDAR *v.* BRAJANATH MAZUMDAR . **4 B. L. R., Ap., 99 : 13 W. R., 309**

**146.** ——————— *Appearing as respondent in appeal.*—In this case certain proceedings of the Beerbhoom Courts in 1866 appealed to, and finally decided by, the High Court in 1868, were held to be the proceedings that would, while they were being carried on, have prevented the decree-holder (respondent) from executing his decree, and therefore proceedings that prevented the bar of limitation from applying to the execution of that decree. SREENARAIN MITTER *v.* DHERAJ MAHTAB CHUND **[17 W. R., 72**

**147.** ——————— *Proceedings to enforce decree.—Opposing right of third party to attached property.*—A decree-holder having sold certain property in execution and purchased it himself, a balance remained due to him under the decree. Some time after, a third party brought a suit to establish his right to the property, the decree-holder and judgment-debtor both being made parties. *Held* that it was right, and, under the circumstances, perfectly equitable, to count the time spent by the decree-holder in that litigation as spent in *bonâ fide* carrying on execution. ROMANATH JHA *v.* LUCHMIPUT SINGH . . . . . **19 W. R., 418**

**148.** ——————— *Defence to suit.*—A party (*M.*) having borrowed money on the security of land, obtained a decree against the borrower for principal and interest, execution being stayed for six months, and plaintiff's lien on the land maintained. A year after the decree-holder applied for execution, and the estate was attached with a view to sale. Thereupon one *K.* claimed the estate as his property, and, the claim being disallowed, commenced a suit in a Civil Court to establish his title, paying in shortly after, under protest, the sum which had accrued under the decree, and that money was taken out with the leave of the Court by the decree-holder (*M.*), and satisfaction entered upon the decree. Subsequently *K.* obtained a decree in virtue of which *M.* was ordered to refund the money. *Held* that the defence to *K.'s* suit by the decree-holder *M.* would not be a proceeding taken by him within the meaning of section 20, Act XIV of 1859, to keep his decree alive. PROSUNNO CHUNDER ROY *v.* MOOKOOND PERSHAD ROY . . . . . **11 W. R., 210**

**149.** ——————— *Application for execution of decree.—Step in aid of execution.*—An application by a decree-holder praying that the objections taken by the judgment-debtor to the sale of property belonging to him in execution of the decree should be disallowed, and the sale be confirmed, is an application from the date of which the period of limitation for a subsequent application for execution of the decree may be computed. KEWAL RAM *v.* KHADIM HUSAIN . . . . . **I. L. R., 5 All., 576**

**LIMITATION ACT, 1877, art. 179, cl. 4** —*continued.*

4. STEP IN AID OF EXECUTION—*continued.*

(*c*) RESISTANCE TO LEGAL PROCEEDINGS—*continued.*

**150.** ——————— *"Step in aid of execution of decree."—R.*, in a suit against *S.* and other persons, obtained a decree on the 24th December 1878, *S.* being exempted from the decree, and being awarded costs against the plaintiff. In executing his decree, *R.*, on the 16th June 1880, sought to set off the costs awarded to *S.* against the amount due to himself. On the 6th August 1880 *S.* preferred objections to this course. On the 19th July 1883 *S.* applied for execution of his decree for costs. *Held* that the application was barred by limitation, inasmuch as article 179 (4) of the Limitation Act requires that the decree-holder should make a direct and independent application for execution on his own account, and it was not sufficient to satisfy the requirements of the law to offer objections under the circumstances under which they were offered in the present case. SHIB LAL *v.* RADHA KISHEN **[I. L. R., 7 All., 898**

(*d*) SUITS AND OTHER PROCEEDINGS BY DECREE-HOLDER.

**151.** ——————— *Proceedings to keep decree in force.*—Where a decree-holder is referred to a civil suit by the Court to which he applies for execution, and he accordingly carries on proceedings in order to get full relief under his decree, such proceedings must be held to be in furtherance of execution, and as keeping the decree alive. RADHA GOBIND SHABA *v.* BROJENDRO COOMAR CHOWDHRY **[15 W. R., 207**

**152.** ——————— *Suit to set aside order under s. 246, Civil Procedure Code, 1859.*—A suit by a decree-holder to set aside orders passed under section 246, Act VIII of 1859, and to declare his right to sell a certain estate as the property of his judgment-debtor in execution of his decree, was a proceeding within the meaning of section 20, Act XIV of 1859, to enforce such decree. RAM COOMAR CHOWDHRY *v.* BROJESSUREE CHOWDHRAIN **[6 W. R., Mis., 14**

KASHER PERSHAD ROY *v.* SHIB CHUNDER DEB **[2 W. R., Mis., 3**

**153.** ——————— *Execution of decree obtained before the passing of Act XIV of 1859.—Suit by decree-holder to declare property liable to attachment.*—Process of execution of a decree obtained before the passing of Act XIV of 1859 might be issued within the time mentioned in section 21 of that Act without any prior proceeding having been taken; but when it was sought to execute such decree after three years from the time of the passing of the Act, process of execution should not be issued unless some proceeding within the meaning of section 20 had been taken to enforce the decree or keep it in force within three years next preceding the application for execution. A regular suit by a decree-holder for a declaration that property released from attachment,

LIMITATION ACT, 1877, art. 179, cl. 4 —*continued.*

4. STEP IN AID OF EXECUTION—*continued.*

(*d*) SUITS AND OTHER PROCEEDINGS BY DECREE-HOLDER—*continued.*

under section 246 of Act VIII of 1859, is liable to attachment in execution of his decree, was a proceeding to keep a decree in force within the meaning of section 20, Act XIV of 1859. KANGELEE CHURN GHOSAL *v.* BONOMALEE MULLICK. MAHABEER PARSAD *v.* PRANPUTTY KOER [B. L. R., Sup. Vol., 709 : 7 W. R., 515

DEEGENDUR NARAIN GHOSE *v.* HURKISHORE DUTT . . . . . 8 W. R., 88

154. ——————— *Suit under s. 246, Act VIII of 1859.—Proceeding to enforce decree.*—Within three years of his first application in execution of a rent-decree, *A.*, the judgment-creditor, made a second application to sell certain lands, the alleged property of *B.*, the judgment-debtor. Third parties intervened who established their claim to the land. *A.* thereupon brought a regular suit, and succeeded in obtaining a decree declaring the lands in suit to be the property of *B.* Within a year of the date of this decree, but more than three years after his first application for execution, *A.* filed a third application for attachment of other lands belonging to *B.* *Held*, the application was barred by limitation. RAMSOONDER SANDYAL *v.* GOPESSUR MOSTOFEE . I. L. R., 3 Calc., 716 : 2 C. L. R., 220

155. ——————— *Proceeding to enforce decree.*—A suit for a declaration of plaintiff's right to assess certain lands as mal having been decreed, some of the defendants applied under section 119, Act VIII of 1859, and prayed the Court to set aside the decree. The remaining defendants were made parties, and the decree was materially modified. *Held* that, as the decree-holder was taking steps for the purpose of preserving the original judgment intact, he was taking a proceeding to keep the decree alive. POORNANUND SURKHEL *v.* HURO SOONDEREE DEBIA [13 W. R., 208

156. ——————— *Procuring attachment and advertising for sale.*—Where a decree-holder expended money in procuring attachment of his debtor's property, and advertising the same for sale, the proceeding was presumed, nothing to the contrary being shown, to be a *bonâ fide* proceeding within the meaning of section 20, Act XIV of 1859. JUTTADHAREE SINGH *v.* WUZEER SINGH [12 W. R., 357

157. ——————— *Application to arrest judgment-debor.*—An application to arrest, which is not carried out, is a *bonâ fide* proceeding, taken with the intention of keeping the decree alive, only when the judgment-creditor can show that certain circumstances happened that rendered it unnecessary for him to proceed further against the judgment-debtor in execution of that process. JOYKISHEN SHAHA *v.* BISHOKA MOYEE CHOWDRAIN [17 W. R., 355

LIMITATION ACT, 1877, art. 179, cl. 4 —*continued.*

4. STEP IN AID OF EXECUTION—*continued.*

(*d*) SUITS AND OTHER PROCEEDINGS BY DECREE-HOLDER—*continued.*

158. ——————— *Unsuccessful suit to have property made liable under decree.*—An unsuccessful suit by a decree-holder for the purpose of having specified property made liable under his decree, is a proceeding to keep the decree in force. AKBAR GAZEE *v.* NUFEEZUN . . . 8 W. R., 99

ESHAN CHUNDER BOSE *v.* JUGGOBUNDHOO GHOSE [8 W. R., 98

*Contra*, JUNARDUN DOSS MITTER *v.* RAJAH ROOKNEE BULLUB . . 6 W. R., Mis., 48

159. ——————— *Unsuccessful application to substitute names as heirs of decree-holder.*—The petitioners applied for the substitution of their names as heirs of a deceased decree-holder, but failed to satisfy the Judge that they were the heirs of the original decree-holder. *Held* that such an infructuous application was not a process to enforce or keep in force a decree within the meaning of section 20. LALLA BISHEN DYAL SINGH *v.* RAM SUNKUR TEWAREE . . . . 6 W. R., Mis., 38

160. ——————— *Taking out proceeds of previous sale in execution.*—The act of taking out the proceeds of a previous sale in execution of a decree was held not to be a proceeding to keep the decree in force. KISHEN MOHUN JUSH *v.* CHUNDER KANT CHUCKERBUTTY . . 6 W. R., Mis., 49

161. ——————— *Taking out money deposited in Court.*—The taking out by a decree-holder of money deposited in Court by his judgment-debtor was an effectual proceeding under section 20, Act XIV of 1859, to keep the decree in force. JOGESH PROKASH GANGOOLY *v.* KALEE COOMAR ROY . . . . . 8 W. R., 274

162. ——————— *Conduct of sale and remission of proceeds to the Collector by Nazir.*—The rule approved by the Privy Council, that any act done by a Court or an officer thereof, or *bonâ fide* by the applicant, for enforcing or keeping in force a decree, satisfies the term "some proceeding" in section 20, Act XIV of 1859, was held to apply to the act of a Nazir in conducting a sale and remitting the proceeds to the Collector, and to the act of the decree-holder in applying for and drawing out a portion of these proceeds. RAJESHUREE DEBIA *v.* RAJ COOMAREE DOSSEE . . . . 15 W. R., 182

163. ——————— *Application to take money out of Court.—Bona fides.*—An execution sale was stayed by consent for two months, and the execution suit was struck off the file. During such period the execution creditor applied to the Court to restore his execution suit, and to pay to him certain moneys in deposit in Court to the credit of the judgment-debtor in another suit, alleging that he (the execution creditor) had attached them; but it turned out that he had attached them in another suit. *Held*, the application being *bonâ fide*, the period of limitation began to run from the date of the disposal of the ap-

**LIMITATION ACT, 1877, art. 179, cl. 4** —*continued.*

4. STEP IN AID OF EXECUTION—*continued.*

(*d*) SUITS AND OTHER PROCEEDINGS BY DECREE-HOLDER—*continued.*

plication by the Court. DHUNPUT SINGH ROY *v.* MUDHOMOTTEE DEBIA
[11 B. L. R., P. C., 23 : 18 W. R., 76

Reversing MODHOOMUTTY DEBIA *v.* DHUNPUT SINGH . . . . . 13 W. R., 164

164. ——————— *"Step in aid of execution."—Application for sale-proceeds.*—An application by a decree-holder to be paid the proceeds of a sale of property in execution of the decree, is a "step in aid of execution" of the decree, within the meaning of article 179 (4), schedule II of Act XV of 1877 (Limitation Act). PARAN SINGH *v.* JAWAHIR SINGH
[I. L. R., 6 All., 366

165. ——————— *Application to take money out of Court.*—An application made by a judgment-creditor to take out of Court certain moneys there deposited by his judgment-debtor, cannot be considered to be an application to the Court to take a step "in aid of execution," and is not, therefore, within the meaning of clause 4 of article 179, schedule II of Act XV of 1877. *Bunsee Singh* v. *Nuzuf Ali Beg, 22 W. R., 328,* distinguished. HEM CHUNDER CHOWDHRY *v.* BROJO SOONDURY DEBEE
[I. L. R., 8 Calc., 89 : 10 C. L. R., 272

166. ——————— *Obtaining money from Court.—Held* that obtaining the money from the Court after the execution proceedings were put an end to, was not an execution proceeding at all. WODOY TARA CHOWDHRAIN *v.* ABDOOL JUBBUR CHOWDHRY . . . . . 24 W. R., 339

167. ——————— *Application to take out money deposited in Court.*—An application made by a judgment-creditor to take out of Court certain moneys, the sale-proceeds realised by the sales of certain properties of his judgment-debtor in a previous execution, cannot be considered to be an application to the Court to take a "step in aid of execution," and is not, therefore, within the meaning of clause 4, article 179, schedule II of Act XV of 1877. *Hem Chunder Chowdhry* v. *Brojo Soondury Debee, I. L. R., 8 Calc., 89; Venkatarayalu* v. *Narasinha, I. L. R., 2 Mad., 174,* dissented from. FAZAL IMAN *v.* METTA SINGH . . I. L. R., 10 Calc., 549

168. ——————— *Steps taken to get money out of Court after refusal of application.*—Where, by declining to pay to the decree-holder the proceeds of an execution sale which has been confirmed, a Court obliges him to take steps to satisfy the Court that there is no other claimant, such steps must be considered as a proceeding to enforce the decree and obtain satisfaction thereof. MAHOMED HOSSEIN KHAN *v.* LOOTF ALI KHAN
[18 W. R., 463

169. ——————— *Proceedings in execution as to mesne profits.—Decree for costs.*—Proceedings in execution of a decree as to mesne profits were held to be an effectual proceeding within the meaning of section 20, Act XIV of 1859, to enforce the same decree as to costs. OOPENDUR MOHUN MUSTAFEE *v.* TRIPP . . . 5 W. R., Mis., 40

170. ——————— *Decree for possession and mesne profits.—Separate applications for execution.*—The holder of a decree for possession and wasilat is not obliged to apply for execution of both within three years from the passing of the decree. He may first apply for execution as to possession and costs, and then, within three years from the date of such application, seek to enforce the decree as to wasilat. BUMODAKANT ROY *v.* RAM KISHORE DUTT
[8 W. R., 99

JOGESH PROKASH GANGOOLY *v.* KALEE COOMAR ROY . . . . . 8 W. R., 274

171. ——————— *Application in aid of execution.—Possession.—Wasilat.*—Where a decree is one for possession, with wasilat from the date of dispossession to the date of suit, an application for wasilat, if not made within three years from the first application in execution, is barred. HEM CHUNDER CHOWDHRY *v.* BROJO SOONDURY DEBEE
[I. L. R., 8 Calc., 89
10 C. L. R., 272

172. ——————— *Application for execution of decree.—Application for execution of portion of decree.*—Where a decree-holder, in the execution of a decree for the possession of land, mesne profits, and costs, applied for and obtained possession of the land, and costs, and afterwards, within three years, applied in execution of the decree for mesne profits, the execution of the decree for mesne profits was not barred by limitation by reason of more than three years having elapsed from the date of the decree. RAM BAKSH SINGH *v.* MADAT ALI
[7 N. W., 95

173. ——————— *Proceedings to assess mesne profits.*—Act XIV of 1859, section 20, applied only to such decretal orders as were complete in themselves and ready to be enforced, and not to so much of a decretal order as directed proceedings to be taken in order to assess the amount of wasilat to be recovered by the judgment-creditor, which were merely a prolongation of the trial, and not proceedings to enforce the decree. FUZEELUN *v.* KERAMUT HOSSEIN
[21 W. R., 212

BUNSEE SINGH *v.* NUZUF ALI BEG
[22 W. R., 328

174. ——————— *Decree for possession and mesne profits.—Application for execution for mesne profits, which had been omitted in execution of decree.—Civil Procedure Code, 1877, s. 230.*—Where a party obtains a decree for possession and mesne profits, under which he obtains possession but fails to prosecute his suit for mesne profits and the execution

**LIMITATION ACT, 1877, art. 179, cl. 4** —*continued.*

4. STEP IN AID OF EXECUTION—*continued.*

(*d*) SUITS AND OTHER PROCEEDINGS BY DECREE-HOLDER—*continued.*

case is struck off for default,—*Held* that it is very doubtful if, in any case, the effect of such an order would be to prevent the decree-holder again applying for execution of that portion of the decree relating to mesne profits, as long as he keeps within the provisions of the Limitation Act. It is otherwise under section 230, Act X of 1877. SURDHAREE LALL *v.* GIRINDUR CHUNDER GHOSE . **1 C. L. R., 475**

**175.** ——————— *Proceedings to execute decree for costs.*—Having obtained possession of property in satisfaction of a decree, the decree-holder had to meet proceedings initiated by a third party under Act VIII of 1859, section 230, and delayed to execute his decree as far as it related to costs. *Held* that the proceedings in question could not be taken to keep alive the decree or save limitation in respect to the costs. BABOONATH JHA *v.* KHUGPUT DOSS . . . **19 W. R., 226**

**176.** ——————— *Transmission by Court of decree for execution.*—The transmission by the Court of one district to the Court of another of a copy of its decree, and a certificate under the provisions of sections 285 and 286 of Act VIII of 1859, with a view to execution in that other district, was a "proceeding" within the meaning of section 20, Act XIV of 1859. LEAKE *v.* DANIEL **[10 W. R., 337**

**177.** ——————— *Application under Civil Procedure Code, 1859, s. 285.*—*Held* that an application under section 285 of Act VIII of 1859, being a necessary and decided step towards the execution of the decree, was an application to enforce or keep in force the decree, within the meaning of article 167, schedule II of Act IX of 1871. HUSAIN BAKHSH *v.* MADGE . **I. L. R., 1 All., 525**

**178.** ——————— *Application for execution where transfer is only effectual mode.*—*Civil Procedure Code, 1859, s. 285.*—An application for the execution of a decree to the Court by which it was passed, where the decree could only have been effectually executed in manner provided by section 285, Act VIII of 1859, was not an application which would save limitation. FRANKS *v.* NUNEH MAL . . . . . **7 N. W., 79**

**179.** ——————— *Application for transfer of decree.*—*Held* that an application to the Court which passed a decree, that it may be sent for execution to another Court, is an application to keep such decree in force within the meaning of the Limitation Act. COLLINS *v.* MAULA BAKHSH **[I. L. R., 2 All., 284**

**180.** ——————— *Application for transfer of decree under s. 223 of Civil Procedure Code, 1877.*—An application for the transfer of a decree under the provisions of section 223 and the following section of Act X of 1877, is a step in aid of the execution of the decree within the meaning of clause 4, article 179, schedule II of Act XV of 1877. LATCHMAN PUNDEH *v.* MADDAN MOHUN SHYE **[I. L. R., 6 Calc., 513: 7 C. L. R., 521**

**181.** ——————— *Application to retransfer decree for execution.*—*Civil Procedure Code, 1877, s. 223.*—Where a decree has been transferred by the Court which passed it to another Court for execution, an application to the latter Court to return the decree to the Court which passed it for further execution is a step in aid of execution within the meaning of clause 4, article 179, schedule II of the Limitation Act, 1877. KRISHNAYYAR *v.* VENKAYYAR . . . **I. L. R., 6 Mad., 81**

**182.** ——————— *Transmission of decree for execution.*—*Application for execution of attached decree.*—*Civil Procedure Code, ss. 223, 228, 273.*—A decree was passed on the 20th February 1878 by the Munsif of M. In November 1878 it was, in accordance with the provisions of section 223 of the Civil Procedure Code, transferred to the Munsif of J. On the 21st January 1879 an application for execution of the decree was made to the Munsif of J., who thereupon issued an order for the attachment of some immoveable property belonging to the judgment-debtor, and also for the attachment of three decrees standing in his Court in favour of the judgment-debtor against other persons. On the 18th March 1882 the decree-holder applied to the Munsif of J. to execute one of these decrees in his behalf, and he further asked that whatever might be realised in such execution should go to the account of the decree which had been transferred, and which was being executed. *Held* that an application of the 18th March 1882 was perfectly legal, and such a proceeding as could keep alive the decree of the 20th February 1878; and that a subsequent application for execution, dated the 12th April 1883, was therefore not barred by limitation. An application to execute an attached decree is a "step in aid of execution" of the original decree, within the meaning of article 179, schedule II of the Limitation Act, inasmuch as its object is to obtain money in order to pay off the judgment-debtor. LACHMAN *v.* THONDI RAM . . **I. L. R., 7 All., 382**

**183.** ——————— *Application for transmission of decree.*—Where a decree-holder applied to the Court to transmit the decree to another Court for execution, and on a subsequent date paid into Court postage stamps for the transmission of the records,—*Held* that, if when the postage stamps were paid into Court an application was made to take some step in aid of execution, such application would be sufficient to give a new period of limitation. VELLAYA *v.* JAGANATHA . **I. L. R., 7 Mad., 307**

**184.** ——————— *Proceedings to get Privy Council decree sent down for execution.*—*Act XXV of 1852, s. 2.*—Proceedings had in the

**LIMITATION ACT, 1877, art. 179, cl. 4** —*continued.*

4. STEP IN AID OF EXECUTION—*continued.*

(*d*) SUITS AND OTHER PROCEEDINGS BY DECREE-HOLDER—*continued.*

High Court for the purpose of getting a Privy Council order sent down to the lower Court for execution, whether strictly legitimate or not with reference to Act XXV of 1862, section 2, if *bonâ fide* efforts made by the judgment-creditor to carry into effect that order, must be taken to be proceedings keeping the decree alive. LETHBRIDGE *v.* PROHLAD SEN **[19 W. R., 301**

**185.** ——————— *Attempt to settle accounts.*—An attempt at settlement of accounts in Court is sufficient to keep a decree alive. FUZUL-UTOONISSA *v.* CHUTTER DHAREE SINGH **[6 W. R., Mis., 43**

**186.** ——————— *Application for execution after decision of case on solehnamah.*—Where parties to a suit which had been decreed entered after remand into a compromise, and filed a solehnamah, in accordance with which the case was decided, —*Held* that an application to execute the solehnamah was not a proceeding taken on the basis of the decree, and being, therefore, illegal, could not keep the decree alive. PREO MADHUB SIRCAR *v.* BISSUMBHUR SIRCAR . . . . . **15 W. R., 514**

**187.** ——————— *Proceedings in execution to enforce barred decree.—Compromise of decree, Payments under.*—Where a decree-holder entered into a compromise with the judgment-debtor, agreeing to accept payment by instalments, which was ratified by the Court executing the decree, the case being struck off the execution file on the basis of the compromise, and, more than three years after the date of the Court's order sanctioning the compromise, subsequent proceedings were taken by the decree-holder to enforce the original decree,—*Held* that such subsequent proceedings, when execution of the original decree had been already barred by limitation, could not avail to keep the decree alive. STOWELL *v.* BILLINGS . . . **I. L. R., 1 All., 350**

**188.** ——————— *Application for execution of decree.—Partial satisfaction under arrangement made through Court.—A.*, a judgment-debtor, being arrested in execution of a decree, applied in the year 1873, under section 273 of Act VIII of 1859, for his discharge. The Court refused to entertain the application except on condition that *A.* should pay into Court a certain fixed sum of money per month on behalf of the judgment-creditor. *A.*, accepting these terms, was thereupon discharged, and the execution proceedings struck off the file. *A.*, in compliance with the directions of the Court, made regular payments into Court until October 1876, when he discontinued payment. *Held*, on an application made in June 1877 by the judgment-creditor for a warrant of further arrest against *A.*, that inasmuch as the decree-holder was not seeking to enforce by means of execution the arrangement made by the Court in 1873, but was rather attempting to execute the original decree, such application was barred, more than three years having elapsed since the date of the last application for execution of such decree. HURRONATH BHUNJO *v.* CHUNNI LALL GHOSE **[I. L. R., 4 Calc., 877: 3 C. L. R., 161**

**189.** ——————— *Application to enforce arrangement made through the Court.*—Where the decree-holder sought to enforce the arrangement made by the Court for satisfaction of the decree, limitation was held not to apply. RADHA KISSORE BOSE *v.* AFTAB CHANDRA MAHATAB **[I. L. R., 7 Calc., 61**

**190.** ——————— *Kistbandi.—Extension of time for limitation by agreement of parties.* —*A.* obtained a decree against *B.* on the 17th September 1853. The decree was kept in force by sundry proceedings, the last of which was taken on the 30th December 1864. On the 6th February 1865, the parties filed a kistbandi, whereby they agreed that the amount due under the decree should be payable by instalments, the first instalment to fall due on 14th July 1865; at the same time an existing attachment was given up. On 14th July 1868, *A.* applied for execution of the decree in respect of six instalments due under the kistbandi. *Held* (MITTER, *J.*, dissenting), the Court could not recognise any arrangement between the parties enlarging the period of limitation allowed by law for the execution of decrees, or which alters the terms of the decree. The filing of the kistbandi and relinquishment of the attachment were not a proceeding to enforce the decree or keep it in force. Execution of the decree was barred by limitation. KRISHNA KAMAL SING *v.* HIRU SIRDAR . . **4 B. L. R., F. B., 101**

S. C. KRISTO KOMAL SINGH *v.* HUREE SIRDAR **[13 W. R., F. B., 44**

**191.** ——————— *Receipt of instalment under compromise out of Court.*—The receipt of instalments by a decree-holder out of Court in pursuance of a compromise made between him and his judgment-debtor is not a proceeding to enforce or keep in force a decree. Nor can the condition in a compromise that on default being made in a certain number of instalments the decree should be executed in full, prevent limitation from running. ABOO IMAM *v.* BENEE RAM . . . **5 N. W., 100**

**192.** ——————— *Application reporting adjustment by parties.*—An application by a judgment-debtor stating that the proceedings in execution had been adjusted and he had paid the decree-holder R10 and would pay him the balance of the decretal amount subsequently, and praying that the execution case might be struck off, is an application to "keep in force the decree," within the meaning of article 167, schedule II of Act IX of 1871, and a "step in aid of execution of the decree," within the meaning of article 179, schedule II of Act XV of 1877. GHANSHAM *v.* MUKHA **[I. L. R., 3 All., 320**

**LIMITATION ACT, 1877, art. 179, cl. 4** —*continued.*

4. STEP IN AID OF EXECUTION—*continued.*

(*d*) SUITS AND OTHER PROCEEDINGS BY DECREE-HOLDER—*continued.*

**193.** ——————— *Agreement to suspend execution.*—An agreement to suspend execution for a specified time was not a "proceeding" within the meaning of section 20, Act XIV of 1859. MEHEROONISSA *v.* ROUSHAN JEHAN . **17 W. R., 396**

**194.** ——————— *Application to stay execution.*—*Held* that an application by the decree-holder for the stay of execution proceedings is not an application to enforce or keep in force the decree, within the meaning of article 167, Act IX of 1871. FAKIR MUHAMMAD *v.* GHULAM HUSAIN **[I. L. R., 1 All., 580**

**195.** ——————— *Application to continue attachment but to stay sale.*—Under the Civil Procedure Code (Act VIII of 1859) an application to the Court to continue the attachment of immoveable property, but to stay the sale of it,—*Held* to be a proceeding to keep in force the decree. NUKANNA *v.* RAMASAMI . . **I. L. R., 2 Mad., 218**

**196.** ——————— *Application by decree-holder for postponement of sale.—Application to take some step in aid of execution of decree.*—An application by a decree-holder for the postponement of a sale in execution of the decree, on the ground that he had allowed the judgment-debtor time, is not "an application according to law to the proper Court for execution, or to take some step in aid of execution, of the decree," within the meaning of article 179, schedule II, Act XV of 1877, and limitation cannot be computed from the date of such an application. MAINATH KUARI *v.* DEBI BAKHSH RAI **[I. L. R., 3 All., 757**

**197.** ——————— *Application to postpone sale.*—Certain lands having been attached in execution of a decree, the judgment-debtor applied to the Court to postpone the sale of some of the lands until others had first been sold. The vakil for the decree-holder consented in part to this application, but insisted that certain other land should also be sold in the first instance. *Held* that this act of the vakil was a sufficient application to the Court to take a step in aid of execution within the meaning of article 179 of schedule II of the Limitation Act, 1879. DHARANAMMA *v.* SUBBA **[I. L. R., 7 Mad., 306**

*See* VELLAYA *v.* JAGANATHA **[I. L. R., 7 Mad., 307**

**198.** ——————— *Application to postpone sale on consent of parties.*—Application for execution of a decree was made on the 22nd November 1875, and in pursuance of such application certain property belonging to the judgment-debtor was advertised for sale on the 27th March 1876. On the latter date the parties to such decree made a joint application in writing to the Court, wherein it was stated that the judgment-debtor had made a certain payment on account of such decree, and the decree-holders had agreed to give him four months' time to pay the balance thereof, and it was prayed that such sale might be postponed and such time might be granted. The Court on the same day made an order on such application postponing such sale. The next application for execution of such decree was made on the 17th January 1879. The lower Appellate Court held, with reference to the question whether such application had been made within the time limited by law, that it had been so made, as under article 179 (6), schedule II of Act XV of 1877, such time began to run from the date of the expiration of the period of grace allowed to the judgment-debtor under the application of the 27th March 1876. *Held* that article 179 (6) had not any relevancy to the present case; but inasmuch as the proceedings of the 27th March 1876 might be considered as properly constituting a "step in aid of execution," within the meaning of article 179 (4), the application of the 17th January 1879 was within time. SITLA DIN *v.* SHEO PRASAD **[I. L. R., 4 All., 60**

**199.** ——————— *Oral application for proclamation of sale.*—An oral application, on a sale of immoveable property in the execution of a decree having been adjourned for the fixing of a fresh date for the sale, is an application to enforce the decree, within the meaning of article 167, schedule II of Act IX of 1871. An application to enforce the decree made within three years from the date of such an oral application will therefore be within time. AMAR SINGH *v.* TIKA **[I. L. R., 3 All., 139**

*See* AMBICA PERSHAD SINGH *v.* SURDHARI LALL **[I. L. R., 10 Calc., 851**

**200.** ——————— *Application for proclamation of sale.—Step in aid of execution.*—An application to a Court to issue a proclamation of sale in respect of property already attached in execution of a decree, is an application, within the meaning of clause 4 of article 179, schedule II of Act XV of 1877, "to take some step in aid of execution of the decree." *Chunder Coomar Roy* v. *Bhogobutty Prosonno Roy, I. L. R., 3 Calc., 235 : 1 C. L. R., 23,* explained. AMBICA PERSHAD SINGH *v.* SURDHARI LAL . **I. L. R., 10 Calc., 851**

(*e*) CONFIRMATION OF SALE.

**201.** ——————— *Date from which limitation runs.*—Until the order is passed confirming a sale in execution, the decree-holder must be considered to be executing his decree, and limitation begins to run against him only from the date of such order. BROJUNGONA DASSEE *v.* SHONA MOOKHEE DASSEE . . . . . **15 W. R., 15**

**202.** ——————— *Proceeding to keep decree in force.*—Where there is a sale in execution,

**LIMITATION ACT, 1877, art. 179, cl. 4** —*continued.*

4. STEP IN AID OF EXECUTION—*continued.*

(*e*) CONFIRMATION OF SALE—*continued.*

the latest act of the decree-holder to keep his decree in force is the sale which took place at his instance, not the confirmation of the sale. MAHARAJAH OF BURDWAN *v.* LUCKHEE MONEE DEBEE [8 W. R., 359

JUGGUT MOHINEE BIBEE *v.* RAM CHUND GHOSE [9 W. R., 100

SHIB RAM DEY *v.* BANEE MADHAB MITTER [11 W. R., 117

**203.** ——————— *Proceding to keep decree in force.—Held*, a confirmation of a sale in execution by the Court was a proceeding under section 20, Act XIV of 1859, and sufficient to keep a decree in force which had been obtained by the purchaser. CHOWDHRY SHEIKH WAHID ALI *v.* MULLICK ENAYET HOSSEIN ALI [12 B. L. R., 500: 20 W. R., 31

GOBIND CHUNDER CHOWDHRY *v.* JOHURULNISSA BIBEE . . . . . 18 W. R., 156

**204.** ——————— *Proceeding to keep decree in force.—Quære,*—Whether a mere confirmation of a sale is a proceeding sufficient to keep the decree in force. Where it was confirmed after objection by the judgment-debtor, and the sale-proceeds received by the creditor, it was held that that was a proceeding sufficient to keep the decree alive. GUNGA BISHEN CHUND *v.* DHIRAJ MAHTAB CHAND BAHADUR . 12 B. L. R., 506, note: 10 W. R., 224

**205.** ——————— *Proceeding to keep decree in force.*—Where the decree-holder takes no step whatever to cause an execution sale to be confirmed, the confirmation of the sale by the Court cannot be regarded as a proceeding on his part towards enforcing the decree. MULLICK ENAET ALI *v.* WAHED ALI . . . . . 13 W. R., 315

**206.** ——————— *Proceeding to keep decree in force.*—Confirmation of a sale in execution of a decree by the Court of its own motion, and drawing out the proceeds of sale by the execution-creditor, were not proceedings to enforce such decree, or to keep the same in force, within the meaning of section 20, Act XIV of 1859. DHIRAJ MAHTAB CHUND BAHADUR *v.* RAM BRAHMA MULLICK [4 B. L. R., A. C., 115: 13 W. R., 38

**207.** ——————— *Application to execute decree.—Order confirming sale.*—The mere act of the Court confirming a sale in execution, which act is not shown to have been performed at the instance of the decree-holder upon petition or application, is not an application to the Court to take some step in aid of execution within the meaning of clause 4, article 179, schedule II of Act XV of 1877. MOTENDRO CHANDRA GHOSE *v.* MOHENDRO NATH GHOSE . . . . . 10 C. L. R., 330

**208.** ——————— *Proceeding to enforce decree.—Application for copy of decree.*—On the 19th of March 1880 a decree for money was passed, and on the 19th of February 1881 certain property belonging to the judgment-debtor was sold in execution thereof. On the 22nd of April 1881 the Court passed an order confirming the sale. On the 10th of January 1882 the decree-holder applied to the Court for a copy of the decree, in order that he might make a fresh application for execution. On the 28th of March 1884 he applied for execution. The judgment-debtor appeared and pleaded that execution was barred by limitation. The Court of first instance held that execution was not barred on the ground that the passing of the order of the 22nd of April 1881 was sufficient, under the provisions of article 179, clause 4 of the Limitation Act of 1877, to keep the decree alive. The lower Appellate Court also held that execution was not barred by limitation, but solely on the ground that the application of the 10th of January 1882 was sufficient to keep the decree alive. It did not appear that the order of the 19th of February 1881 was passed in consequence of any application by the decree-holder, and neither the application of the 10th of January 1882 nor any copy thereof was put in evidence on the present application. *Held*, on appeal to the High Court, that the execution of the decree was barred by limitation. RAJKUMAR BANERJI *v.* RAJLAKHI DABI [I. L. R., 12 Calc., 441

(*f*) MISCELLANEOUS ACTS OF DECREE-HOLDER.

**209.** ——————— *Application to record certificate of payment by judgment-debtor in part satisfaction.*—An application by a judgment-creditor to bring an execution proceeding on the file, and to record his certificate of the payment of a sum of money by the judgment-debtor, is an application to take some step in aid of execution of the decree within the meaning of clause 4, article 179 of schedule II of the Limitation Act. TARINI DAS BANDYOPHADYA *v.* BISHTOO LAL MUKHOPADAYA [I. L. R., 12 Calc., 608

**210.** ——————— *Precept to Collector under Beng. Reg. XLVIII of 1793, s. 24, cl. 2.*—A precept to the Collector under clause 2, section 24, Regulation XLVIII of 1793, for mutation of names in the terms of a decree, was a process to enforce the decree, and could not, under section 20, Act XIV of 1859, be issued after a lapse of three years from the passing of the decree. NANERBI KUNWAR *v.* KASTURI KUNWAR . 4 B. L. R., A. C., 581

S. C. NAUNHEE KOONWAR *v.* KUSTOOREE KOONWAR . . . . . 13 W. R., 141

**211.** ——————— *Confiscation of decree.—Correspondence relating to right of Government.*—Where a decree had awarded a sum as costs to one who turned a rebel,—*Held* that correspondence relating to the asserted right of Government to get the sum to be realised by the execution of decree, did not

LIMITATION ACT, 1877, art. 179, cl. 4 —*continued.*

4. STEP IN AID OF EXECUTION—*continued.*

(*f*) MISCELLANEOUS ACTS OF DECREE-HOLDER —*continued.*

amount to a proceeding to save limitation. AMEEN-OODDEEN KHAN *v.* MOOZUFFER HOSSEIN KHAN [3 Agra, Mis., 5

212. ——————— *Application for certificate of administration.*—The petitioners, as widow and adopted son of a decree-holder, applied by petition to the District Munsif for execution of the decree on the 17th June 1864. The District Munsif made an order stating that execution would not be granted unless the petitioners obtained a certificate from the District Court under Act XXVII of 1860. In August 1864 an application was made for a certificate to the Civil Court, and an order was made refusing the application, and the order was affirmed on appeal. A second application was made for execution in July 1867. *Held* that the right of the petitioners to obtain execution was barred by section 20, Act XIV of 1859. *Quære,*—Whether a suit on the decree could be maintained. LAKSHAMMA *v.* VENKATARAGAVA CHARIAR . . 4 Mad., 89

213. ——————— *Application in execution proceedings to have witnesses summoned.*—An application by a decree-holder in the course of an investigation into an objection to the attachment of property to have his witnesses summoned, is an application within the meaning of clause, 4, article 179, schedule II of the Limitation Act, 1877. ALI MUHAMMAD KHAN *v.* GUR PRASAD . [I. L. R., 5 All., 344

214. ——————— *Application for certificate showing necessity of copy of revenue register in order to obtain copy.—Civil Procedure Code, 1877, s. 230.*—An application by a judgment-creditor to the Court which passed the decree for a certificate that a copy of a revenue register of the land is necessary to enable him to obtain such copy from the Collector's office, and thereupon to execute the decree by attaching the land, is a step in aid of execution within the meaning of clause 4, article 179 of schedule II of the Limitation Act, 1877. *Per* INNES, *J.*—The right to execute decrees having been curtailed by section 230 of the Code of Civil Procedure, 1877, the provisions of the Limitation Act should be construed as far as possible so as to prevent the defeat of *bonâ fide* endeavours to secure the fruits of a decree once obtained. KUNHI *v.* SESHAGIRI [I. L. R., 5 Mad., 141

215. ——————— *Notice not to pay amount decreed.—Deduction of time decree is under attachment.*—A notice or order to a judgment-debtor, *A.*, not to pay the amount decreed to his judgment-creditor, *B.*, will not in any case serve to keep the decree alive in favour of *C.*, a judgment-creditor of *B.*, at whose instance the notice or order is issued, much less in favour of other judgment-creditors of *B.* with whom *A.* had nothing to do. AZMUDDIN *v.* MATHURADAS GOVARDHANDAS GULABDAS [11 Bom., 206

LIMITATION ACT, 1877, art. 179—*continued.*

5. NOTICE OF EXECUTION.

216. ——————— cl. 5.—*Issue of notice under s. 216, Civil Procedure Code, 1859.*—The word "proceeding" in section 20 of Act XIV of 1859 included any *bonâ fide* application, or the last act done by the party, by the Court, or by the officer of the Court, in furtherance of such application; hence it included the issue by the Court of a notice under section 216 of the Civil Procedure Code, and the service of it by the officer of the Court. RAM SAHAI SINGH *v.* SHEO SAHAI SINGH. GURUDAS AKHULI *v.* GOBIN NAIK [B. L. R., Sup. Vol., 492 : 1 Ind. Jur., N. S., 421 : 6 W. R., Mis., 98

TABBUR SINGH *v.* MOTEE SINGH . 9 W. R., 443

RAJEEB LOCHUN SAHA CHOWDHRY *v.* MASSEYK [18 W. R., 193

MAHOMED BAKER KHAN *v.* SHAM DEY KOER [12 W. R., 2

SUBHAN ALI *v.* SUFDAR ALI . 24 W. R., 227

*Contra,* TABBUR SINGH *v.* MOTEE SINGH [8 W. R., 306

SHAM CHAND BYSACK *v.* LUCAS [5 W. R., Mis., 5

GIRJANUND OOPADHYA *v.* CHUNDER BINODE OOPADHYA . . . 5 W. R., Mis., 5

KISTO KANT BURAL *v.* NISTARINEE DEBIA [8 W. R., 268

MAZEDOONISSA BEEBEE *v.* FUEZEN BEEBEE [4 W. R., Mis., 6

217. ——————— *Civil Procedure Code, s. 216, Notice under.—Bonâ fides.*—The service of a notice under section 216 of Act VIII of 1859, if made *bonâ fide* with a view to take further proceedings, was sufficient to keep a decree alive. DHIRAJ MAHTAB CHAND BAHADUR *v.* LAKHI BIBI [6 B. L. R., Ap., 146

BHUGOBUTTY *v.* MOTEE CHAND PUTEEDUNDO [6 W. R., Mis., 97

OBHOY CHURN DUTT *v.* MODHOO SOODUN CHOWDHRY . . . . . 9 W. R., 330

CHILICANY BASKARAYENINGARU *v.* PILLARY SETTY RAJAVULU NAIDU . 5 Mad., 100

MAKOONDONATH BHADOORY *v.* SHIB CHUNDER BHADOORY . . . 19 W. R., 102

218. ——————— *Issue of notice under s. 216, Civil Procedure Code, 1859.*—A notice issued within time under Act VIII of 1859, section 216, and actually served upon the judgment-debtor, constituted a starting-point for the commencement of a new period of limitation under Act IX of 1871, schedule II, article 167, any question as to its *bonâ fides* notwithstanding. KOONJ BEHAREE LALL *v.* GIRDHAREE LALL . . . 22 W. R., 484

SHEO SAHOY SINGH *v.* BIRJ BEHARY SINGH [23 W. R., 195

**LIMITATION ACT, 1877, art. 179, cl. 5** —*continued.*

5. NOTICE OF EXECUTION—*continued.*

**219.** ——————— *Issue of notice under s. 216, Civil Procedure Code, 1859.*—A decree-holder applying for the execution of his decree was entitled, under the provisions of Act IX of 1871, to have such execution, upon his showing that his application was made within three years from the date of a previous application to the Court to enforce the same decree, or from the date of issuing notice under section 216 of the Code of Civil Procedure in the same matter. ESHAN CHUNDER BOSE *v.* PRANNATH NAG **[14 B. L. R., F. B., 143 : 22 W. R., 512**

ROHINI NUNDUN MITTER *v.* BHOGOBAN CHUNDER ROY **[14 B. L. R., 144, note : 22 W. R., 154**

SHUBUT CHUNDER SEN *v.* ABDOOL KHYE MAHOMED MOHUTESSUR BILLAH . **23 W. R., 327**

**220.** ——————— *Issue of notice of execution.—Execution partly had under Act XIV of 1859.*—In an execution case, in which the notice was served before, but the application for execution was made after, the passing of the present law of limitation,—*Held* that the period within which proceeding should be taken must be reckoned from the date of the notice, and not from the date of application. BEMUL DOSS *v.* IKBAL NARAIN . **25 W. R., 249**

RUGHOONATH DAS *v.* SHIROMONEE PAT MOHADEBEE . . . . . **24 W. R., 20**

**221.** ——————— *Issue of notice of execution.*—When proceedings have been taken subsequent to an application to execute a decree, and to the issue of notice, limitation does not run from the date of such subsequent proceedings, but from the date of the first application to execute the decree, or from the date of the notice, as the case may be. NILMONEY SINGH DEO *v.* NILCOMUL TUPPADAR **[25 W. R., 546**

**222.** ——————— *Notice to judgment-debtor of execution of decree.—Civil Procedure Code, 1859, ss. 212, 216.*—On the 3rd March 1875, an application was made by a decree-holder to the Court executing the decree, which did not, as required by section 212 of Act VIII of 1859, state the mode in which the assistance of the Court was required, whether by the arrest and imprisonment of the judgment-debtor or attachment of his property, but prayed that the Court would, under section 216 of that Act, issue a notice to the judgment-debtor to show cause why the decree should not be executed against him. Under this application notice was issued to the judgment-debtor on the 28th March 1875. On the 27th April 1875 the execution case was struck off the file on the ground that the decree-holder did not desire further proceedings to be taken. *Held, per* PEARSON and OLDFIELD, *JJ.*, that for the purposes of article 167, schedule II of Act IX of 1871, the application was one to enforce or keep in force the decree; and, further, that limitation should be computed from the date the notice to the judgment-debtor was issued. *Franks* v. *Nuneh Mal, 7 N. W., 79,* impugned. *Per* SPANKIE, *J., contra.* BEHARI LAL *v.* SALIK RAM **[I. L. R., 1 All., 676**

**LIMITATION ACT, 1877, art. 179, cl. 5** —*continued.*

5. NOTICE OF EXECUTION—*continued.*

**223.** ——————— *Service of notice of execution.*—Application for execution of a decree was made on the 10th November 1869, and on the 27th November 1869 notice issued under section 216 of the Civil Procedure Code, 1859. Again, on the 4th February 1873, application was made for execution, and notice was issued on the 19th February 1873 under section 216. A subsequent application for execution was made on the 31st August 1874, and the order for notice to issue, under section 216, was made on the same day. The question raised in appeal against the order to issue execution was whether the plaintiff's right to execution was barred, and had been so when the application, dated 31st August 1874, for execution was made. *Held* on appeal by the High Court (KERNAN and KINDERSLEY, *JJ.*) that as the application for execution on the 4th February 1873, being more than three years after the date of issuing the last prior notice under section 216,—*viz.*, 27th November 1869,—was late, under article 167, paragraph 5, Act IX of 1871, execution was barred by limitation at and before the date of that application, and that this bar was not removed by the circumstance that the judgment-debtor had allowed the service of the notice on him in February 1873 to pass unchallenged. *Chilicany* v. *Rajavulu Naidu, 5 Mad., 100,* distinguished. PRABHACARA ROW *v.* POTANNAH **[I. L. R., 2 Mad., 1**

**224.** ——————— *Service of notice of execution.—Civil Procedure Code, 1859, s. 216.*—On the presentation of the last of a series of applications made for the execution of a decree, the Court is competent to consider the question whether, on the date of making a prior application for execution, the decree sought to be enforced was barred by limitation, and that notwithstanding the fact that notice of such prior application had been served on the judgment-debtor under section 216 of Act VIII of 1859. UNNODA PERSAD ROY *v.* KOORPAN ALLY **[I. L. R., 3 Calc., 518 : 1 C. L. R., 408**

6. ORDER FOR PAYMENT AT SPECIFIED DATE.

**225.** ——————— cl. 6.—*Civil Procedure Code, s. 230 (b).—Execution of decree.—Annual payments.—"Certain date."*—A decree which directs payment to be made annually to the decree-holder is not a decree which directs payment of money to be made at a certain date within the meaning of section 230 of the Code of Civil Procedure, or clause 6 of article 179 of schedule II of the Limitation Act, 1877. Where a decree directed annual payments to be made, and the decree-holder applied for and obtained payment of the money due for 1877 and 1878 in March 1879 by execution, and then applied in July 1882 for the sums due for 1880 and 1881,—*Held* that this application was barred by limitation. YUSUF KHAN *v.* SIRDAR KHAN **[I. L. R., 7 Mad., 83**

**LIMITATION ACT, 1877, art. 179, cl. 6** —*continued.*

**6. ORDER FOR PAYMENT AT SPECIFIED DATE**—*continued.*

**226.** ——————— *Civil Procedure Code, 1882, s. 210.—Time granted to debtor.—Decree not altered.*—On the 26th of June 1878 a judgment-debtor applied, under section 210 of the Code of Civil Procedure, for two years' time to pay the amount of the decree, which was dated 12th March 1878. Notice having been given to the judgment-creditor, an *ex parte* order was made allowing the judgment-debtor two years' time to pay, but the decree itself was not altered in accordance with this order. On the 9th of July 1882 the decree-holder applied for execution of the decree. *Held* that the application was not barred by limitation. TATA CHARLU *v.* KONADALA RAMACHANDRA REDDI **[I. L. R., 7 Mad., 152**

**227.** ——————— *Civil Procedure Code, Act XIV of 1882, s. 210.—Petition of judgment-debtor amounting to fresh decree.*—On the 23rd February 1878, an application was made for execution of a decree, dated the 3rd December 1877, in which the decree-holder stated that the judgment-debtor had agreed to pay the balance then due on the 13th August 1878. The application was then struck off on the 26th June 1878. On the 30th June 1881 the decree-holder again applied for execution, and on the 11th July 1881 the judgment-debtor, with the consent of the decree-holder, applied for time to pay the balance due till the 8th September 1881, and that application was also struck off. On the 1st March 1883 the decree-holder again applied for execution. *Held* that the application was not barred by limitation upon the ground that the application by the judgment-debtor, made on the 11th July 1881, alleging that he had come to an arrangement with the decree-holder for the payment of the amount due by instalments, having resulted in its being registered and the proceedings struck off, amounted to a direction that the decretal amount be paid by instalments as stipulated in the petitions, and that this being so, there was a decree passed on that date under the provisions of the second paragraph of section 210 of the Code of Civil Procedure, of which the decree-holder was entitled to have execution. JHOTI SAHU *v.* BHUGUN GIR . . **I. L. R., 11 Calc., 143**

**228.** ——————— *Order for payment of decree by instalments.*—The provision of section 20, Act XIV of 1859, applied where there was a present right to execute the decree, and not to cases of an instalment made payable at a future date; in the latter case, application might be made within three years from the date of each instalment becoming due, without being barred by limitation provided in the said section. ULTAF ALI KHAN *v.* RAM LALL **[Agra, F. B., 83: Ed. 1874, 63**

**229.** ——————— *Decree awarding payment by instalments.*—When a decree awards payment by instalments, to be made at particular specified dates, the date when each instalment becomes due is to be deemed the date of the decree in respect of that instalment for the purpose of calculating the time within which execution may be issued to enforce payment of it. UTTAMRAM MANIKRAM *v.* GIRDHARLAL MOTIRAM . **6 Bom., A. C., 45**

RAM SUDOY GHOSE *v.* RAJBULLUBH SAHA **[15 W. R., 547**

TINCOWRIE DOSSEE *v.* UMBIKA CHURN ROY CHOWDHRY . . . . **23 W. R., 41**

SHEO JALUN *v.* GUNESH . . **2 Agra, 237**

PANAMCHAND VALAD SURAJMAL *v.* BHIVRAJ VALAD DASHRAT . . **6 Bom., A. C., 38**

**230.** ——————— *Execution of decree for maintenance payable by instalments.*—Process of execution cannot always be issued for three years' arrears under a decree directing annual payment of money for a series of years. The petitioner, who had obtained a decree for an annual sum for maintenance during her life, alleged satisfaction of the decree up to a period less than three years from the date of the application for execution of the decree. The Judge was not satisfied of the alleged satisfaction, and dismissed the application for execution. *Held* that the petitioner was entitled to execution of the decree at any time from the date at which the first instalment became due, but that she was not entitled to have process of execution issued within three years from the date at which the second instalment or subsequent instalments became due. LAKSHMI AMMAL *v.* SASHADRY AIYANGAR . . . **4 Mad., 275**

*See* SINTHAYEE *v.* THANAKAPUDAYEN **[4 Mad., 183**

**231.** ——————— *Execution of decree payable by instalments.*—The decree provided that the amount should be paid in three instalments, and in default of payment of one instalment the decree-holder was empowered to execute his decree for the whole amount. When the instalment for December 1865 fell due, the judgment-debtor paid a portion and obtained an extension of time up to December 1866. On application on 21st September 1869 for execution of the decree for the instalments of 1866 and 1867,—*Held* that the instalment for 1866 was not barred by lapse of time. KRISHNA CHANDRA SHAHA *v.* OMED ALI . . **6 B. L. R., Ap., 31**

S. C. KRISTO CHUNDER SHAHA *v.* OOMED ALI **[14 W. R., 414**

**232.** ——————— *Bond payable by instalments.*—Upon an application for execution being made, the judgment-debtor executed in Court an instalment bond, by which he bound himself to pay his debt by half-yearly instalments in the months of Magh (January and February) and Bhadra (August and September) of each year, and it was stipulated that, on failure to pay a single instalment, the whole of the bond might be realised by execution. A decision was given accordingly, and the instalment bond was filed. The judgment-debtor did not pay the instalment due in August and September 1861 till a

**LIMITATION ACT, 1877, art. 179, cl. 6**
*—continued.*

6. ORDER FOR PAYMENT AT SPECIFIED DATE—*continued.*

few days after the expiry of that month. He did not pay the instalment of January and February 1865 at all, but subsequent payments were made and accepted. In December 1867 and January 1868 the decree-holder applied to execute the decree and realise the whole amount of the bond. The lower Appellate Court, holding that time ran from the first default in August and September 1864, dismissed the application. *Held* by the High Court on appeal that the application was not barred by section 20, Act XIV of 1859, and that the time ran from January and February 1865. UPENDRA MOHAN TAGORE *v.* TAKALIA BEPARI

**[2 B. L. R., A. C., 345**

S. C. WOOPENDRO MOHUN TAGORE *v.* TAKALIA BEPAREE . . . . **11 W. R., 570**

**233.** ——————— *Decree payable by instalments.—Limitation Act, 1871, art. 75.*—A decree payable by instalments, with a proviso that, in default of payment of any one instalment, the whole amount of the decree shall become payable at once, is barred, if application for execution be not made within three years from the date on which any one instalment fell due, and was not paid. The payment of instalments subsequent to default in payment of the first inftalment at the date specified, does not give the judgment-creditor a fresh starting-point. DULSOOK RATTACHAND *v.* CHUGON NARRUN

**[I. L. R., 2 Bom., 356**

*See* GUMNA DAMBERSHET *v.* BHIKU HARIBA

**[I. L. R., 1 Bom., 125**

**234.** ——————— *Decree for money payable by instalments.—Adjustment of decree.—Civil Procedure Code, 1859, s. 206.*—A decree for the payment of money by instalments directed that, if the judgment-debtor failed to pay two instalments in succession, the decree-holder should be entitled to enforce payment of the whole amount due under the decree. The decree-holder, alleging that a portion of the ninth instalment was payable, and that the whole of the tenth (the last) instalment was due, applied to enforce payment of the moneys due under the decree. *Held, per* PEARSON *J.*, that whether former instalments had been paid or not was immaterial, and the application, being within three years from the dates on which the ninth and tenth instalments became due, was, with reference to article 167, schedule II of Act IX of 1871, within time. SPANKIE, *J.*, refused to interfere in second appeal, inasmuch as the lower Appellate Court had found as a fact that there had been no such default in the payment of the former instalments as was contemplated by the decree. KANCHAN SINGH *v.* SHEO PRASAD

**[I. L. R., 2 All., 291**

**235.** ——————— *Decree payable by instalments.—Default.*—Where a decree was passed by consent in 1872 for payment to plaintiff through the Court of R300 by fifteen annual instalments on February 20 in each year, and in default of payment of any instalment the whole amount became recoverable, and four years' instalments were paid out of Court and default made on February 20, 1877, and plaintiff applied to recover the instalment of 1877 by execution on November 17, 1879, and March 1, 1880, —*Held* that the application of November 1879 was not barred under clause 6, article 179, schedule II of the Limitation Act of 1877, inasmuch as when the Limitation Act, 1877, came into force (October 1, 1877), the application was not barred under clause 6, article 167, schedule II of the Limitation Act, 1871. *Held*, also, that the provision as to the whole amount becoming recoverable at once if default was made, did not affect the admissibility of the application for execution, because that provision had not been enforced, and the obligation to pay by instalments was still subsisting. KARAKAVALASA APPAYYA *v.* KARANAM PAPAYYA . . . **I. L. R., 3 Mad., 256**

**236.** ——————— *Decree for money payable by instalments.—Execution of decree.—Held*, in the case of a decree for money payable by instalments, with a proviso that in the event of default the decree should be executed for the whole amount, that the decree-holder was strictly bound by the terms of the decree, and not having applied for execution within three years from the date of the first default, the decree was barred. SHIB DAT *v.* KALKA PRASAD . . **I. L. R., 2 All., 443**

**237.** ——————— **and art. 75.**—*Decree directing payment to be made at a certain date.*—*L.* obtained a decree against *U.*, dated the 24th September 1867, for possession of a certain estate, subject to this provision, *viz.*, that if *U.* paid in cash into the treasury of the Court, year by year, for *L.'s* maintenance, so long as she might live, an allowance of R15 per mensem, in three instalments of R60 each, the decree for possession should not be executed, but if default were made in payment of three such instalments, *L.* should be entitled to delivery of possession of such estate. The first default was made on the 18th January 1874, but *L.* waived the benefit of the proviso. A fresh default was made, and on the 23rd January 1880 *L.* applied for possession of such estate. *Held* that the provisions of column 3, article 75, schedule II of Act XV of 1877, were not applicable to this case, but article 179 (6) of that schedule contained the law which must govern it; and, the date upon which such decree became capable of execution for possession being the 18th January 1874, the date of the first complete default, the application of the 23rd January 1880 was barred by limitation. UGRAH NATH *v.* LAGANMALI

**[I. L. R., 4 All., 83**

**238.** ——————— *Decree payable by instalments.—Execution of whole decree.—Payments out of Court.—Act X of 1877 (Civil Procedure Code), s. 258.*—A decree payable by instalments provided that, in default in payment of two instalments, the whole decree should be executed. The decree-holder applied for execution of the whole decree on the ground that default had been made in payment of

**LIMITATION ACT, 1877, art. 179, cl. 6** —*continued.*

6. ORDER FOR PAYMENT AT SPECIFIED DATE—*continued.*

the third and fourth instalments. The judgment-debtor objected that the application was barred by limitation, as he had made default in payment of the first and second instalments, and three years had elapsed from the date of such default. The decree-holder offered to prove that those instalments had been paid out of Court. *Held* that he was entitled to give such proof, in order to defeat the judgment-debtor's plea of limitation, notwithstanding such payments had not been certified. *Fakir Chand Bose* v. *Madan Mohan Ghose, 4 B. L. R., F. B., 130,* followed. SHAM LAL *v.* KANAHIA LAL . **I. L. R., 4 All., 316**

**239.** ——————— *Decree payable by instalments.—Default.—Waiver.—Estoppel.—Application for execution as provided for in case of default.—Application to recover instalments.*—A decree for the payment of money directed that an amount less than the amount sued for should be paid by instalments, and that if default were made in payment of one instalment, the amount sued for should be payable. Default having been made, the decree-holder, on the 7th May 1877, applied for execution of the decree for the larger amount. It appeared that at this time, although the instalments had not been paid regularly, the decree-holder had received in full all the instalments which had fallen due excepting the instalment falling due in the previous September,—that is, September 1876,—of which he had received only a part. The application of the 7th May 1877 was struck off the file. The decree-holder subsequently accepted the remaining instalments, which were paid on due dates. On the 28th August 1878 the decree-holder applied for payment of an instalment which had been paid into Court. On the 8th September 1881 the decree-holder applied for execution of the decree for the larger amount payable thereunder in case of default, with reference to the default in respect of the instalment for September 1876. The Court refused to allow execution to issue for such amount, but allowed it to issue for the balance of the instalment for September 1876. *Per* STRAIGHT, *J.*—That, having by his application of the 7th May 1877, sought to execute the decree for the larger amount payable thereunder in case of default in payment of the instalments of the smaller amount, the decree-holder was not competent afterwards to seek to execute the decree in respect of such instalments; that, therefore, his application of the 28th August 1878 was not a step in aid of execution of the decree in the shape in which he had previously sought execution, from the date of which limitation could be computed; and that consequently his application of the 8th September 1881 was barred by limitation. *Per curiam.*—That the decree-holder was not entitled to recover the balance of the instalment for September 1876, regard being had to the limitation prescribed by No. 179 (6), schedule II of the Limitation Act, 1877. RADHA PRASAD SINGH *v.* BHAGWAN RAI . . **I. L. R., 5 All., 289**

**240.** ——————— *Decree payable by instalments.—Execution of whole decree.—Construction of decree.—Payments out of Court.—Civil Procedure Code, s. 258.*—A decree passed against the defendant in a suit, dated the 13th March 1877, directed "that the plaintiff should recover the decree-money by instalments, agreeably to the terms of the deed of compromise, and he, in case of default, should recover in a lump sum." The compromise mentioned in the decree provided that the amount in dispute should be paid in ten instalments, from 1284 to 1294 Fasli, the first to be paid on the 27th May 1877 (1284 Fasli), and the remaining nine instalments on Jaith Puranmashi of each succeeding Fasli year. On the 1st September 1883 the decree-holders applied for execution of the decree, alleging that the first four instalments had been paid, but not any of the succeeding instalments, and they claimed to recover, under the terms of the decree, the fifth and all the remaining instalments in a lump sum. The judgment-debtors contended that the application was barred by limitation, as they had not paid a single instalment, and more than three years had elapsed from the date of the first default; and that, even if the first four instalments had been paid, such payments could not be recognised by the Court as they had not been certified. *Held,* reversing the decision of the lower Appellate Court, that if the four annual instalments had not been paid under the decree, the execution of the decree was barred by limitation. *Held,* also, that recognition of such instalments was not barred by the terms of section 258 of the Civil Procedure Code. *Sham Lal* v. *Kanahia Lal, I. L. R., 4 All., 316;* and *Fakir Chand Bose* v. *Madan Mohan Ghose, 4 B. L. R., F. B., 130,* followed. ZAHUR KHAN *v.* BAKHTAWAR **[I. L. R., 7 All., 327**

**241.** ——————— *Debt on decree payable by instalments.—Failure to pay.—Waiver of default.*—The terms of compromise in a suit for money provided that the debt should be paid by monthly instalments, and that, on the failure to pay any three successive instalments, the entire amount should be recoverable by application to execute the full decree. The decree was dated the 12th June 1875, the first instalment was due in July 1875, and the last in October 1877. Default was made in payment of the first three instalments, but the decree-holder did not apply for execution, and accepted subsequent payments. On the 13th December 1879 he applied for execution for the amount then remaining due. *Held* that the period of limitation prescribed by article 179, schedule II of Act XV of 1877, began to run on the third default taking place, and that no subsequent payment could stop limitation once begun. ASMUTULLAH DALAL *v.* KALLY CHURN MITTER . . . . **I. L. R., 7 Calc., 56**

**242.** ——————— *Decree payable by instalments.*—On an application, dated 10th Aughran 1288, for execution of a decree which provided, on the basis of a kistbundi, that the amount decreed should be paid in four instalments annually, extending over

**LIMITATION ACT, 1877, art. 179, cl. 6** —*continued.*

6. ORDER FOR PAYMENT AT SPECIFIED DATE—*continued.*

the years 1284, 1285, 1286, 1287, and that, if there should be default in payment of any instalment, and that instalment should remain unpaid for six months, the whole of the decree should at once become due, it was objected that the application was barred on the ground that the instalments for 1284 not having been paid, the whole amount of decree had become payable within six months for the first default. The application was to recover the instalments due for 1285, 1286, and 1287. *Held* that the application was not barred, except as to the instalment of 1285, which fell due in Jaith, as it was optional with the decree-holder to realise the whole decree at once upon default being made, or to waive his right to do so and seek to realise instalments as they became due. *Ashmutullah Dalal* v. *Kally Churn Mitter, I. L. R., 7 Calc., 56,* followed. CHUNDER KOMAL DASS *v.* BISSASUREE DASSIA . . . . **13 C. L. R., 243**

**243.** ——————— *Decree payable by instalments.—Option to execute.—Waiver.—Construction of decree.*—Where a decree is made payable by instalments, and contains a provision that, on failure of any one instalment, the whole is to become due, the question whether the decree-holder may waive the benefit of the provision or must execute his decree within three years from the due date of the first instalment of which default is made in payment, is a question purely of construction to be decided on the terms of the whole decree in each case. On an application for execution of a decree made payable by instalments,—*Held* that the application was barred by limitation, on the ground that the judgment-creditor should have applied for execution within three years from the date of the first default in payment. JUDHISTIR PATRO *v.* NOBIN CHANDRA KHELA . . . . **I. L. R., 13 Calc., 73**

7. JOINT DECREES.

(*a*) JOINT DECREE-HOLDERS.

The following are the cases decided as to the proceedings in joint decrees under the Acts of 1859 and 1871:—

**244.** ——————— **expl. 1.**—*Application by one of several decree-holders.*—Every application made by one or more out of several decree-holders is an application made in the interests of all, and every proceeding taken by one is a proceeding taken for the benefit of all to enforce the judgment, or to keep it in force. ROY PREEONATH CHOWDHRY *v.* PRANNATH ROY CHOWDHRY . **8 W. R., 100**

DHANESSUREE *v.* GOODHUR SAHOY **[11 W. R., 421**

BHOOBUNESSUREE DEBIA *v.* CHUNDER MONEE DEBIA . . . . **21 W. R., 243**

HURUCK ROY *v.* ZUHOOREE MULL **[22 W. R., 468**

OUDH BEHARI LAL *v.* BRAJAMOHAN LAL **[4 B. L. R., Ap., 41: 13 W. R., 128**

**LIMITATION ACT, 1877, art. 179, expl. 1** —*continued.*

7. JOINT DECREES—*continued.*

(*a*) JOINT DECREE-HOLDERS—*continued.*

JOHIROONISSA KHATOON *v.* AMEEROONISSA KHATOON . . . . **6 W. R., Mis., 59**

INDURJEET KOONWAR *v.* MAZAM ALI KHAN **[6 W. R., Mis., 76**

**245.** ——————— *Arrangement by decree-holders amongst themselves.*—In the case of a joint-decree, any arrangement made by the decree-holders amongst themselves as to their relative shares in the amount of the decree would not alter its character, and *bonâ fide* proceedings taken by one of the number to execute the decree would keep alive the rights of all the decree-holders. INDURJEET KUNWAR *v.* MAZAM ALI KHAN . **6 W. R., Mis., 76**

BRIJO COOMAR MULLICK *v.* RAM BUKSH CHATTERJI . . . . **1 W. R., Mis., 1**

**246.** ——————— *Application after death of some of decree-holders.—Civil Procedure Code, 1859, s. 207.*—A joint decree for damages was obtained by several plaintiffs in the Court of the Principal Sudder Ameen of Patna in 1854, and was kept alive by endeavours to execute it till 1861. On the 15th June 1861, the Court passed an order modifying the costs of the original decree, but this order was reversed on appeal on the 19th August 1862. Some of the plaintiffs having died in the meantime, an application was made on the 29th July 1863, and an order was passed thereon on the 26th May 1864, whereby the present decree-holders were substituted for the deceased plaintiffs. A new Principal Sudder Ameen was appointed on the 10th December 1864, and he reversed that order, and required from the present decree-holders a certificate of heirship, which they obtained on the 16th September 1865. On the 20th of the same month, an order for execution was made by the Principal Sudder Ameen, but it was reversed by the Judge on appeal, on the ground that the order of the 26th May 1864 was not a proceeding within the meaning of section 20 of Act XIV of 1859; and, therefore, the application for execution was too late. *Held* that execution might have been obtained under section 207 of Act VIII of 1859 by the survivors of the original decree-holders for the benefit of all parties interested in it. The order of the lower Appellate Court was reversed. TEJA SINGH *v.* RAJNARAYAN SINGH . . **1 B. L. R., A. C., 62**

S. C. TEJA SINGH *v.* POKHUN SINGH **[10 W. R., 95**

**247.** ——————— *Separate taking out of execution.—Civil Procedure Code, 1859, s. 207.*—Three persons obtained a joint decree. Two of them took out execution and realised each his own share. The third applied for execution within three years from the time of the last proceedings taken by the other two, but after a lapse of three years from the last proceedings taken jointly by all three. *Held* that, under section 207, Act VIII of 1859, there was no severance of the decree, and therefore the pro-

**LIMITATION ACT, 1877, art. 179, expl. 1** —*continued.*

7. JOINT DECREES—*continued.*

(*a*) JOINT DECREE-HOLDERS—*continued.*

ceedings taken by the two kept the decree alive. AZIZUNNISSA KHATUN *v.* SHASHI BHUSHAN BOSE [2 B. L. R., Ap., 47: 11 W. R., 343

**248.** ——————— *Separate taking out of execution.*—In a case in which a certain sum was adjudged to five persons as an entire sum to which all of them were jointly entitled, but one moiety to three of them and the other moiety to the remaining two, —*Held* that the effect of the adjudication was the same as if two separate and distinct decrees had been pronounced, and that no action taken by the decree-holders to whom one moiety had been assigned could keep the decree alive for the benefit of the others. CHOOA SAHOO *v.* TRIPOORA DUTT . 13 W. R., 244

**249.** ——————— *Application by one decree-holder for execution.*—Where one of several joint decree-holders made, under Act VIII of 1859, section 207, a proper application for execution, the date on which the application was made was held to constitute a point of time from which would run the limitation of three years provided in Act IX of 1871, schedule II, article 167. HURUCK ROY *v.* ZUHOOREE MUL . . . 22 W. R., 468

**250.** ——————— *Application to execute part of decree.*—An application to execute an aliquot part of a decree, though irregular and ineffectual for the purpose, must, if made *bonâ fide* under a misapprehension of the law, be regarded as a proceeding which keeps the decree alive. KOYLAS NATH GHOSE *v.* NITYA SHAMA DASSEE [15 W. R., 449

SHIB CHUNDER DASS *v.* RAM CHUNDER PODDAR [16 W. R., 29

PRAN KISHORE DEB *v.* KISHORE CHUNDER CHOWDHRY . . . . . 16 W. R., 267

DOYA MOYEE DABEE *v.* NILMONEE CHUCKERBUTTY [25 W. R., 70

**251.** ——————— *Application for partial execution of joint decree.—Costs.*—An application for the partial execution of a joint decree by one of the decree-holders is not an application according to law, and consequently has not the effect of keeping the decree in force. Where a decree of the Sudder Court awarded costs in the lower Court to certain defendants separately, and to eight sets of defendants collectively, and costs in the Sudder Court to three sets, and the only applications which were made for execution of the decree within the period of limitation were made by one of the defendants to recover his costs in the lower Court and a fractional share of the costs in the Sudder Court awarded to his set of defendants, a subsequent application by him and the other defendants for execution of the decree was held to be barred by limitation. RAM AUTAR *v.* AJUDHIA SINGH . . I. L. R., 1 All., 231

**252.** ——————— *Application by one of two joint decree-holders for part execution of joint*

**LIMITATION ACT, 1877, art. 179, expl. 1** —*continued.*

7. JOINT DECREES—*continued.*

(*a*) JOINT DECREE-HOLDERS—*continued.*

*decree.—Act X of 1877 (Civil Procedure Code), s. 231.*—A decree passed jointly in favour of more persons than one can only be legally executed as a whole for the benefit of all the decree-holders, and not partially to the extent of the interest of each individual decree-holder. *Held*, therefore, where one of two persons, in whose favour a decree for money had been passed jointly, applied on the 27th April 1880 for execution of a moiety of such decree, and the other of such persons made a similar application on the 30th April 1880, that such applications, not being made in accordance with law, were not sufficient to keep the decree in force. Also that the illegality of such applications could not be cured by a subsequent amended application for the execution of the decree as a whole, preferred after the period of limitation had expired. COLLECTOR OF SHAHJAHANPUR *v.* SURJAN SINGH . . . I. L. R., 4 All., 72

**253.** ——————— *Application by two of three joint decree-holders for part execution of joint decree.—Acquiescence by judgment-debtor in part execution.*—A decree for money was passed in 1871 in favour of two persons jointly. In 1883 the decree-holders applied for execution thereof. By previous application for execution made in 1875, 1877, and 1880, the decree-holders had sought to recover two thirds of the amount of decree. *Held* that inasmuch as the previous executions of the decree by some sharers for their shares, whether strictly allowable or not, were allowed, and no objections at the time were taken, they were good for the purpose of keeping the decree alive, and that the judgment-debtor could not now take exception to them as not being applications to enforce the decree within the meaning of the Limitation Act. *Mungul Pershad Dichit* v. *Grija Kant Lahiri, I. L. R., 8 Calc., 51*, followed. NANDA RAI *v.* RAGHUNANDAN SINGH [I. L. R., 7 All., 282

**254.** ——————— *Application for partial execution of joint decree.*—Although the Civil Procedure Code does not allow one of several decree-holders to apply for the partial execution of a joint decree, yet an application by one of such decree-holders for execution of the decree in respect of so much of the relief granted to all as he considers appertains to him individually, may keep in force the decree as being an application according to law. PONAMPILATH PARAPRAVAN KUTHATH HAJI *v.* PONAMPILATH PARAPRAVAN BAVOTTI HAJI [I. L. R., 3 Mad., 79

**255.** ——————— *Application for partition under decree.—Decree for partition.*—A consent decree for partition made between three parties contained a provision that if the plaintiffs should not have the property partitioned within two months from the date thereof, any one of the other parties to the suit might obtain partition by executing the decree. One of the parties sued out execution and obtained partition and possession of his own share.

**LIMITATION ACT, 1877, art. 179, expl. 1** —*continued.*

7. JOINT DECREES—*continued.*

(*a*) JOINT DECREE-HOLDERS—*continued.*

More than three years after the date of the decree, but less than three years from the date of the application just mentioned, another of the parties applied for partition under the decree. *Held* that the application was not barred by limitation under the provisions of the Limitation Act, Act XV of 1877, schedule II, article 179, explanation 1. MOHUN CHUNDER KURMOKAR *v.* MOHESH CHUNDER KURMOKAR **[I. L. R., 9 Calc., 568**

**256.** ——————— *Decree for partition, Application for execution of.—Co-sharers.—A.*, on the 29th June 1871, obtained a decree for partition against *B.*, his co-shareholder, and, on the 28th November 1876 applied to have the execution proceedings struck off the file. The application was refused, and the partition was ordered to be completed at *B.'s* expense. *Held* that, as the execution proceedings taken either by one shareholder or the other were taken on behalf of both, limitation did not apply. KHOORSHED HOSSEN *v.* NUBBEE FATIMA **[I. L. R., 3 Calc., 551 : 2 C. L. R., 187**

**257.** ——————— *Application for execution of decree.—Power of mooktear to make application.—Civil Procedure Code, 1859, s. 207.—Waiver of irregularity by Court.*—An application for execution of a decree on behalf of all the judgment-creditors was presented in Court by a mooktear. The mooktear had himself appended to such application the names of all of them but one who had signed his own name. *Held*, reversing the decision of the Court below, that although exception might fairly have been taken to the form of the application at the time it was presented, yet, having once been accepted by the Court, it was substantially an application on behalf of all the judgment-creditors sufficient to prevent the operation of the Law of Limitation. AUTOO MISREE *v.* BIDHOOMOOKHEE DABEE . . **I. L. R., 4 Calc., 605**

(*b*) JOINT JUDGMENT-DEBTORS.

**258.** ——————— *Decree declaring separate liability.—Proceeding to keep decree alive.*—Where a decree has passed against several defendants, each of whom is declared to have a separate liability in respect of a definite amount, execution against one or more of such judgment-debtors keeps the decree in force against all simultaneously. MOHESH CHUNDER CHOWDHRY *v.* MOHUN LALL SIRCAR **[8 W. R., 80**

**259.** ——————— *Proceeding against some only of judgment-debtors.*—A proceeding against certain of a number of joint judgment-debtors, in which, in the presence of certain of them, some are released from execution and some declared liable, is a proceeding within the meaning of section 20, Act XIV of 1859. MOHESH CHUNDER BISWAS *v.* TARAMONEE DASSEE . . . **9 W. R., 240**

**260.** ——————— *Proceedings against some only of judgment-debtors.*—The law makes no distinction between the different defendants liable under a decree; the decree is kept wholly in force if any effectual proceeding is taken under it within the prescribed time to keep it alive. But where a decree, though nominally in one document, really contains separate decrees against separate individuals, the Law of Limitation may be put into force in execution against the different defendants as if there were separate decrees. STEPHENSON *v.* UNNODA DOSSEE . . . . **6 W. R., Mis., 18**

**261.** ——————— *Decree against two persons specifying period for which each was liable.—Execution against one.*—Where a decree was given for arrears of rent against two persons, and one of them was afterwards declared on appeal to be liable for the rents for a certain period only, and execution was taken out against him only,—*Held* that the decree must be taken as a separate decree against each defendant for the portion for which each was declared to be liable, and consequently that execution proceedings against one would not prevent the Law of Limitation applying to bar execution against the other. WISE *v.* RAJNARAIN CHUCKERBUTTY **[1 B. L. R., F. B., 258 : 10 W. R., 30**

KHEMA DEBEA *v.* KAMOLAKANT BUKSHI **[10 B. L. R., 259, note : 10 W. R., 10**

**262.** ——————— *Surety.—Separate liability.—Proceedings to keep alive decree.*—In execution of decree, the debtors arranged to pay the debt by instalments, and the petitioner entered into a surety-bond by which he agreed, on failure of the debtors to pay the debt, or any one of the instalments, to be liable for the debt, or to have execution at once taken out against him. *Held* that the surety's was a separate liability; that proceedings against one or others of the joint debtors which would keep the decree alive against all of them would not affect him; and that, if he could be proceeded against in execution of the original decree, execution should have been taken against him from the date when his liability commenced, and that the decree should have been kept alive as against him by proceedings irrespective of those taken against the judgment-debtors. HURKOO SINGH *v.* RAM KISHEN **[6. W. R., Mis., 44**

**263.** ——————— *Application for execution of decree against legal representatives of deceased judgment-debtor.*—An application for execution of a decree against one of the several legal representatives of the deceased judgment-debtor takes effect, for the purposes of limitation, against them all. RAMANUJ SEWAK SINGH *v.* HINGU LAL **[I. L. R., 3 All., 157**

8. MEANING OF PROPER COURT.

**264.** ——————— **expl. II (1871, art. 167).**—"*Court,*" *Meaning of.—Application to execute decree.*—The term "Court" in Act IX of 1871,

**LIMITATION ACT, 1877, art. 179, expl. II—*continued.***

8. MEANING OF PROPER COURT—*continued.*

schedule II, article 167, means the Court whose business it is, either by transfer or otherwise, to execute the decree. PROKASH CHUNDER LAHORY *v.* POORNO CHUNDER ROY . . . . **21 W. R., 410**

265. ——————— *"Court."—Conciliator.*—A conciliator appointed under the Dekkan Agriculturists' Relief Act (XVII of 1879) is not a Court. The presentation, therefore, to a conciliator of an application for execution of a decree within the period of limitation does not save the limitation, if the application to the proper Court be time-barred: Act XV of 1877, section 14, paragraph 3; schedule II, article 179. MANOHAR *v.* GEBIAPA **[I. L. R., 6 Bom., 31**

**——— art. 180 (1871, art. 169; 1859, s. 19).**

1. ——————— *Decree of Sudder Court, Calcutta.*—The twelve years' limitation was held not to apply to a decree of the late Sudder Court, which was not a Court established by Royal Charter. THAKOOR DOSS GOSSAIN *v.* KASHEE NATH MUNDUL **[12 W. R., 73**

HURO PERSHAD ROY CHOWDHRY *v.* MANICK LUSHKUR . . . . **12 W. R., 343**

2. ——————— *Judgment of Judges of Supreme Court sitting as Small Cause Court Judges.*—The judgments of the Judges of the late Supreme Court sitting under Act IX of 1850 (the Small Causes Courts Act) were held to be judgments of a Court established by Royal Charter, and were therefore not affected by Act XIV of 1859, section 20, but were governed by section 19. COULTROUP *v.* SMITH **[1 Mad., 204**

3. ——————— *Decrees of High Court.*—It was formerly held that the execution of decrees of the High Court was governed as to limitation by section 19, and not section 20 or 22, of Act XIV of 1859. MAHATAB CHAND *v.* TARUCKNATH MOOKERJEE . . . . . **6 W. R., Mis., 94**

ISHAN CHUNDER CHOWDHRY *v.* JUGODISHUREE **[8 W. R., 267**

BAPURAV KRISHNA *v.* MADHAVRAV RAMRAV **[5 Bom., A. C., 214**

Later rulings, however, are to the contrary,—*see infra.*

4. ——————— *Decrees of Privy Council.*—Section 19, Act XIV of 1859, applies only to Courts in this country established by Royal Charter, and not to the Privy Council, the execution of whose decrees was subject to the limitation prescribed by section 20 of that Act. WISE *v.* JUGOBUNDHOO BABOO **[4 W. R., Mis., 10**

5. ——————— *Execution of decree of Privy Council.—Court established or not established by Royal Charter.—Act XXV of 1852, s. 1.—Per* PEACOCK, *C. J.*, TREVOR and L. S. JACKSON, *JJ.*—A decree of Her Majesty in Council is neither a

**LIMITATION ACT, 1877, art. 180—*continued.***

decree of a Court established by Royal Charter within section 19, nor a decree of a Court not established by Royal Charter within section 20 of Act XIV of 1859. Therefore that Act does not apply to such decrees. Section 1 of Act XXV of 1852 only prescribes the procedure for executing such decrees, and does not apply any law of limitation to them. ANANDAMAYI DASI *v.* PURNO CHANDRA ROY **[B. L. R., Sup. Vol., 506: 6 W. R., Mis., 69**

6. ——————— *Alteration of decree on appeal.—Decree of lower Court altered by High Court.*—Where a decree of the lower Court is materially altered on appeal by the High Court,—*e.g.*, where the amount of mesne profits allowed by the lower Court is cut down by the High Court,—the decree becomes a decree of the High Court, and the period within which a proceeding must have been taken to enforce the same, so that it may not be barred by the law of limitation, is twelve years under section 19 of Act XIV of 1859. CHOWDHRY WAHID ALI *v.* MULLICK INAYET ALI **[6 B. L. R., 52: 14 W. R., 288**

7. ——————— *Execution of decree of High Court on appeal from mofussil.*—A decree of the High Court on appeal from the mofussil must be executed within three years under section 20, Act XIV of 1859. Such decree is not a decree of a Court established by Royal Charter within the meaning of section 19. RAMCHARAN BYSAK *v.* LAKHIKANT BANNIK **[7 B. L. R., F. B., 704: 16 W. R., F. B., 1**

*See* ARUNACHELLA THUDAYAN *v.* VELUDAYAN **[5 Mad., 215**

8. ——————— *Execution of decree of High Court on appeal from mofussil.—Portion of decree relating to costs.*—The portion of a decree of the High Court on appeal from the mofussil which relates to costs comes within section 19, Act XIV of 1859. TAFUZZAL HOSSEIN KHAN *v.* BAHADUR SINGH **[7 B. L. R., 706, note: 11 W. R., 205**

9. ——————— *Embodiment in final decree of portion affirmed.*—Where the High Court passes a decree on appeal from a mofussil Court, the Court which has to execute the decree of the High Court is governed by the rules which govern the execution of its own decrees. The ruling in *Chowdhry Wahid Ali* v. *Mullick Inayet Ali, 6 B. L. R., 52,*—that, whether the decree of the lower Court is reversed or modified or affirmed, the decree passed by the Appellate Court is the final decree in the suit, and as such the only decree which is capable of being enforced by execution,—not dissented from, except that it was suggested that in all cases it may be expedient expressly to embody in a decree of affirmance so much of the decree below as it is intended to affirm, and thus avoid the necessity of a reference to the superseded decree. *Quære,*—Can the ruling in *Anandamayi Dasi* v. *Purno Chandra Roy, B. L. R., Sup. Vol., 506,* be supported? KISTOKINKER GHOSE ROY *v.* BURRODACANT SINGH ROY . **10 B. L. R., 101 [17 W. R., 292: 14 Moore's I. A., 465**

**LIMITATION ACT, 1877, art. 180**—*continued.*

S. C. in lower Court, KISHEN KINKER GHOSE *v.* BURODA KANT ROY . . 8 W. R., 470

JOY NARAIN GIREE *v.* GOLUCK CHUNDER MYTEE [22 W. R., 102

10. ——————— *Execution of an order of Privy Council.—Order in Council confirming a decree.*—Although an order of Her Majesty in Council may confirm a decree of the Court below, that order is the paramount decision in the suit; and any application to enforce it is, in point of law, an application to execute the order and not the decree which it confirmed. Such an application is governed by article 180, schedule II of Act XV of 1877. LUCHMUN PERSAD SINGH *v.* KISHUN PERSAD SINGH [I. L. R., 8 Calc., 218: 10 C. L. R., 425

BHOOBOONA ALUMBABI KOER *v.* JOBRAJ SINGH [11 C. L. R., 277

11. ——————— *Application for execution of decree.—Revivor.—Order for execution after notice.—Writ of scire facias.*—The plaintiff obtained a decree in 1864. The first application for execution was made in September 1869 under section 216 of the Civil Procedure Code (Act VIII of 1859); and after notice to the defendant as provided thereby, an order was made under that section for execution to issue. In September 1880 an application for execution was made under section 230 of the Civil Procedure Code of 1877, which repealed Act VIII of 1859. *Held* that the order after notice had the effect of reviving the decree within the meaning of article 180, schedule II, Act XV of 1877, and therefore the decree was not barred by the Law of Limitation. An order for execution under the Code made after notice to show cause has, on the Original Side of the Court, the same effect as an award of execution in pursuance of a writ of *scire facias* had under the procedure of the Supreme Court,—*i.e.*, it creates a revivor of the decree. ASHOOTOSH DUTT *v.* DOORGA CHURN CHATTERJEE [I. L. R., 6 Calc., 504: 8 C. L. R., 23

12. ——————— *Application for execution of decree.—Decree of High Court.—Civil Procedure Code (Act X of 1877), s. 230.*—The plaintiffs obtained a decree of the High Court of Bombay against the defendant on 22nd February 1867. The defendant, after the passing of the decree against him, resided in Ahmedabad. In July plaintiff assigned his decree to *L.*, who in 1876 assigned it to *M.* From time to time *M.* obtained orders for the execution of the said decree, but was always unable to proceed to execution. The last order for execution made by the High Court was on the 4th February 1879. In April 1879 the decree was transmitted to the Court at Ahmedabad for execution, and that Court in September 1879 issued a warrant of arrest against the defendant, against the order for which the defendant appealed. The said order was confirmed by the High Court on 10th February 1880. In April 1881 the defendant was in Bombay, and *M.*, the decree-holder, obtained a summons calling on defendant to show cause why the decree should not be executed against him. On 3rd May the summons was made absolute. The defendant appealed and contended that the application for execution was barred by limitation under section 230 of the Civil Procedure Code (Act X of 1877), which was to be read with clause 180 of schedule II of the Limitation Act, XV of 1877. *Held* that the application was not barred. Clause 180 of the second schedule of the Limitation Act, XV of 1877, was intended to be independent of section 230 of the Civil Procedure Code, and not to be in any way controlled by it. Section 230 does not apply to decrees made by the High Court. MAYABHAI PREMBHAI *v.* TRIBHUVANDAS JAGJIVANDAS . . I. L. R., 6 Bom., 258

GANAPATTHI *v.* BALASUNDARA [I. L. R., 7 Mad., 540

**LIQUIDATED DAMAGES.**

*See* CASES UNDER DAMAGES—MEASURE AND ASSESSMENT OF DAMAGES—BREACH OF CONTRACT . . 11 W. R., 558 [17 W. R., 94 5 W. R., S. C. C. Ref., 10

*See* CASES UNDER INTEREST—STIPULATIONS AMOUNTING TO PENALTIES OR OTHERWISE.

**LIQUIDATORS, POWER OF—**

*See* CASES UNDER COMPANY—WINDING UP—POWERS OF LIQUIDATORS.

**LIQUOR, SALE OF—**

*See* EXCISE ACT, 1871. [I. L. R., 1 All., 630, 635, 638

**LIS PENDENS.**

*See* MAHOMEDAN LAW—DEBTS. [I. L. R., 4 Calc., 402

*See* PARTIES—PARTIES TO SUITS—PURCHASERS . . . 7 W. R., 225

1. ——————— **Application of doctrine in India.**—The doctrine of *lis pendens* is applicable to natives of this country, and has a wider operation here than in England. The distinction between an equitable lien created *pendente lite* and an absolute sale is that in the latter case, though not in the former, it is necessary to institute a fresh suit. KASSIM SHAW *v.* UNNODAPERSHAD CHATTERJEE [1 Hyde, 160

2. ——————— The doctrine of *lis pendens* is in force in British India. LAKSHMANDAS SARUPCHAND *v.* DASRAT . I. L. R., 6 Bom., 168

GULABCHAND MANICKCHAND *v.* DHANDI VALAD BHAU . . . . . 11 Bom., 64

3. ——————— *Principle of doctrine.—Registered and unregistered conveyances.*—The doctrine of *lis pendens* rests, as stated by Turner, *L. J.*, in *Bellamy* v. *Sabine*, not upon the principle of

**LIS PENDENS.—Application of doctrine in India—*continued.***

constructive notice, but upon the fact that it would be plainly impossible that any action or suit could be brought to a successful termination if alienations *pendente lite* were permitted to prevail. This reason for refusing recognition to alienations *pendente lite* made by a party to a suit is as fully applicable in the case of a registered as of an unregistered conveyance LAKSHMANDAS SARUPCHAND *v.* DASRAT **[I. L. R., 6 Bom., 168**

**4.** ——————— *English law, Applicability of, in mofussil.—Suit to set aside alienations by widow.*—The widow of a legatee of one half of the residue and the bulk of considerable estate sued to set aside alienations made by the widow of one of three executors acting as managers; her husband, the deceased executor, being legatee of one sixth. The alienations were made pending a suit by the same plaintiff in the Supreme Court to administer the entire estate, and to expose defalcations and frauds of the managers and executors also, after an injunction issued in that suit prohibiting alienation; and the alienations were set aside by the Court. *Quære,*—Whether the English doctrine of *lis pendens* is applicable in the mofussil. EX PARTE NILMADHUB MUNDUL **[2 Ind. Jur., N. S., 169**

**5.** ——————— The doctrine of *lis pendens* applies only to alienations which are inconsistent with the rights which may be established by the decree in the suit. MUNISAMI *v.* DAKSHANAMURTHI . . . **I. L. R., 5 Mad., 371**

**6.** ——————— *Assignment of mortgages.—Suit for possession.*—*N.* being mortgagee in possession of five eighths of a pangu (share) of certain land—security for a debt of R400—hypothecated his rights to *M.* in 1876. In 1878 *K.* bought two eighths of the said five eighths from the mortgagor. In 1879 *K.* sued *N.* claiming possession of his two eighths on payment of R400, and obtained a decree and possession thereof. Pending this suit, *N.* assigned his mortgage to *M.* *M.* was aware of the suit, and *K.* was aware of the assignment when he paid R400 into Court for *N.* In 1883 *K.* bought the remaining three eighths from the mortgagor, and sued *N.* and *M.* to recover possession thereof. *M.* pleaded that he had a valid mortgage over three eighths. *Held,* by MUTTUSAMI AYYAR, *J.*, that if the assignment of the mortgage by *N.* to *M.* was a real transaction, this plea was good. *Per* MUTTUSAMI AYYAR, *J.*—The doctrine of *lis pendens* can only be relied on as a protection of the plaintiff's right to property actually sought to be recovered in the suit. BRAHANNAYAKI *v.* KRISHNA **[I. L. R., 9 Mad., 92**

**7.** ——————— The effect of a *lis pendens* in India considered. KRISHNAPPA VALAD MAHADAPPA *v.* BAHIRU YADAVRAV **[8 Bom., A. C., 55**

SAM *v.* APPUNDI IBRAHIM SAIB . **6 Mad., 75**

**8.** ——————— *Possession of property obtained pending suit.*—Possession of property obtained from a defendant while a suit is pending against him in respect of that property, must be taken to be the possession of the defendant himself for the purposes of the suit. RAM KISHEN *v.* DOOLEE CHAND . . **22 W. R., 547**

**9.** ——————— *Maxim, "Pendente lite nihil innovetur."*—The rule "*Pendente lite nihil innovetur*" is in force in British India. Where the owner of a house, during the pendency of a suit by an unregistered mortgagee for foreclosure and sale, mortgaged the same house by a registered mortgage to another person, it was held that the last-mentioned mortgagee had no title as against the purchaser under a decree for sale in the suit, although such purchaser was the plaintiff in the suit. A grantee or vendee of the defendant, becoming such during the pendency of the suit, need not be made a party to the suit; and, inasmuch as the above-mentioned rule does not rest upon the equitable doctrine as to notice, it is a matter of indifference whether or not, at the time of his becoming grantee or vendee, he had actual notice of the existence of the suit. GULABCHAND MANICKCHAND *v.* DHONDI VALAD BHAU . **11 Bom., 64**

**10.** ——————— *Possession under a subsequent mortgage created during the pendency of a suit by a prior mortgagee.*—A sale or mortgage *pendente lite* is invalid as against the plaintiff, and the vendor or mortgagor is under a disability to give any valid possession, as against the plaintiff in the pending suit, to the party who becomes a purchaser or mortgagee during the pendency of the suit, whether or not the purchaser or mortgagee *pendente lite* has knowledge of the prior sale or mortgage as to which the litigation is pending, or of the litigation itself, *Kasim Shaw* v. *Unodapersad Chatterjee, 1 Hyde, 160;* and *Manual Fruval* v. *Sanagapalli Latchmidevamma, 7 Mad., 104,* followed. BALAJI GANESH *v.* KHUSALJI . . . . **11 Bom., 24**

**11.** ——————— *Sale pendente lite.—Right of purchaser.—Mortgage.*—On the 31st August 1863 *A.* mortgaged his house to *B.*, who brought a forcelosure suit, and on 7th July 1866 obtained a decree against *A.* for the sale of the house if the mortgage-debt was not paid on or before the 24th March 1868. The debt not having been paid, the house was sold at a Court sale on the 15th July 1870 and purchased by *C.* In an action brought by the plaintiff to recover possession of the house, on the ground that he had purchased it on the 2nd August 1868 at an execution sale under a common money-decree against *A.*,—*Held* that, even if there had been no decree in the mortgage suit, the fact that that suit had been instituted in 1866, and was pending in 1868, would have been sufficient to defeat the plaintiff's suit; his purchase in 1868 having been made *pendente lite,* was completely subject to any decree which might be made in the mortgage suit. RAOJI NARAYAN *v.* KRISHNAJI LAKSHMAN **[11 Bom., 139**

**12.** ——————— *Sale in execution of decree.—Purchaser, Right of.*—The purchase of property in the mofussil at a sale in execution of

**LIS PENDENS.—Application of doctrine in India—*continued.***

decree is valid, notwithstanding a decree for sale of the property in a suit for foreclosure pending in the High Court at the time of sale, to which the purchaser was not a party. ANANDAMAYI DASI *v.* DHARENDRA CHANDRA MOOKERJEE

**[8 B. L. R., 122: 14 Moore's I. A., 181 16 W. R., P. C., 19**

Affirming the decision of the High Court in ANNUND MOYEE DOSSEE *v.* DHURUNDRO CHUNDER MOOKERJEE . . . . . **1 W. R., 103**

**13.** ——————— *Suit for partition.—Right of purchaser.*—Three brothers, *L. M. B.*, *P. K. B.*, and *G. D. B.*, being jointly entitled in equal shares to an undivided one-third share in certain property, mortgaged their shares by three deeds bearing different dates to one *R. N.* Between the dates of the two last mortgages the brothers instituted a suit for partition of the property, and for certain other objects; and on the 2nd February 1864 a decree was made in the suit, declaring the brothers entitled to a one-third share of the property, and ordering a partition and the taking of accounts, and reserving the question of costs. *R. N.* was not made a party to this suit. On 6th September 1864 the brothers covenanted to mortgage certain property to the plaintiff, including that previously mortgaged to *R. N.* On 8th and 9th December the agreement was performed by conveyances, in which *R. N.* joined, and which recited that he had been paid off; and on 28th November 1866 and 27th March 1867 the three brothers conveyed their equities of redemption to the plaintiff. On 15th June 1868 an order was made in the partition suit for the sale of a sufficient portion of the property to pay the costs of the parties to the suit, and under this order the property which the plaintiff sought to recover in the present suit was sold on 1st May 1869, and purchased by the defendant, who at the time had full notice of the plaintiff's claim. *Held*, the doctrine of *lis pendens* did not apply, and the plaintiff was entitled to recover possession. KAILAS CHANDRA GHOSE *v.* FULCHAND JAHURRI

**[8 B. L. R., 474**

**14.** ——————— *Suit for account against executor.—Sale by Sheriff in execution of decree.—Right of purchaser at Sheriff's sale against purchaser at sale by mortgagee.*—In 1855 a decree for an account was passed, in the Supreme Court at Calcutta, against *A.*, an executor. *A.* died in 1856, and the suit, which was revived against his representatives, came on for consideration on further directions on the 29th of August 1866. It was then found that *A.'s* estate was liable for R1,32,406-11-8, and his representatives were ordered to pay this money into Court. The representatives having made default in payment, a writ of *fieri facias* was issued, under which certain property was sold by the Sheriff of Calcutta and conveyed by him to *B.* on the 1st of April 1867. Previously to this the representatives of *A.* had, on the 11th of January 1865, mortgaged the same property, together with other lands, "for the purpose of paying the Government revenue of certain taluqs belonging to *A.*, deceased;" and the mortgagee having

**LIS PENDENS.—Application of doctrine in India—*continued.***

obtained a decree on his mortgage, the property was sold to *C.* in execution of the mortgage decree on the 30th of March 1867. In a suit for possession by *C.* against *B.*, the latter pleaded *lis pendens*. *Held* that the nature of the suit, in which the decree of 1855 and the subsequent order of 1866 were passed, was not such as to warrant the application of the doctrine of *lis pendens* to the mortgage of the 11th of January 1855. *Kailas Chandra Ghose* v. *Fulchand Jahurri*, *8 B. L. R., 474*, followed. KASIMUNNISSA BIBEE *v.* NILRATNA BOSE

**[I. L. R., 8 Calc., 79: 9 C. L. R., 173: 10 C. L. R., 113**

**15.** ——————— *Purchase pendente lite.—Right of purchaser against mortgagee of property.*—Plaintiff purchased, at a sale by the District Munsif's Court of Guntur, held on the 22nd of December 1868, the interest of one *F. G.* in a cotton screw at Guntur. Previous to this, on the 31st July 1867, the husband of the 1st defendant in the present suit filed a plaint, No. 16 of 1867, in the Civil Court of Guntur against the representatives of *F. G.* (who was then dead), praying to be declared entitled to be treated as mortgagee of the shares of *F. G.* in that and another screw for R1,696-9-0, and that the amount might be raised by sale of those shares. Issues were settled, the 4th of which was—"Was there a tangible mortgage of real property or shares in real property?"—and the decree made on 30th September 1869 found this issue in the affirmative, and declared that the amount sued for should be paid from the aforesaid shares hypothecated to the plaintiff in that suit. At a sale in execution of this decree, the share of *F. G.* in the screw at Guntur was purchased by 2nd defendant (in the present suit) on the 18th of February 1870. The present plaintiff objected to the sale and was referred to a regular suit. Accordingly he brought the present suit to set aside the decree in No. 16 of 1867 as regards the share of *F. G.* in the screw at Guntur, to cancel the attachment and sale to 2nd defendant, and for possession of the share. First defendant pleaded that plaintiff at the date of his purchase had notice of the pending of the suit No. 16 of 1867 and of the mortgage claim. The plaintiff denied the fact of the mortgage and its regularity, and issues were framed, the 1st of which was—"whether plaintiff knew that the suit No. 16 of 1867 was under hearing when he bought the one-third share, and that there might be declared a hypothecation to the late husband of the first defendant in this suit." The Civil Court, treating the claim of the plaintiff in No. 16 of 1867 as a mortgage, held that, as it was prior in point of time to the sale under the Munsif's decree, it should prevail against plaintiff's claim, even though plaintiff had not notice. The Court also found that plaintiff had notice. Upon appeal,—*Held* that, as the purchase made by the plaintiff was made while the suit No. 16 of 1867 was pending, in which a mortgage was alleged and payment was prayed out of the property, the plaintiff was bound by the decree made therein, whether he had or had not notice, nor could he in

**LIS PENDENS.—Application of doctrine in India—*continued.***

any way question that decree. MANUAL FRUVAL *v.* SANAGAPALLI LATCHMIDEVAMMA . **7 Mad., 104**

**16.** ——————— *Notice.—Right of purchaser pendente lite as against person whose lien has been declared in suit to which the purchaser was no party.—Notice.*—Suit to recover possession of a mutah from which plaintiff had been ejected by an order of Court, passed in execution of the decree in a suit to which he was no party. Plaintiff claimed under a deed of sale from *A.* (a purchaser from *C.* and *D.*), dated 11th November 1860, and alleged that he purchased for valuable consideration and without notice of any other claim. Defendant asserted that plaintiff purchased fraudulently with notice of her late husband's right of purchase. It appeared that defendant's husband had sued *C. D.* and others to enforce a lien upon the mutah, and obtained a judgment of the Privy Council upholding his lien and declaring its priority over the purchase of *C.* and *D.* This suit was pending before the Privy Council at date of plaintiff's purchase. In 1862 defendant's husband sued *C.* and *D.* for specific performance of an alleged agreement for sale, dated October 1851, without adducing any evidence as to the existence of the agreement, and got a decree in his favour, because the Principal Sudder Ameen had said in the original case that *C.* and *D.* had agreed to sell the mutah. The present plaintiff was turned out of possession under this decree, to the proceedings in which he had in vain sought to get made a party, on the ground that he was affected by notice of the former proceedings. He sought relief under section 230, Act VIII of 1859, but his application was dismissed, and he then commenced this suit. The Civil Judge decided in favour of plaintiff. *Held,* confirming the decree of the lower Court, that this was a case of a vendee of property, perhaps subject to a lien, turned out upon a decree against other people declaring the holder of the lien the owner of the property, and that the ejectment was wrongful and procured by a gross misuse of the Court's process. The effect of notice of *lis pendens* considered. SAM *v.* APPUNDI IBRAHIM SAIB . . . . . **6 Mad., 75**

**17.** ——————— *Purchase pendente lite.—Right of suit.—T.*, having obtained a decree against the heirs of *H.*, attached certain property in execution. *P.*, one of the heirs, objected that the decree was made against the defendants in their representative capacity, and that the property attached had descended to her, not from *H.*, but from her husband. The objection was overruled and the property sold. *P.* appealed to the High Court, which passed a judgment in her favour. *Held* that the sale of the property was one *pendente lite*, and, as such, subject to the final result of the suit between the parties; and that *P.* had a right to come into Court as against the purchaser and establish her title to the property. INDERJEET KOOER *v.* POOTEE BEGUM. **19 W. R., 197**

**18.** ——————— *Purchaser under execution sale.*—In a suit for rent by the auction-purchaser of property which had been sold in execution of a money-decree, the defendant admitted being in possession, but denied the alleged relationship of landlord and tenant, contending that the property had been purchased by himself at a sale in execution of a decree which he had obtained upon a mortgage-bond, *i.e.*, a money-bond with a clause creating a charge upon the property. The suit on this mortgage was commenced after the attachment upon which the property was sold to the plaintiff, but was pending when the plaintiff purchased. *Held* that the mortgagors were bound by the proceedings in the suit including the attachment and sale, and the defendant had a good title against the plaintiff in the same manner as against the mortgagors whose interest the plaintiff purchased, even if the certificate of sale was not registered. A purchaser under an execution is bound by a *lis pendens*, for it would be impossible that any action or suit could be brought to a successful termination if alienating *pendente lite* were permitted to prevail. RAJ KISHEN MOOKERJEE *v.* RADHA MADHUB HOLDAR . . . **21 W. R., 349**

**19.** ——————— *Putni lease granted pendente lite.*—A putni lease of lands granted by a Hindu widow in possession upheld though made pending an equity suit brought by her against her husband's executors. BISSONATH CHUNDER *v.* RADHA KRISTO MUNDUL . . **11 W. R., 554**

**20.** ——————— *Purchase of property on which there is a decree in suit on a mortgage-bond.—Suit for possession against purchaser from mortgagor.*—The plaintiff in 1877 obtained a decree on a mortgage-bond in execution of which property belonging to his debtor was put up for sale and purchased by the plaintiff on 5th May 1878. The defendants had, in execution of a subsequent money-decree against the same debtor, purchased the same property on the 1st April 1878. In a suit by the plaintiff for possession and mesne profits,—*Held*, following the case of *Raj Kishen Mookerjee* v. *Radha Madhub Holdar, 21 W. R., 349*, that the defendants were purchasers *pendente lite*, and were consequently bound by the proceedings in the plaintiff's suit on the mortgage-bond. JHAROO *v.* RAJ CHUNDER DASS . . **I. L. R., 12 Calc., 299**

**21.** ——————— *Sale in execution of decree.—Auction-purchaser.—Res judicata.—A.*, the auction-purchaser of certain immoveable property at a sale in execution of a decree, purchased with notice that a suit by *H.* and *M.* against the judgment-debtor and the decree-holder for a share in such property was pending, but did not intervene in such suit. Before the sale to *A.* was made absolute, *H.* and *M.* obtained a decree in the suit for a moiety of the share claimed by them. *A.* took no steps to get such decree set aside, but sued them to establish his right to such moiety in virtue of his auction-purchase. It appeared that the Court which passed the decree in favour of *H.* and *M.* did so without jurisdiction. *Held* that, inasmuch as the suit in which such decree was made was tried and determined by a Court having no jurisdiction, it could not be held that *A.* was bound by such decree, and that it could not be said that *A.* was bound to take steps to get

**LIS PENDENS.—Application of doctrine in India—*continued.***

such decree set aside by means of appeal, or that because he had omitted to do so, it had become binding on him and his suit was precluded. *Quære,*—Whether the doctrine of *lis pendens* applies in the case of a purchase in execution of decree. ALI SHAH *v.* HUSAIN BAKHSH . . **I. L. R., 1 All., 588**

It was held it does not. NUFFUR MERDHA *v.* RAM LALL ADHICARY . **15 W. R., 308**

**22.** ——————— *Sale in execution of decree.—Purchaser, Rights of.—Decree by mortgagee.—Incumbrance.*—Where a creditor obtains a decree against his debtor, and in execution puts up for sale, and himself becomes the purchaser of, certain property of his debtor, which is already under mortgage to another, and such other has, previous to the decree and sale, commenced a suit on his mortgage-bond (although such suit has not proceeded to a decree), such judgment-creditor purchasing *pendente lite* only obtains the right and interest of the mortgagor in such property,—*viz.*, the equity of redemption,—and does not acquire the property free from the incumbrance created by the debtor. LALA KALI PROSAD *v.* BULI SINGH **[I. L. R., 4 Calc., 789: 3 C. L. R., 396**

**23.** ——————— *Applicability of the doctrine to a Court sale in execution of a decree.—Code of Civil Procedure (1859), ss. 240, 270, 271.—Effect of a decree obtained by an attaching creditor in a suit against successful intervenors or claimants.*—In 1872 the plaintiff obtained a money-decree against two brothers, *P.* and *K.* In execution of that decree he attached their one-half share in certain fields in 1874. The attachment was removed at the instance of two claimants, *S.* and *B.* In 1875 the plaintiff sued the claimants, and obtained a decree in his favour in 1878. Meanwhile in December 1874, after the plaintiff's attachment had been removed, one *V.* obtained a decree against one of the brothers, *P.* In 1876, while the plaintiff's suit against *S.* and *B.* was pending, *P.'s* right, title, and interest in the one-half share of the fields belonging to himself and *K.* was sold in execution of *V.'s* decree, and purchased by the defendant. In 1881 the plaintiff again attached the one-half share belonging to the two brothers under his decree of 1872. Thereupon the defendant, relying on his purchase of 1876, applied for the removal of the attachment. It was removed from *P.'s* one-fourth share, and maintained on *K.'s* share, which was in due course sold. The plaintiff now sued to establish his right to sell *P.'s* one-fourth share under his decree of 1872. *Held* that the doctrine of *lis pendens* did not apply to this case; that the defendant, though he purchased *P.'s* share during the pendency of the plaintiff's suit of 1875, was not bound by the decree made in that suit —first, because, as an auction-purchaser at a Court sale in execution of a decree, he derived title, not from *P.*, but by operation of law; secondly, because *P.* was not the person against whom the decree was made in the suit of 1875; and, thirdly, because *P.* was not represented in that suit by the plaintiff simply because the plaintiff sought to establish his right to attach and sell the property as *P.'s* property. *Ali Shah* v. *Husain Bakhsh, I. L. R., 1 All., 588,* followed. LALU MULJI THAKAR *v.* KASHIBAI **[I. L. R., 10 Bom., 400**

**LIS PENDENS.—Application of doctrine in India—*continued.***

**24.** ——————— *Presentation in Court of award.—Assignment pending such proceedings.*—*P.* and his partners mortgaged certain immoveable property to plaintiff on the 11th October 1869. They had then no title to the property, but they subsequently acquired one by purchase on the 29th June 1871. On plaintiff demanding that *P.* and his partners should make good the contract of mortgage and of the interest they had acquired, the matter was referred to arbitrators, who, on the 26th December 1873, made an award empowering plaintiff to sell the mortgaged property in satisfaction of his debt. The award was presented in Court by plaintiff on the 23rd January 1874, and was filed by the Court on the 23rd February 1874. Meanwhile, on the 14th February 1874, the property was attached in execution of a money-decree obtained by a creditor of *P.* and his partners against them. On the 15th April 1874 it was sold by auction and purchased by defendant. In a suit brought by plaintiff to recover possession of the property, both the lower Courts rejected his claim, on the ground that *P.* and his partners had no right to the property when they mortgaged it to plaintiff. *Held* that the presentation in Court of the award obtained by plaintiff was equivalent to the presentation of a plaint for the specific performance of the contract of mortgage, and the proceedings consequent thereon constituted a *lis pendens,* during which a mere money-decree-holder could not, by any proceedings which he might take, defeat the object of plaintiff's application to the Court to file his award. PRANJIVAN GOVARDHANDAS *v.* BAJU . . . **I. L. R., 4 Bom., 34**

**25.** ——————— *Mortgage by executors.—Suit on mortgage.—Administration suit.—Writ of fi-fa.—Sheriff's sale.—Sale in execution of decree.*—In a suit by the representatives of *P. D.* against his brother *A. D.*, and after *A. D.'s* death against his executors, it was found that there was over R1,32,400 due to the plaintiff from the estate of the deceased; and on the 29th of August 1866 the executors were ordered to pay this sum into Court. The executors disobeyed, and on the 24th of December 1866 a writ of *fi-fa* was issued from the High Court, in execution of which certain property belonging to the estate of *A. D.* was sold to the defendants on the 18th of July 1867. Previously, however, on the 12th of October 1866, the executors had mortgaged the same property to the plaintiff, who brought a suit on his mortgage on the 10th of June 1867. On the 28th of August 1867 the present defendants were made parties to that suit, and in their written statement they alleged that they had been improperly made parties, and claimed a title superior to that of the plaintiff. That suit was dismissed with costs as against the present defendants, on the ground that they were improperly added; but a decree for sale was given against the executors, in execution of which the mortgaged property was sold to the plain-

**LIS PENDENS.—Application of doctrine in India—*continued.***

tiff. In a subsequent suit brought by the plaintiff for possession,—*Held* that the defendants were entitled to redeem, and were not affected by the suit of 1867 as a *lis pendens*. CHUNDER NATH MULLICK *v.* NILAKANT BANERJEE . I. L. R., 8 Calc., 690

26. ——————— *Sale in execution of decree.—Prior attachment.*—On the 29th June 1876 the plaintiff obtained a money-decree by consent against *R.*, the father-in-law of the defendant. On the 24th of July 1876 the plaintiff attached a house apparently belonging to *R.* On the 12th October 1876 the defendant sued *R.* for maintenance, and alleged that the house in question was the property of her deceased husband and *R.*, and she claimed the right to continue to live in it. On the 10th of November 1876, and during the pendency of the defendant's suit against *R.*, the house was sold under the plaintiff's decree against *R.*, and the plaintiff himself became the purchaser. On the 20th of June 1877 the defendant obtained a decree against *R.* in terms of the prayer of her plaint. On the 27th of August 1879 the plaintiff brought the present suit to eject the defendant from the house. *Held* that what the plaintiff bought from *R.* was his right, title, and interest in the house, which being subject to the decree in the defendant's pending suit, the plaintiff's purchase was likewise subject to the same, and the circumstance that the plaintiff had placed a prior attachment on the house made no difference. The plaintiff, therefore, could not eject the defendant during her lifetime. PARVATI *v.* KISANSING . . . . I. L. R., 6 Bom., 567

27. ——————— *Sale pending appeal.—Decree reversed.—Right of judgment-debtor.*—*S.*, having obtained a decree against *M.* and another, brought to sale and purchased *M.'s* property pending appeal. The decree having been reversed,—*Held* that *M.* was entitled to the restoration of his property, and not merely to the proceeds of the sale thereof. SADASIVA *v.* MUTTU SABAPATHI CHETTI [I. L. R., 5 Mad., 106

*See* LATI KOER *v.* SOBADRA KOER [I. L. R., 3 Calc., 724

28. ——————— *Perpetual lease.—Cultivation of waste land.*—A decree-holder, who has obtained possession of land in suit pending an appeal, cannot grant a perpetual lease thereof which will be binding on his opponent in the event of the decree being reversed. GAJAPATI RADHIKA PATTA MAHADEVI GURU *v.* GAJAPATI RADHAMAM MAHADEVI GURU . . . I. L. R., 7 Mad., 96

29. ——————— *Former decree for partition.—No return to commission.—Mortgage of share.—Purchase by a stranger of portion of the lands included in the decree.—Suit by him for partition.—Res judicata.*—*A.* and *B.* were the joint owners n equal shares of certain property. In 1869 *B.* mortgaged his share to *A.* under a mortgage-deed drawn up in the English form. Later on, in 1869, *A.* brought a suit against *B.* for partition, and in 1870 obtained a decree appointing a commissioner of partition and directing the partition. No return was made to this commission, and no actual partition come to. In 1873 *A.* obtained a decree for an account and for payment, or in default for sale of the property. In 1878 *B.'s* share was put up for sale and purchased by *C.*, and *C.* was put into possession. In 1881 *C.* brought a suit against *A.* for partition. *Held* that the decree obtained by *A.* in 1873 put an end to *B.'s* right to redeem, unless he paid the amount found due against him, and therefore, at the time of the sale to *C.*, *B.'s* right to redeem had ceased to exist, and the property was no longer subject to partition under the decree of 1870, and therefore the partition asked for under the suit of 1881 could be granted. KIRTY CHUNDER MITTER *v.* ANATH NATH DEY [I. L. R., 10 Calc., 97: 13 C. L. R., 249

**LOAN ON SECURITY OF LAND.**

*See* BANK OF BENGAL . 7 B. L. R., 653

**LOCAL GOVERNMENT.**

——— Order of, effect of—

*See* MAGISTRATE, JURISDICTION OF—POWERS OF MAGISTRATES. [16 W. R., Cr., 79

——— Power of—

*See* BOMBAY ACT I OF 1865, ss. 35, 48. [I. L. R., 1 Bom., 352

*See* GOVERNOR OF BOMBAY IN COUNCIL. [8 Bom., A. C., 195; I. L. R., 8 Bom., 264

*See* GOVERNOR OF MADRAS IN COUNCIL. [2 Mad., 439

*See* HIGH COURT, JURISDICTION OF—HIGH COURT, MADRAS—CRIMINAL. [5 Mad., 277

*See* MAGISTRATE, JURISDICTION OF—POWERS OF MAGISTRATES. [I. L. R., 9 Mad., 431

——— Suit against—

*See* NORTH-WESTERN PROVINCES AND OUDH MUNICIPAL ACT, s. 28. [I. L. R., 1 All., 269

1. ——————— *Small Cause Court, Mofussil.—Civil Procedure Code, ss. 5, 360, ch. XX.—Insolvency jurisdiction.*—Under section 360 of the Code of Civil Procedure, the Local Government cannot invest a Mofussil Small Cause Court with the insolvency jurisdiction conferred on District Courts by chapter XX of the said Code, inasmuch as, by reason of section 5, chapter XX does not extend to such Courts of Small Causes. SETHU *v.* VENKATARAMA . . . . I. L. R., 9 Mad., 112

2. ——————— *Notification of Government of Bombay extending Act, Effect of.—Scheduled Districts Act, XIV of 1874, ss. 5, 6.*—Under section 5 of the Scheduled Districts Act, XIV of 1874, the Local Government cannot, by extending an Act which is of necessarily restricted application,

**LOCAL GOVERNMENT.—Suit against—** *continued.*

make its provisions applicable to an entirely new subject-matter,—*viz.*, the litigation of a new local area. Accordingly, where the Government of Bombay issued the following notification, No. 823 of 1886,—"In exercise of the powers conferred by section 5 of the Scheduled Districts Act, XIV of 1874, the Governor of Bombay in Council is pleased, with the previous sanction of the President in Council, to extend to the Island of Perim the whole of Act II of 1864 of the Governor General in Council, with the exception of sections 2, 17, and 23. The Governor in Council is further pleased, in exercise of the powers conferred by section 6 of the Scheduled Districts Act, XIV of 1874, and by any other enactment, to direct that the Resident at Aden shall be Sessions Judge and Court of Session for the Island of Perim, and shall exercise the same jurisdiction and powers in respect of the administration of civil and criminal justice in the said island, and in respect of the trial of persons committed for trial by the Court of Session for offences committed in the said island as are vested in him in Aden by the said Act,"—*Held* that the provisions of the Aden Act II of 1864, which (as appears from the preamble) deals with the litigation of Aden alone, could not be extended to Perim, without enlarging the subject-matter of the Act. *Held*, also, that the appointment of the Political Resident at Aden as a Sessions Judge and Court of Session for the Island of Perim made under clause (*a*) of section 6 of the Scheduled Districts Act, XIV of 1874, was valid and effectual with reference only to the provisions of the Criminal Procedure Code, and that that portion of the notification which regulates the exercise by the Resident of his powers with reference to Act II of 1864 should be treated as surplusage. QUEEN-EMPRESS *v.* MANGAL TEKCHAND [I. L. R., 10 Bom., 274

**LOCAL INQUIRY.**

*See* DECREE—CONSTRUCTION OF DECREE—MESNE PROFITS. [I. L. R., 8 Calc., 178

**——— Criminal.**

*See* CASES UNDER POSSESSION, ORDER OF CRIMINAL COURT AS TO—LOCAL INQUIRY.

**LOCAL INVESTIGATION.**

*See* CASES UNDER AMEEN.

*See* APPEAL—ORDERS . 7 W. R., 425 [W. R., 1864, 363 Marsh., 469: 2 Hay, 591

*See* APPELLATE COURT—EXERCISE OF POWERS IN VARIOUS CASES—SPECIAL CASES . . . 6 B. L. R., 677 [15 W. R., 423 18 W. R., 452

*See* CHUR LANDS . 6 B. L. R., 677

**——— Omission to direct—**

*See* CASES UNDER SPECIAL APPEAL—OTHER ERRORS OF LAW OR PROCEDURE—LOCAL INVESTIGATIONS.

**LOCAL INVESTIGATION—***continued.*

1. **——— Object of local investigations.**—*Evidence not obtainable in Court.*—Local investigations are had recourse to not so much for the purpose of collecting evidence which can be taken in Court, as to obtain evidence which from its peculiar nature can only be obtained on the spot. BHOWANEE DUTT SINGH *v.* BEER SINGH . 2 N. W., 196

2. **——— Application for inspection or local investigation.**—*Civil Procedure Code, 1859, s. 180.*—An application under section 180, Act VIII of 1859, should be made at the hearing of the suit, and not previously. MACKINNON, MACKENZIE, & Co., *v.* BHUGRAM DOSS . Bourke, O. C., 243

3. **——— Discretion of Court.**—*Local inquiry.*—It is within the discretion of a Judge to order or refuse a local inquiry. RASH BEHAREE SINGH *v.* SAHEB ROY . . . 12 W. R., 76

GRAHAM *v.* LOPEZ . . . 1 W. R., 141

4. **——— *Power of Court to direct, when parties do not ask for it.—Remand order for local investigation.***—In a suit for land, where the question was as to whether the land lay within the boundaries of the plaintiffs' or the defendants' land, the Court of first instance suggested to the parties that the proper mode of determining the case was in the first instance to hold a local investigation, and that such local investigation should be applied for by one or other of the parties. Both parties resolutely refused to make such application, and the Court thereupon dealt with the case upon the materials before it and passed a decree. Upon appeal, the lower Appellate Court remanded the case for the purpose of a local investigation being held at the cost of the plaintiff in the first instance. *Held* that inasmuch as neither of the parties desired to have a local investigation, the Court was wrong in remanding the case, and that it was bound to decide it upon the evidence before it. JATINGA VALLEY TEA COMPANY *v.* CHERA TEA COMPANY . . . I. L. R., 12 Calc., 45

5. **——— Notice of local investigation.**—*Civil Procedure Code, 1859, s. 180.*—Though there was no express direction to that effect in section 180, Act VIII of 1859, yet it was necessary to give notice to parties of the time when a local investigation ordered by the Court was to be held. KISTOMONEE DEBIA *v.* EGLINTON . . . . 12 W. R., 139

6. **——— Officer to hold local inquiry.**—*Civil Procedure Code, 1859, s. 180.*—Section 180, Act VIII of 1859, made it imperative on a Court to employ in the first instance the regular officer of the Court to hold a local inquiry. RAM DOSS KOONDOO *v.* NIL KANTO DHUR . . . 8 W. R., 6

BYJNATH SINGH *v.* INDURJEET KOER [8 W. R., 331

BAHADOOR ALLY *v.* DOOMNUN SINGH [7 W. R., 27

Instances of improper appointments are given in

DOORGA DOSS CHATTERJEE *v.* GOOROO CHURN MISTREE . . . 6 W. R., Act X, 81

**LOCAL INVESTIGATION.—Officer to hold local inquiry—*continued.***

And TEELUCKDHAREE ROY *v.* MOOBALEEDUR ROY [13 W. R., 285

**7. ——— Question of disputed boundary.**—*Possession before date of suit.—Held* that a local inquiry ought not to have been ordered in this case, where the question to be decided was one of disputed boundary, which turned chiefly on possession before the date of suit, and that the Subordinate Judge would have been justified in disregarding the Ameen's report, and trying the appeal on the recorded evidence. KALEE DOSS ACHARJEE *v.* KHETTRO PAL SINGH ROY . . . 17 W. R., 472

*See* ISWAR CHANDRA DAS *v.* JUGAL KISHORE CHUCKERBUTTY . 4 B. L. R., Ap., 33 [S. C. 17 W. R., 473, note

**8. ——— Ascertainment of fact of marriage.**—In a case where the issue is whether two persons bear the relation of man and wife, a Judge is not justified in going himself to the village where the parties live, in order to make inquiries among their neighbours; much less in holding such local investigation on a Sunday, and whithout due notice to one of the parties. JUBHOO SAHOO *v.* JUSSODA KOOER . . . 17 W. R., 230

**9. ——— *Power of Judge to order local investigation by Subordinate Judge.***—A Judge has no power to order a Subordinate Judge, whose judgment is before him on appeal, to go and inspect the locality and make a report. Such a report cannot be treated as evidence one way or the other. If the Judge was of opinion that it was necessary to take further evidence, he ought to have proceeded as directed by sections 354 and 355, Act VIII of 1859, and it was competent to him, if necessary, to order an Ameen or any suitable person to make a local investigation under section 180. But a Judge from whose decision an appeal is pending is the most unsuitable person to make such investigation. ROY SOOLTAN BAHADOOR *v.* LALOO KOOER . . 17 W. R., 300

**10. ——— Incomplete inquiry owing to laches of plaintiff.**—In a suit for wasilat, where the Ameen's inquiry was not completed on account of the *laches* of the plaintiff,—*Held* (GLOVER, *J.*, dissenting) that there had been no local investigation at all, and that the defendant had no opportunity of producing his evidence. KALEE DOSS MITTER *v.* DEBNARAIN DEB . . . 13 W. R., 412

**11. ——— Duty of Ameen to return report to Court ordering investigation.**—An appeal having been made from an order relating to the execution of a decree, the High Court directed that an Ameen should deliver over possession and make a map of the property so delivered over, and a map showing the boundaries laid down in the decree. The Ameen went to the spot and made a map. That map was not transmitted to the Court; but in consequence of certain proceedings in the Subordinate Judge's Court, a second Ameen was sent and a second map made. These proceedings were wholly disregarded by the High Court, which proceeded upon the first Ameen's map and report, against which no exception was filed in the High Court. LALLJEE SAHOO *v.* RAJENDER PERTAB SAHEE [14 W. R., 418

**LOCAL INVESTIGATION.—Duty of Ameen to return report to Court ordering investigation—*continued.***

**12. ——— Investigation by Ameen.**—*Power of District Judge to interfere with order for.—Circular Orders, 41 of 1866 and 25 of 1870.*—In a suit for the possession of land, the boundaries of which were disputed, the Subordinate Judge ordered an Ameen to make a local investigation, and reported his order to the District Judge, who refused to allow the investigation to proceed. *Held* that this was a case coming within the provisions of Circular Order No. 41, dated the 2nd October 1866, which authorises local investigations by Ameens when it is necessary to ascertain by measurement disputed areas of land; and that the District Judge had no authority to stay the investigation. *Per* PRINSEP, *J.*—All that the District Judge was entitled to do under Circular Order No. 25, dated 25th August 1870, was to express his opinion as to the propriety or otherwise of the Subordinate Judge's order. NIROD KRISHNO ROY *v.* WOOMANATH MOOKERJEE [I. L. R., 4 Calc., 718 : 3 C. L. R., 234

**13. ——— Non-attendance at local investigation.**—*Procedure order setting aside a judgment by default.*—Sections 114 and 180 are to be read together. The words "and persons not attending upon the requisition of the commissioner" in section 180 are general and apply to parties making default, whether required to give evidence or not. The words "like disadvantages" referred to in section 180 mean that in the case of the non-attendance of a defendant, the local investigation is to be proceeded with *ex parte;* and in the case of the non-attendance of a plaintiff, the suit is to be dismissed with costs. In case of judgment by default for non-appearance before a commissioner appointed under section 180, the proper course is to apply to the Judge for an order to set aside the judgment, and if that application be refused, to appeal against the order of refusal. The Judge's order should contain a distinct direction to the commissioner to proceed *ex parte* in the event of the non-attendance of the plaintiff. ESSAN CHUNDER CHUCKERBUTTY *v.* SOORJO LALL GOSSAIN [1 Ind. Jur., O. S., 3 W. R., F. B., 1: Marsh., 139

**14. ——— Non-attendance at local investigation.**—*Failure of party to appear on local inquiry.*—In a case in which plaintiff sued to recover some land, and in which defendant denied the power of plaintiff's vendor to sell the land claimed or a part of it, a local inquiry was ordered to ascertain the boundaries of the land in dispute. Judgment of the High Court—upholding the decision of the lower Court, which dismissed the suit because plaintiff failed to appear or take proper steps before the Ameen at the local investigation, and because he omitted to give formal proof of his deed of purchase—confirmed. MAHOMED TUQUE CHOWDHRY *v.* JUDONATH JHA . . 16 W. R., P. C., 28

**LODGING-HOUSE KEEPER.**

*See* INNKEEPER AND GUEST.
[3 Bom., O. C., 137

**LODGINGS LET TO PROSTITUTE, SUIT FOR RENT OF—**

*See* LANDLORD AND TENANT—TENANCY FOR IMMORAL PURPOSE.
[9 B. L. R., Ap., 37

**LORD'S DAY ACT.**

1. ——— Application of.—*British Burma.—Abkari rules.*—The Lord's Day Act (29 Car. II, c. 7) does not extend to criminal cases in British Burma. *A.* was convicted and fined for the breach of an Abkari rule. *Held* that the conviction could not be supported, on the ground that the Abkari rule had not the force of law. ABRAHAM *v.* QUEEN
[1 B. L. R., A. Cr., 17 : 10 W. R., 350

2. ——— *Moulmein.*—The Lord's Day Act does not apply to Moulmein. GRASEMANN *v.* GARDNER . 3 W. R., Rec. Ref., 2

Nor to Madras.

*See* ANONYMOUS CASE . 4 Mad. Ap., 62

3. ——— Application of Act to Madras Presidency.—*Arrest of Mahomedan debtor on Sunday.*—A Mahomedan debtor was arrested within the original jurisdiction of the High Court on a Sunday. Upon application made, INNES, *J.*, directed his discharge, on the ground that the arrest, having been made upon, a Sunday, was illegal. Upon appeal,—*Held* by HOLLOWAY, *J.*, that the provisions of the Lord's Day Act (29 Car. II, c. 7) do not apply in this country. That even if the substantive provisions of the statute were applicable, it did not follow that section 6 would be. That if the statute dealt with substantive law it would be applicable to all the Queen's subjects or none, and that there were ample reasons for saying it was impossible to apply it to all. By KERNAN, *J.*, that, as between natives of India, the Lord's Day Act does not apply. PARAM SHOOK DOSS *v.* RASHEED-OOD-DOWLAH . . 7 Mad., 285

4. ——— *Criminal proceedings taken on Sunday, Legality of.*—Criminal proceedings taken by a Magistrate are not necessarily illegal by reason of having been taken on a Sunday. IN THE MATTER OF THE PETITION OF SINCLAIR . . 6 N. W., 177

And *see* Cases under HOLIDAY.

**LOST GRANT, PRESUMPTION OF—**

*See* PRESCRIPTION—CLAIM TO PRESCRIPTION . . . 15 W. R., 212
[1 W. R., 230

*See* PRESCRIPTION — EASEMENTS — LIGHT AND AIR . 3 B. L. R., O. C., 18
[6 B. L. R., 85 : 12 B. L. R., 406

**LOTTERY.**

——— *Foreign lottery.—Advertisement.—Newspaper.—Publisher.—Penal Code (XLV of 1860), s. 294A.*—The expression "in any such lottery" in paragraph 2 of section 294A of the Penal Code (XLV of 1860) means "any lottery not authorised by Government," and includes a foreign lottery. The word "publisher" in the above paragraph includes both the person who sends a proposal as well as the proprietor of a newspaper who prints the proposal as an advertisement. The proprietor of a Bombay newspaper who published an advertisement in his paper relating to a Melbourne lottery was accordingly held to be punishable under section 294A of the Penal Code. QUEEN-EMPRESS *v.* MANCHERJI KAVASJI SHAPURJI . I. L. R., 10 Bom., 97

**LOTTERY ACT (V OF 1844).**

*See* PROMISSORY NOTE . 9 B. L. R., 441

**LOTTERY OFFICE, CHARGE OF KEEPING—**

*See* ACT XXVII OF 1870.
[6 B. L. R., Ap., 98

**LOTTERY TICKETS.**

*See* GAMBLING . 12 W. R., Cr., 34

**LUNACY.**

*See* EVIDENCE—CIVIL CASES—HEARSAY EVIDENCE . . 6 B. L. R., 509

*See* CASES UNDER HINDU LAW—INHERITANCE—DIVESTING OF EXCLUSION FROM, AND FORFEITURE OF, INHERITANCE—INSANITY.

*See* CASES UNDER INSANITY.

*See* MAHOMEDAN LAW—INHERITANCE.
[2 B. L. R., A. C., 306

**LUNATIC.**

*See* LETTERS PATENT, HIGH COURT, N.-W. P., CL. 12 . I. L. R., 4 All., 159

*See* REGISTRATION ACT, S. 35.
[I. L. R., 1 All., 465

——— Estate of—

*See* RIGHT OF SUIT—INTEREST TO SUPPORT RIGHT . . 13 B. L. R., Ap., 14

1. ——— Jurisdiction.—*Act XXXV of 1858, s. 2.*—A lunatic had been for a number of years in involuntary confinement in Bhowanipore Lunatic Asylum, within the jurisdiction of the Court of the Judge of the 24-Pergunnahs, and was possessed of property out of that jurisdiction. On an application to the Judge to appoint a manager of his property,—*Held* that, as the lunatic was residing within the jurisdiction of the Court of the 24-Pergunnahs, the Judge could, under Act XXXV of 1858, section 2, inquire into the fact of his insanity, and order a manager to be appointed to the estate. DURANT *v.* CHANDRANATH CHATTERJEE
[2 B. L. R., A. C., 246

S. C. KALLONAS *v.* COLLECTOR OF BACKERGUNGE . . . . 11 W. R., 109

LUNATIC—*continued.*

2. ——— **Application under Act.**—*Act XXXV of 1858, ss. 2 and 3.*—Applications made under sections of the Lunacy Act, XXXV of 1858, must be verified. BUSRUT ALLY CHOWDHRY *v.* ESHAN CHUNDER ROY . . **7 W. R., 267**

3. ——— *Act XXXV of 1858, Procedure on inquiry under.*—The application for an inquiry under the Lunacy Act, Act XXXV of 1858, should be verified, and proper notice should be given to the alleged lunatic or his friends in case of necessity. In examining him, the greatest care and delicacy should be observed, and everything likely to cause unnecessary pain or excitement to him avoided. If also he be a person of rank, exempted from personal appearance in Court in ordinary civil proceedings, his personal appearance in Court in an inquiry into the state of his mind should be dispensed with. JUGUNNATH SAHEE DEO *v.* BURRA LALL OPENDRONATH SAHEE DEO **[5 W. R., Mis., 54**

4. ——— **Procedure.**—*Act XXXV of 1858, s. 5.—Examination of lunatic.*—Section 5, Act XXXV of 1858, never intended that an alleged lunatic should be summoned into a public Court as a witness, and subjected to examination as a witness by the vakeel of the person on whose petition the inquiry was instituted. IN THE MATTER OF THE PETITION OF JUGGERNATH . . **7 W. R., 246**

5. ——— *Appearance of lunatic.—Act XXXV of 1858.*—A person alleged to be a lunatic, though not found so under Act XXXV of 1858, may appear either by vakeel or in person. UMA SUNDARI DASI *v.* RAMJI HALDAR **[I. L. R., 7 Calc., 242: 9 C. L. R., 13**

*See* BINDABUN CHUNDER KUR CHOWDHRY *v.* KALI DASS SIRCAR . **W. R., 1864, 268**

6. ——— *Non-appearance of lunatic after service of summons.—Act XXXV of 1858.*—A Judge, instead of striking off a case because an alleged insane person does not appear after service of notice, ought in such event to prosecute the inquiry contemplated by Act XXXV of 1858. MOORUT KOONWAR *v.* DHURM NARAIN SINGH **[2 W. R., Mis., 7**

7. ——— *Act XXXV of 1858.—Procedure necessary before appointing guardian.*—A Court cannot, under Act XXXV of 1858, make over charge of the property and person of an alleged lunatic to a guardian until it has adjudged him to be of unsound mind and incapable of managing his affairs. BHOLANATH MOOKERJEE *v.* GRISH MOHINEE DEBIA . . **15 W. R., 259**

8. ——— **Unsoundness of mind.**—*Act XXXIV of 1858, s. 1.—Unsound mind.*—The term "unsound mind" in section 1 of Act XXXIV of 1858 comprehends imbecility, whether congenital or arising from old age, as well as lunacy or mental alienation resulting from disease. IN RE COWASJI BERAMJI LILAOOVALA . . **I. L. R., 7 Bom., 15**

LUNATIC—*continued.*

9. ——— **Unsoundness of mind, Proof of.**—*Act XXXV of 1858.—Incapacity to manage affairs.—Ascertainment of state of mind by medical examination.*—Unsoundness of mind taken by itself is not sufficient to bring a person within the meaning of the term "lunatic" as used in Act XXXV of 1858, unless it would incapacitate him from managing his affairs; nor, on the other hand, will a person who is incapable of managing his affairs be a lunatic, unless that incapacity is produced by unsoundness of mind. For the purposes of this Act, the observation of the patient by medical witnesses, between the date of petition and the date of actual hearing, would be sufficient for ascertaining his state of mind at the time of inquiry. SHERMAN *v.* SCHORN **[24 W. R., 124**

10. ——— *Witnesses, Evidence of.*—The bare assertion of witnesses, unsupported by any details of the causes, the course, and the treatment of the malady, ought not to be accepted as satisfactory proof of insanity. KALA CHAND GHOSE *v.* SHOOLOOHUNA DOSSIA . . **22 W. R., 33**

11. ——— **Inquiry as to fact of lunacy.**—*Power of judicial officer.—Evidence.*—On an inquiry as to the fact of lunacy under Act XXXV of 1858, any finding as to the actual time when the lunacy began is beyond the jurisdiction of the judicial officer making the inquiry. Where the fact of lunacy was admitted, and the question was the date at which it commenced, the evidence of a planter in the neighbourhood, as to common report for years in the village as to the lunacy, having been admitted by the lower Court, the Judicial Committee refused to reject it. BODHNARAYAN SINGH *v.* UMRAO SINGH. AJODHYA PRASAD SINGH *v.* UMRAO SINGH **[6 B. L. R., 509: 15 W. R., P. C., 1 13 Moore's I. A., 519**

12. ——— *Act XXXV of 1858, s. 8.*—The inquiry as to alleged lunacy under Act XXXV of 1858 must be made by the Judge, and not by a subordinate Court, to which the Judge can only issue a commission under section 8 of the enactment, in cases where the alleged lunatic resides at a distance more than fifty miles from the place where the Court is held. Ordinarily to such inquiries the members of the family are proper and sufficient parties, but other persons interested may, under special circumstances, be permitted to take part. RAM PURGASS SINGH *v.* AMEER ALI . **3 Agra, Mis., 3**

13. ——— *Act XXXV of 1858.*—An inquiry into the state of mind of an alleged lunatic should not be instituted under Act XXXV of 1858 without its being clearly shown to the Court that there is ground for supposing that the person is of unsound mind. GUNGA PERSHAD SAHOO *v.* WOOMA KOOWER . . . **18 W. R., 326**

14. ——— *Act XXXV of 1858.—Procedure.—Power of High Court under Act.—Onus probandi.*—Before a Judge can, on the application of a Collector under Act XXXV of 1858, order the property of an alleged lunatic to be placed

**LUNATIC.—Inquiry as to fact of lunacy —*continued.***

in charge of somebody else, he must observe the procedure laid down in that Act and pronounce the alledged lunatic to be of unsound mind after instituting a proper inquiry into the point. The High Court can set aside an order of the Judge made under the Act without evidence being taken, without remanding the case to the Judge, there being no analogy in this respect between an ordinary civil suit and proceedings under this Act. The burthen of proving an allegation as to the lunacy of any person rests on the Collector or the person who makes the allegation. BUSHARUTOOLLA *v.* COLLECTOR OF TIPPERAH

**[8 W. R., 375**

**15.** ——— *Act XXXV of 1858.—Inquiry as to state of lunatic's mind*— Where a District Judge in a matter of lunacy under Act XXXV of 1858 stopped the case at a preliminary stage of the proceedings, on a report of the medical officer that the alleged lunatic was labouring under a considerable aberration of mind as a consequence of the habit of ganja-smoking, which the Judge considered to be a form of intoxication not amounting to lunacy,—*Held* that the Judge ought to have gone on to hold the inquiry and satisfied himself whether the alleged lunatic was capable of managing his affairs irrespective of the cause of such incapacity. HURSAHOY LALL *v.* BHUTTUN SINGH

**[20 W. R., 55**

**16.** ——— **Appointment of manager.** —*Necessity of preliminary inquiry and adjudication.*—It is only when a man has been adjudged a lunatic as the result of proceedings, and on inquiry held in due course of law, that the Court obtains the authority to appoint a manager of his estate. GIREEJABUTTY KOOERREE *v.* MONJEE LAL

**[20 W. R., 477**

**17.** ——— *Act XXXIV of 1858, s. 25.—Application by curator bonis appointed in Scotland.*—A petition was presented through his constituted attorney by a *curator bonis* duly appointed in Scotland to *W.*, a doctor in the Bombay Army, absent from India on leave, praying for an order authorising the petitioner's attorney to recover and give valid receipts for certain moneys belonging to the said *W.*, and to realise certain shares and bonds also belonging to the said *W.*, and to remit the proceeds according to the directions of the petitioner as such *curator bonis.* The petitioner stated that the said *W.* had been duly adjudged to be of unsound mind by the Court of Session in Scotland, and annexed a "Court of Session Extract" of the "act and decree" whereby the said *curator bonis* was appointed; but there was no evidence that *W.* had been found of unsound mind and incapable of managing his affairs, or that the curator had given security, or that funds were required for the maintenance of *W.* The Court refused the order. IN RE WELSH

**[I. L. R., 8 Bom., 280**

**18.** ——— *Civil Procedure Code, 1882, s. 463—Lunatic defendant.—Guardian ad litem.—Act XXXV of 1858.*—A guardian *ad litem* cannot be appointed under chapter XXXI of

**LUNATIC.—Appointment of manager— *continued.***

the Code of Civil Procedure for a lunatic defendant to whom Act XXXV of 1858 applies, until the defendant has been adjudged a lunatic under the provisions of the said Act. SUBBAYA *v.* BUTHAYA

**[I. L. R., 6 Mad., 380**

**19.** ——— *Beng. Act IV of 1870.—Sanction to proceedings.—Court of Wards.*— The sanction of the Commissioner of the Division is necessary under Bengal Act IV of 1870 before proceedings can be taken under Act XXXV of 1858 to place the estate of a lunatic under the management of the Court of Wards. The proceedings set aside as null and void. IN RE KOWLBAS KOER

**[8 B. L. R., Ap., 50**

S. C. CHUCKUR SURUN NARAIN SINGH *v.* COLLECTOR OF SARUN . . . **17 W. R., 180**

**20.** ——— *Act XXXV of 1858, s. 9.—Act XIX of 1873, s. 195.—Court of Wards, Power of.*—Section 9 of Act XXXV of 1858 and section 195 of Act XIX of 1873 do not render it imperative on the Court of Wards to take charge of the estate of a person adjudged by a Civil Court, under Act XXXV of 1858, to be of unsound mind, but merely confer on that Court a power so to do. Until the Court of Wards exercises that power, the appointment by the Civil Court of a manager of the lunatic's property, under section 9 of Act XXXV of 1858, is valid. MANOHAR LAL *v.* GAURI SHANKAR

**[I. L. R., 1 All., 476**

**21.** ——— *Act XXXV of 1858.*—On an application for the appointment of a guardian to the estate of a lunatic under Act XXXV of 1858, the Judge should only appoint a person to take charge of the estate of the lunatic, without specifying of what that estate consists. NITAMBINI CHOWDHRAIN *v.* SHASHI MUKHI CHOWDHRAIN

**[4 B. L. R., Ap., 24: 12 W. R., 518**

**22.** ——— *Guardian.*— *Mortgage by de facto guardian.*—A Hindu, who is lunatic, may be possessed of property, although he cannot take it by inheritance. All dealings with such property to be binding must be effected by a guardian or manager duly appointed by the supreme civil authority; and since the passing of Act XXXV of 1858, a guardian or manager can only be appointed in the special manner prescribed by that Act. *A de facto* manager can have no greater powers than one duly appointed. Where, therefore, the mother of a lunatic, who had not been so appointed, mortgaged his estate without the previous sanction of the Court, the mortgagee's suit for foreclosure was dismissed. COURT OF WARDS *v.* KUPULMUN SING

**[10 B. L. R., 364: 19 W. R., 164**

**23.** ——— **Power of manager.**—*Person appointed manager of lunatic's affairs while he was of sound mind.*—A person who was appointed manager of a lunatic's affairs, by consent obtained while she was of sound mind, and who is capable of making a defence on her behalf, is competent to represent her in a suit although not appointed under the law

**LUNATIC.—Power of manager—*continued.***

as representative of the lunatic. KALA CHAND GHOSE *v.* SHOOLOCHUNA DOSSIA . **22 W. R., 33**

**24. ———— *Act XXXV of 1858, s. 11.—Suit on behalf of minor.—Collector.*—** A Collector appointed under section 11, Act XXXV of 1858, to take charge of the estate of a lunatic, cannot himself sue on behalf of the lunatic, but must appoint a manager for the purpose. GOUREENATH *v.* COLLECTOR OF MONGHYR. COURT OF WARDS *v.* RUGHOOBUR DYAL. SHEOPERSHAD NARAIN *v.* COLLECTOR OF MONGHYR . . . **7 W. R., 5**

**25. ———— Appeal, Right of.—*Act XXXV of 1858, ss. 3, 4, 22.—Right of suit to recover property.*—**On an application made by the wife and son of *T. H*, an alleged lunatic, under the provisions of Act XXXV of 1858, section 3, the daughters of the alleged lunatic, who were served with a notice under section 4 of the same Act, appeared at the hearing of the application, and cross-examined the witnesses examined in support of the application. The Judge found that *T. H.* was of unsound mind, and appointed his wife, *L.*, to be the guardian of his person. The daughters appealed to the High Court. *Held* (on an objection being taken that the appellants had no *locus standi*) that the daughters were entitled to appeal under the provisions of section 22, Act XXXV of 1858. *Sherman* v. *Schorn, 24 W. R., 124,* referred to. *Quære,*—Whether a right to sue to recover a property would be sufficient to confer jurisdiction under Act XXXV of 1858. IN THE MATTER OF THE PETITION OF MAHOMED BUSHEERUL HOSSEIN. MUNGHUR *v.* MAHOMED BUSHEERUL HOSSEIN

**[I. L. R., 8 Calc., 263 : 10 C. L. R., 1**

**26. ———— Appointment of guardian of lunatic where lunatic is member of joint family.—*Act XXXV of 1858.*—**An application made by the wife of a lunatic that she should be appointed manager under Act XXXV of 1858 was opposed by the lunatic's nephew, who was a member with him of a joint family governed by Mitakshara law, and who claimed to be entitled himself to the appointment of manager. The nephew was held to be disqualified on the ground of misconduct, and the wife was appointed. On appeal by the nephew, it was objected that, under Act XXXV of 1858, no manager could be appointed, as the lunatic was a member of a joint family and had no separate property. *Held* that the nephew, by claiming to be appointed manager, could not object that the lunatic had no separate property. *Quære,*—Whether a manager can under any circumstances be appointed under Act XXXV of 1858 if the lunatic is a member of a joint family under the Mitakshara law and possessed of no separate property. SOOBANSE SINGH *v.* JUGGESSHUR KOER . . **13 C. L. R., 86**

**27. ———— *Act XXXV of 1858.—Member of joint Mitakshara family.—Guardian.*—**The husband of a lunatic's daughter applied to the Court to declare his father-in-law, who was a member of a joint Mitakshara family, to be a lunatic, and appoint a manager of his property and

**LUNATIC.—Appointment of guardian of lunatic where lunatic is member of joint family—*continued.***

guardian of his person under Act XXXV of 1858. The lunatic had an interest both in joint ancestral property and in property inherited collaterally, which might, but was not shown to, belong to him separately. The lower Court found that the application was made with a view to taking consequent proceedings for partition. *Held* that, it appearing that he had remained for sixteen years in the same house under the same guardians, and there being no allegation of ill-treatment, no sufficient grounds were shown for the Court's interference, or the appointment of another guardian of his person. Before any action can be taken under the Act in this respect, there ought to be a strong case made out that the change of custody would be for the lunatic's benefit. *Held,* also, that as his daughter could not inherit his ancestral property, and as it was doubtful if the collaterally-inherited property was the separate property of the lunatic, the Court would not, under such circumstances, appoint a manager of the property ; but that the guardians of the lunatic, who were managers of the joint family, should, on her request, furnish accounts to the daughter of the management of the collaterally-inherited property. *Semble,*—Act XXXV of 1858 applies to the members of a Mitakshara family. *Quære,*—Assuming the application to be made with a view to a partition of the property, and that the lunatic was declared a lunatic under the Act, whether a partition could be had. IN THE MATTER OF THE PETITION OF BHOOPENDRA NARAIN ROY. BHOOPENDRA NARAIN ROY *v.* GREESH NARAIN ROY

**[I. L. R., 6 Calc., 539 : 8 C. L. R., 30**

**28. ———— Incapacity of joint owners of property.—*Effect of, in favour of managing owners.*—**The incapacity of joint owners confers powers of alienation, in certain cases of necessity, upon the managing owner. SHEO PERSHAD NARAIN *v.* COLLECTOR OF MONGHYR. GOUREENATH *v.* COLLECTOR OF MONGHYR. COURT OF WARDS *v.* RUGHOOBUR DYAL . . . . **7 W. R., 5**

**29. ———— Insanity pending award.—*Person becoming lunatic before award published.*—**If a person was in fit condition to manage his affairs down to the time when the proceedings before an arbitrator in which he was interested were substantially concluded, the award will not be invalidated by reason of the person having become insane before the final publication of the award. GOUREENATH *v.* COLLECTOR OF MONGHYR COURT OF WARDS *v.* RUGHOOBUR DYAL. SHEO PERSHAD NARAIN *v.* COLLECTOR OF MONGHYR . . . . **7 W. R., 5**

**30. ———— Power to lease lands of proprietor disqualified from lunacy.—*Act XXXV of 1858, s. 9.—Court of Wards in Oudh.*—**The order of a Civil Court declaring, under Act XXXV of 1858, an Oudh taloukdar to be of unsound mind and incapable of managing his affairs, renders him a disqualified proprietor within the meaning of section 9 of that Act, with the result that the Court of Wards is authorised to take charge of his estate without a further order of the Civil Court appointing

**LUNATIC.—Power to lease lands of proprietor disqualified from lunacy—*continued.***

the Court of Wards to be manager. A Civil Court having made an order declaring a talookdar to be of unsound mind and incapable of managing his affairs, and having at the same time appointed to be manager of his estate the Deputy Commissioner of the district, who also acted as manager of the Court of Wards,—*Held* that a lease for more than five years made by the latter officer, as representing the Court of Wards, was not invalidated under section 14 of the above Act, providing that no manager, appointed by the Civil Court under it, shall have power to grant a lease for any period exceeding five years. SARABJIT SINGH *v.* CHAPMAN . . . I. L. R., 13 Calc., 81
[L. R., 13 I. A., 44

## M

## MADRAS ABKARI ACT, III OF 1864.

*See* SENTENCE—IMPRISONMENT—IMPRISONMENT IN DEFAULT OF FINE.
[6 Mad., Ap., 40

1. ——— s. 2.—*Liquor.—Toddy.—Fermented palm juice.*—Sweet palm juice, which by exposure to the operation of natural causes ferments and becomes toddy, is as much manufactured by the person who exposes it as if the same result were produced by the process of distillation. ANONYMOUS
[5 Mad., Ap., 26

2. ——— *Toddy.—Fermented palm juice.—Conviction without evidence of fermentation.—Primâ facie,* toddy is fermented palm juice. A conviction under section 21 of Madras Act III of 1864, for selling toddy without a license, upheld, although no evidence was given as to whether fermentation had taken place. ANONYMOUS
[5 Mad., Ap., 36

This case was not intended to define toddy as a matter of law. ANONYMOUS . 6 Mad., Ap., 11

3. ——— *Sale.—Barter.—Payment of wages in liquor.*—Payment of wages in liquor does not amount to a sale of liquor within the meaning of section 2 of the Abkari Act (Madras Act III of 1864). QUEEN-EMPRESS *v.* APPAVA
[I. L. R., 9 Mad., 141

4. ——— and s. 9.—*Unexecuted contract to sub-rent.—Suit for specific performance.*—In a suit brought by plaintiff for the specific performance of an agreement entered into between the plaintiff and defendant, whereby the defendant, an abkari contractor, undertook to sub-let to plaintiff the abkari of a talook, and also to recover damages for the breach of contract,—*Held* that section 9 of the Abkari Amendment Act (Madras Act III of 1864) did not affect the rights and liabilities of the parties *inter se,* under the terms of an unexecuted contract to sub-rent, although the Act would prevent the sub-rentor deriving any benefit under an executed contract of sub-renting from the excise or the manufacture or sale of liquor, as defined in section 2,

**MADRAS ABKARI ACT, III OF 1864, s. 2 and s. 9—*continued.***

until he had complied with the condition prescribed in section 9 of the Act. VENKATA KRISTNAIYA *v.* VENKATACHALAIYAR . . . . 5 Mad., 1

——— s. 8.—*Licensed vendor, Sale by agent of.*—A license to sell liquor granted to *N.* under the provisions of the Abkari Act (Madras Act III of 1864) having been cancelled, *N.* put forward *M.* as a proper person to be licensed for the shop in which *N.* himself had been selling. *M.* was duly licensed by the Collector. Under cover of this license *N.* continued his former business, paying *M.* a certain sum monthly. *N.* was convicted of selling liquor without a license. *Held* that the conviction was illegal. QUEEN-EMPRESS *v.* NANJAPPA
[I. L. R., 7 Mad., 432

——— s. 10.—*Revenue Recovery Act (Madras Act II of 1864), ss. 1, 3, 4, 5, 37, 42, 52.—Sale for arrears of abkari revenue.—Prior encumbrance not affected.*—Where land is sold under the provisions of section 10 of the Madras Abkari Act, 1864, for arrears due by an abkari renter, the purchaser at the sale does not take the land free of all encumbrances as in the case of a sale for arrears of land revenue under the provisions of the Revenue Recovery Act (Madras Act II of 1864). RAMACHANDRA *v.* PITCHAIKANNI
[I. L. R., 7 Mad., 434

——— s. 17.
*See* s. 23 . . I. L. R., 5 Mad., 137

——— s. 21.
*See* s. 32 . . I. L. R., 7 Mad., 185

1. ——— *Licensed vendor.—Possession of arrack.*—The Magistrate convicted the accused under section 21 of Madras Act III of 1864, and directed the confiscation of certain arrack found in his possession. *Held* that the accused being a licensed vendor, the arrack was not liable to confiscation. ANONYMOUS . . . 5 Mad., Ap., 41

2. ——— and s. 22.—*Licensed vendors where license has expired.*—The provision in section 21 of the Madras Abkari Act limiting the liability of licensed vendors whose license has expired to the case in which they are found in possession of liquor kept for the purpose of sale must be read as an exception to the general provision of section 22. QUEEN *v.* RAMAYYA . . . I. L. R., 5 Mad., 131

1. ——— s. 22.—*Conveyance of liquor without valid permits.—Permits made out in names of third parties.*—Upon a conviction under section 22 of (Madras) Act III of 1864, for conveying liquor without valid permits, it appearing that the defendants produced permits by the talook abkari renter, covering the amount of liquor which was being conveyed, but made out in the names of third parties who were not present when the liquor was seized, but on whose behalf the liquor was at the time of seizure being conveyed,—*Held* that the permits were valid, and the conviction was bad. ANONYMOUS
[5 Mad., Ap., 29

**MADRAS ABKARI ACT, III OF 1864, s. 22—*continued.***

2. ——— *Possession of toddy by servants.*—The servants of an abkari renter of certain villages were convicted under section 22 of Act III of 1864 (Madras) for conveying three measures of toddy without a permit from one of the said villages to the shop of the renter. *Held* that the conviction was illegal. QUEEN *v.* PATTACHI [I. L. R., 7 Mad., 161

3. ——— and V of 1879, s. 23.—*Confiscation of boat used for carrying liquor without permit.*—Neither under the provisions of the Madras Abkari Act nor under the provisions of the Abkari Amendment Act, 1879, is an order by a Magistrate confiscating a boat used for carrying liquor without a valid permit, legal. The Collector alone can confiscate. QUEEN *v.* PERIANNAN. QUEEN *v.* NARAINA [I. L. R., 4 Mad., 241

——— ss. 23, 26, and s. 17.—*Confiscation of animals.*—Although a Magistrate may not confiscate animals under section 23 (*a*) of the Madras Abkari Act, yet the proceeds of whatever has been confiscated by the Collector under section 17, including animals, would be available for distribution in the manner prescribed in section 26 (*b*). QUEEN *v.* SAKIYA . . . I. L. R., 5 Mad., 137

——— s. 25, and V of 1879, s. 26 (b).—*Not producing license.*—The offence, under Madras Act III of 1864, section 25, of not producing, when called upon by the Police, a liquor license, is not one for which a Magistrate may proceed under section 26 (*b*) of Madras Act V of 1879. QUEEN *v.* VASANTAPPA . . . . I. L. R., 4 Mad., 231

——— *Police officer.—Village policeman.—Mohatad.*—The term "police officer" used in section 26 of the Abkari Act (Madras Act III of 1863) includes a mohatad or village policeman. QUEEN-EMPRESS *v.* SESHAYA . I. L. R., 9 Mad., 97

——— s. 32.—*Non-payment of penalty.*—Where it appears that after distress and sale a penalty imposed under section 21 of the Madras Abkari Act, 1864, cannot be recovered, and the penalty is not paid, the Court may commit the offender to the civil jail under section 32 of the Act. QUEEN *v.* CHAKRASAHU . . . . I. L. R., 7 Mad., 185

**MADRAS ACT—1858—I.**

——— *Labouring classes.—Forced labour.*—Persons who habitually engage in manual labour, although they may at the same time be employers of labour, are included in the term "labouring classes" used in section 2 of Act I of 1858 (Madras). QUEEN *v.* MUTTU REDDI . I. L. R., 6 Mad., 199

——— **1859—XXIV.**

*See* MADRAS POLICE ACT, 1859.

——— **1860—XXVIII.**

*See* MADRAS BOUNDARY ACT, 1860.

**MADRAS ACT—1860—XXVIII, s. 25.**

*See* COURT FEES ACT, SCH. II, ART. 17 CL. 1 . . I. L. R., 4 Mad., 204

——— **1863—I.**

*See* CONTEMPT OF COURT—PENAL CODE, s. 174 . . 4 Mad., Ap., 51, 52

——— **1863—IV.**

*See* MUNSIF, JURISDICTION OF— [2 Mad., 82
3 Mad., 339
4 Mad., 149

——— **1864—II.**

*See* LANDLORD AND TENANT—MIRASIDARS . . I. L. R., 1 Mad., 205

*See* MADRAS ABKARI ACT, III OF 1864, s. 10 . . I. L. R., 7 Mad., 434

*See* MADRAS REVENUE RECOVERY ACT, 1864.

——— **1864—III.**

*See* MADRAS ABKARI ACT.

——— **1865—III.**

*See* MAGISTRATE, JURISDICTION OF—SPECIAL ACTS—MADRAS ACT III OF 1865. [I. L. R., 1 Mad., 223
I. L. R., 2 Mad., 161
4 Mad., Ap., 54, 64
7 Mad., Ap., 6

——— **1865—V.**

*See* FINE . . 3 Mad., Ap., 9

——— **1865—VII (Water Cess Act).**

*See* MADRAS RENT RECOVERY ACT, 1865 [I. L. R., 7 Mad., 182

——— **1865—VIII.**

*See* MADRAS RENT RECOVERY ACT, 1865.

*See* REGISTRATION ACT, 1877, s. 17. [7 Mad., 234

——— **1865—X.**

*See* RIGHT OF SUIT—SUITS AGAINST MUNICIPAL OFFICERS . . 3 Mad., 370

——— s. 108.—*Slaughter-house, Using place as.*—Slaughtering a sheep in one's own premises for one's own private use is not an offence under section 108 of Madras Act X of 1865. ANONYMOUS [6 Mad., Ap., 18

——— s. 114.—*Continuing of offensive trade in premises already used.*—The continuing of offensive trades in premises already used is not an offence under section 114 of Madras Act X of 1865. The section only applies to the fresh dedication of premises to certain offensive trades. ANONYMOUS [5 Mad., Ap., 16

## MADRAS ACT—1866—I.

*See* CANTONMENT ACT (MADRAS ACT I OF 1866) . . 7 Mad., Ap., 15
[I. L. R., 8 Mad., 428

*See* CANTONMENT MAGISTRATE.
[I. L. R., 8 Mad., 350

*See* HIGH COURT, JURISDICTION OF—HIGH COURT, MADRAS—CRIMINAL.
[3 Mad., 277

——— 1866—IV.

*See* RIGHT OF SUIT—OFFICE OR EMOLUMENT . . I. L. R., 8 Mad., 249

——— 1867—IX.

*See* MADRAS MUNICIPAL ACT, 1867.

——— 1869—III.

*See* CONTEMPT OF COURT.
[5 Mad., Ap., 28
6 Mad., Ap., 44
7 Mad., Ap., 10, 11
I. L. R., 5 Mad., 377
I. L. R., 7 Mad., 197

——— 1871—III.

*See* MADRAS TOWNS IMPROVEMENT ACT, 1871.

——— 1871—IV.

*See* MADRAS LOCAL FUNDS ACT, 1871.
[I. L. R., 6 Mad., 37

——— 1873—III.

*See* MADRAS CIVIL COURTS ACT, 1873.

——— 1878—V.

*See* MADRAS MUNICIPAL ACT, 1878.

——— 1879—V.

*See* MADRAS ABKARI ACT, SS. 22 AND 25.

——— 1882—I.

*See* SALT, ACTS AND REGULATIONS RELATING TO—MADRAS.

*See* MADRAS FOREST ACT, 1882.

——— s. 10.

*See* VALUATION OF SUIT—APPEALS.
[I. L. R., 8 Mad., 22

——— 1884—I.

*See* MADRAS MUNICIPAL ACT, 1878, SS. 103, 105 . I. L. R., 8 Mad., 428

——— 1884—IV.

*See* MADRAS DISTRICT MUNICIPALITIES ACT, 1884.

——— 1885—I.

*See* MADRAS POLICE ACT, 1859, s. 48.
[I. L. R., 9 Mad., 167

## MADRAS BOAT RULES.

——— *Act IV of 1842.—Act IX of 1846.—Jurisdiction of Magistrates.—Liability of owner under rule 7.—Burden of proof.*—Under Act IX of 1846, the Madras Government is authorised to make in respect of ports in the presidency such regulations for the management of boats and such other matters as are provided for by Act IV of 1842 in respect of the Madras roads, being similar in principle to the provisions of the said Act, but varying in detail as local circumstances may require. Act IV of 1842, section 24, empowers a Justice of the Peace of the town of Madras to hear and determine all pecuniary forfeiture and penalties had or incurred under or against that Act. *Held* that it was competent to the Government of Madras to provide that cases cognisable under the rules passed in accordance with Act IX of 1846 should be heard and determined by Magistrates not being Justices of the Peace. Under rule 7 of the amended rules for the better management of boats, &c., plying for hire at the out-ports of the Madras Presidency, dated 1st October 1867, the owner of a boat is liable to fine on proof of his allowing his boat to ply without the requisite complement of men. *Held* that, where it was proved that a boat was plying without its proper crew, the absence of proof by the prosecutor that the owner was aware of the fact was no bar to his conviction. IN RE ROUTHAKONNI . I. L. R., 9 Mad., 431

## MADRAS BOUNDARY ACT (XXVIII of 1860).

*See* ACT XXVIII OF 1860.
[I. L. R., 1 Mad., 192
I. L. R., 7 Mad., 280

1. ——— s. 25.—*Appeal.—Limitation.—Special extension of time for appeal.*—Under section 25 of the Boundary Act (Madras Act XXVIII of (1860), the decision against which an appeal is allowed in the form of a regular suit is the original decision of the settlement officer, and not that of his superior passed on revision; and unless time is extended by the Governor in Council, the appeal must be brought within two calendar months from the date of the original decision. The provisions of the exception to section 5 of the Limitation Act, 1871, do not apply. THIR SING *v.* VENKATARAMIER
[I. L. R., 3 Mad., 92

2. ——— *Limitation.—Procedure.*—Under section 25 of Act XXVIII of 1860 (Madras Boundary Act), which limits the time within which a suit may be brought to set aside the decision of a settlement officer to two months from the date of the award, time will not begin to run until the date on which the decision is communicated to the parties. As the settlement officer is required to take evidence before coming to a decision under section 25, a decision based upon the report of a subordinate vitiates the whole proceedings and is not binding on the parties. ANNAMALAI CHETTI *v.* CLOETE
[I L R., 6 Mad., 189

## MADRAS CIVIL COURTS ACT, 1873.

*See* MUNSIF, JURISDICTION OF— [I. L. R., 9 Mad., 208

*See* VALUATION OF SUIT—SUITS. [I. L. R., 4 Mad., 339

——— s. 12.

*See* EXECUTION OF DECREE—TRANSFER OF DECREE FOR EXECUTION, &c. [I. L. R., 7 Mad., 397

*See* VALUATION OF SUIT—SUITS. [I. L. R., 5 Mad., 284 I. L. R., 8 Mad., 235, 384

——— s. 13.

*See* VALUATION OF SUIT—APPEALS. [7 Mad., 356

*See* VALUATION OF SUIT—SUITS. [I. L. R., 4 Mad., 314

——— s. 14.

*See* VALUATION OF SUIT—SUITS. [I. L. R., 5 Mad., 284

## MADRAS DISTRICT MUNICIPALITIES ACT.

——— *Procedure to compel payment of tax.—Distress.*—Under section 103 of Act IV of 1884 (Madras), a prosecution for default of payment of tax cannot be instituted unless the tax cannot be recovered by distress and sale of moveable property of the defaulter as provided in that section. QUEEN-EMPRESS *v.* O'SHAUGHNESSY . I. L. R., 9 Mad., 429

## MADRAS FOREST ACT.

——— ss. 2, 43.—*Rules 10, 13, 23.—Logs permanently fastened to a building cease to be timber.*—The accused were convicted of removing "timber" vested in the Forest Department, and the convicting Magistrate ordered it to be confiscated. *Held* that, having been already permanently fastened to a building, it had ceased to be timber within the meaning of section 2 of the Forest Act, and the order for confiscation was illegal. QUEEN-EMPRESS *v.* KETHIGADU [I. L. R., 9 Mad., 373

——— s. 10.

*See* VALUATION OF SUIT—APPEALS. [I. L. R., 8 Mad., 22

## MADRAS LOCAL FUNDS ACT (IV of 1871).

——— *Tolls where leviable.*—Under the Local Funds Act (Madras Act IV of 1871) tolls are only leviable at toll-bars, and tolls are not leviable on carts which enter a circle by a public road on which there is no toll-bar. *Quære,*—Whether toll would not be leviable on a cart approaching a toll-bar, and, to evade payment, making a detour otherwise than by a road available to the public. GOVINDARAJULU *v.* LAKSHUMAN . . . I. L. R., 6 Mad., 37

## MADRAS MUNICIPAL ACT.

——— IX of 1867, s. 142.—*President of Municipality, Discretion of, to grant licenses.*—The President of the Municipality has a discretion to grant or withhold a license under Act IX of 1867, section 142. His exercise of that discretion does not render him liable to an action. MOONEE UMMAH *v.* MUNICIPAL COMMISSIONERS FOR TOWN OF MADRAS [8 Mad., 151

——— V of 1878, ss. 103, 105, sch. A, class I.—*Act I of 1884, sch. A, class I.—Professional tax.—Half-yearly payments.*—Although the tax levied on professions under section 103 of the City of Madras Municipal Act, 1878, is described as a yearly tax, a half-yearly liability is incurred in respect thereof by the tax-payer. *W.* having been assessed under class I, schedule A of Act V of 1878, Madras, to profession tax at the yearly rate of R150, paid a moiety thereof for the first half of the year 1884 as provided in section 105 of the said Act. When the tax for the second half-year became due, Madras Act I of 1884 had come into force, and *W.* was assessed for the second half of the year under class I of schedule A of that Act at R125, being a moiety of the yearly tax on the same class. *Held* that the assessment was legal. WILSON *v.* PRESIDENT, MUNICIPAL COMMISSION, MADRAS . . I. L. R., 8 Mad., 429

1. ——— s. 119.—*Place of public worship.—Feeding Brahmins.*—A building used in whole or in part for purposes other than those of public worship is not exempt from taxation under section 119 of the City of Madras Municipal Act, 1878. The feeding of Brahmins is not an act of public worship within the meaning of that section. THAMBU CHETTI SUBRAYA CHETTI *v.* ARUNDEL [I. L. R., 6 Mad., 287

2. ——— and ss. 120, 123.—*Waste land.—Tax.*—Section 123 of the City of Madras Municipal Act, 1878, which defines the annual value of a house, building, or land, for the purpose of taxation under the Act, has no reference to the alternative given to the President by section 120 to levy a fixed annual tax (not exceeding R4 per ground) on lands unappropriated to any building, or occupied by native huts with their appurtenances. AHMED UNNISSA BEGAM SAHIBA *v.* ARUNDEL . I. L. R., 7 Mad., 63

——— s. 192, Case referred under.—*Right of Municipal Commissioners to levy water tax.—Condition precedent.—Independent power.—Construction of statutes.*—The Madras Municipal Act is not a "private" Act. When a public body is entrusted by the Legislature with the duty of making public improvements, and powers are entrusted to it for such purpose, those powers will not be subject to a restrictive construction though they interfere with private rights. A statute is not to be construed like a contract. The power to impose a tax is not contractual and needs no correlative right. An equitable construction is not permissible in a taxing statute where it is possible to adhere to the words of the statute. *B.* resided within the City of Madras and occupied premises within a division or district of the city in which no water had been introduced by

**MADRAS MUNICIPAL ACT, s. 192, Case referred under—*continued.***

the Municipal Commmissioners. The Commissioners levied a water tax on *B.* in respect of his premises. *B.* appealed under section 189 to the President and two Commissioners, who decided that he was liable to pay the tax. On a case stated to the High Court it was held by INNES, *J.*, and MUTTUSAMI AYYAR, *J.* (KERNAN, *J.*, dissenting), that upon the true construction of the Act (V of 1878) the right of the Commissioners to levy the water tax was independent of the duty imposed upon the Commissioners to supply water. BRANSON *v.* MUNICIPAL COMMISSIONERS, MADRAS . . . **I. L. R., 2 Mad., 362**

——— **s. 433.**—*Water rate.—Liability of Commissioners to a suit for compensation for not supplying water and collecting rate.*—By the provisions of the City of Madras Municipal Act, 1878, if a water rate is levied by the Commissioners, they are bound to supply water for house service to every rate-payer who desires and provides the necessary works to connect his premises with the main, which ought to be within 150 yards of his premises, and the rate-payers are bound to pay water rate whether or not they avail themselves of the privilege of house service. If the Commissioners do not perform this duty, the rate-payer has a remedy by action and may recover compensation, either under the provisions of section 433 (which provides that a person aggrieved by the failure of the Commissioners to do their duty may bring his action, and the Court may either direct the duty to be performed "or make such order as to the Court may seem fit") or under those of the Statute of Westminster. *Semble,*—If the Court does not order the execution of the works under section 433, the only other order it could make would be an order for reasonable compensation. The Legislature intended the water rate to be a payment for a benefit conferred, and the tax should not be levied till water can be supplied. If in part of the city the Commissioners are able to supply water and desire to obtain at once a return for their works, they should apply to the Government to exempt the rest of the city from the operation of the Act. MUNICIPAL COMMISSIONERS, MADRAS, *v.* BRANSON **[I. L. R., 3 Mad., 201**

**MADRAS POLICE ACT, XXIV OF 1859, s. 10.**

*See* s. 44 . . . **6 Mad., Ap., 31**

——— **s. 44.**

*See* REVISION — CRIMINAL CASES — EVIDENCE AND WITNESSES. **[6 Mad., Ap., 45**

1. ——— **and s. 10.**—*Sentry going to sleep on duty.—Ceasing to perform duties.*—Accused, a police constable, was convicted under section 44 of Act XXIV of 1859 of ceasing to perform the duties of his office. The evidence showed that he had gone to sleep while posted as a sentry over the jail. *Held* that the accused was not guilty of the particular species of offence of which he was convicted; he was, however, guilty *primâ facie* under

**MADRAS POLICE ACT, XXIV OF 1859, s. 44 and s. 10—*continued.***

the section. Going to sleep while on guard is an offence punishable under section 10. ANONYMOUS **[6 Mad., Ap., 31**

2. ——— *Sentry going to sleep on duty.*—Accused, a police constable, was on duty at the outer gate of a central jail. Quitting his post beside the gateway and leaving the gate open, he went to sleep outside. For this violation of duty he was convicted and sentenced under section 44 of Act XXIV of 1859. *Held* that the conviction was legal. ANONYMOUS . . . . **7 Mad., Ap., 7**

3. ——— **and ss. 8, 10, 11.**—*Village kavalgars.*—Section 44 of Act XXIV of 1859 applies only to police officers enrolled and appointed in the manner prescribed in sections 8, 10, and 11 of the Act. Village kavalgars not being so appointed, are not punishable under section 44. ANONYMOUS **[7 Mad., Ap., 4**

——— **s. 48.**

*See* JURISDICTION OF CRIMINAL COURT—EUROPEAN BRITISH SUBJECTS. **[5 Mad., Ap., 25**

*See* SENTENCE—IMPRISONMENT. **[5 Mad., Ap., 35**

*See* SENTENCE — IMPRISONMENT — IMPRISONMENT AND FINE. **[7 Mad., Ap., 22**
**3 Mad., Ap., 9**

1. ——— *Spreading fishing-nets by the side of public thoroughfare.*—To spread fishing-nets by the side of a thoroughfare in a town is not an offence punishable under clause 3, section 48 of Act XXIV of 1859. QUEEN *v.* KHADER MOIDIN **[I. L. R., 4 Mad., 235**

2. ——— *Power of Local Government to define "town."*—There is no Act of Legislature which empowers either the District Magistrate or the Local Government to define a "town" for the purpose of section 48, Act XXIV of 1859. ANONYMOUS . . . . . **6 Mad., Ap., 34**

3. ——— *Reckless riding in streets —Riding untrained bullock.*—Accused was convicted under clause 1, section 48 of the Police Act, XXIV of 1859. The facts found were that he rode an untrained bullock, which he could not control, in the public street. *Held* that the evidence warranted the conviction. ANONYMOUS . . **7 Mad., Ap., 10**

4. ——— *Madras Act I of 1885.—Dung-heap kept in a town.*—By clause 5 of section 48 of Act XXIV of 1859 (Madras), as amended by Act I of 1885 (Madras), any person who, within the limits of a town, "throws or lays down any dirt, filth, rubbish, or any stones or building materials; or who constructs a cow-shed or stable without the bounds of any thoroughfare, or who causes any offensive matter to run from any dung-heap into the street" is punishable. *A.* was convicted and fined

**MADRAS POLICE ACT, XXIV OF 1859, s. 48**—*continued.*

for having kept a manure-heap in a town, but not in a street. *Held* that the conviction was bad. QUEEN-EMPRESS *v.* APPATHORAY . **I. L. R., 9 Mad., 167**

——— **s. 50.**

*See* MAGISTRATE, JURISDICTION OF—SPECIAL ACTS—MADRAS ACT III OF 1865. **[4 Mad., Ap., 54**

**MADRAS REGULATION—1802—II.**

*See* CASES UNDER LIMITATION—STATUTES OF LIMITATION—MADRAS REGULATION II OF 1802.

*See* LIMITATION ACT, 1877, ART. 149. **[I. L. R., 9 Mad., 175**

——— **s. 17.**

*See* ENGLISH LAW—EQUITABLE MORTGAGE . . **9 Moore's I. A., 303**

——— **III, s. 6.**

*See* OATH . . . **4 Mad., Ap., 3**

*See* OATHS ACT, 1873, s. 11. **[I. L. R., 2 Mad., 356**

——— **XVII, s. 3.**

*See* REGISTRATION—MADRAS REGULATION XVII OF 1802 . . **2 Mad., 108**

——— **XXV.**

*See* COLLECTOR . . **3 Mad., 35**

*See* GRANT—CONSTRUCTION OF GRANTS. **[I. L. R., 9 Mad., 307**
**I. L. R., 2 Mad., 234**

*See* JURISDICTION OF CIVIL COURT—REGISTRATION OF TENURES . **3 Mad., 35**

*See* MADRAS RENT RECOVERY ACT, 1865. **[I. L. R., 8 Mad., 351**

*See* TAX . . **I. L. R., 9 Mad., 14**

1. ——— **XXV.**—*Mad. Reg. XXXI of 1802, Rights of zemindars under.—Proprietary possession.—Construction of statute.—Preamble.*—The affirmative words of Madras Regulation XXV of 1802, section 2, the preamble thereto forming no part of the enactment, did not either give to or take away from the former owners of lands, not permanently assessed, any rights which they then had. It merely vested in all zemindars an hereditary right at a fixed revenue upon the conclusion of the permanent assessment with them. The words "proprietors of lands" as used both in the Bengal Code of 1793 and in the Madras Code of 1802, have a technical signification. They refer to "zemindars, independent talookdars, and others, who pay the revenue assessed upon their estates immediately to Government." So also the words "proprietary possession," in the recital of Regulation XXV of 1802, mean the possession of a person who is a proprietor according to the technical meaning of the term. According to the true construction of Madras Regulations XXV and XXXI of 1802, the Legislature recognises the right of private property, and does not assert a right on the part of Government to deprive or dispossess zemindars in their lifetime, or their heirs after their deaths, independently of any considerations connected with the realisation of the public revenue. It provides for the protection of the revenue from invalid lakhiraj grants, and for the mode of trying the validity of the titles of persons claiming to hold their lands exempt from the payment of revenue. OOLAGAPPA CHETTY *v.* ARBUTHNOT. COLLECTOR OF TRICHINOPOLY *v.* LEKHAMANI. PEDDA AMANI *v.* ZEMINDAR OF MARUNGAPORE . **14 B. L. R., 115 : 21 W. R., 358**
**[L. R., 1 I. A., 268, 282**

2. ——— *Alienation by zemindar.—Limitation.*—In a suit brought by a zemindar to recover either assessment at the rate of R5,000 per annum, or a pergunnah, part of the plaintiff's zemindari, the defendant pleaded that he had held the pergunnah as his own before and ever since the Permanent Settlement, and that the claim was barred by both Regulation XXV of 1802 and Act XIV of 1859. The lower Court overruled both pleas: the first, because it held that, under Regulation XXV of 1802, the zemindar's title could not be questioned; the second, because it considered that the decision in a former suit (that the *laches* of the zemindar could not prejudice his successor) prevented the application of the statute, on the ground of subsequent hostile possession, and that the plaintiff had had twelve years from the time he came into possession in which to bring the suit. *Held*, first, there was nothing in the Regulations relating to the Permanent Settlement showing an intention to affect rights of property in existence at the period of their being passed; secondly, that the decision in the previous suit could not be followed in the present case in which the claimant was the grandson of him against whom, as to property of a normal character, the statute would have begun to run. KRISHNA DEVU GARU *v.* RAMACHANDRA DEVU MAHARAJULU GARU **[3 Mad., 153**

3. ——— *Settlement.—Mistake in settlement papers.—Grant by zemindar before Permanent Settlement.*—Tenants are not concluded by a mistake in settlement papers, nor does Regulation XXV of 1802 provide for forfeiture of rights by parties who by carelessness or accident allow their land to be misdescribed in settlement proceedings. It was doubted whether grants made by a zemindar before the Permanent Settlement were, or were not, binding on his successors,—their Lordships' minds inclining strongly to the affirmative side of the alternative, but as the question was not raised in the Courts below, it was not considered to be open to the appellants in the appeal to the Privy Council. VYRICHERLA RAZ BAHADOOR *v.* NADMINTI BAGAVAT SASTRI **[25 W. R., P. C., 3**

4. ——— *Alienation of proprietary rights.*—Regulation XXV of 1802 strictly restrains the alienations of proprietary rights except in

**MADRAS REGULATION—1802—XXV—** *continued.*

manner therein provided, and invalidates a disposal or transfer of such rights as against the Government and the heirs and successors of the proprietor making the disposal or transfer. *Semble,*—Such alienation would be valid against the proprietor himself. A permanent lease is as much within the operation of Regulations XXV and XXX of 1802 as an absolute transfer by gift or sale. SUBBARAYULU NAYAK *v.* RAMA REDDI . . . . . **1 Mad., 141**

1. ——— s. 8.—*Perpetual lease.—Transfer.*—A perpetual lease of a distinct portion of a zemindari is not a transfer within the meaning of section 8, Regulation XXV of 1802, Madras Code. VENCATASWARA NAICKER *v.* ALAGOOMOOTTOO SERVAGAREN . **4 W. R., P. C., 73 : 8 Moore's I. A., 327**

2. ——— *Alienation by zemindar.—Limitation.*—Where a zemindar alienated a part of the zemindari, and the terms of the Regulation XXV of 1802, section 8, were complied with,—*Held* (HOLLOWAY, *J., dissentiente*) that the alienation was invalid against the plaintiff, the grandson of the zemindar. *Held* also by the whole Court that the defendant and his father having held the land for a lengthened period on a claim of right, the plaintiff's suit was barred by the Statute of Limitations. ALI SAIB *v.* SANYASIRAZ PEDDABALIYARA SIMHULU **[3 Mad., 5**

*See* SETA RAMA KRISTNA RAYUDAPPA RANGA RAO *v.* JAGUNTI SITAYAMMA GARU **[3 Mad., 67**

3. ——— *Right of grantee of proprietor against purchaser from his successor.*—A zemindar granted part of his zemindari absolutely and died. His grantee was then dispossessed by a purchaser from his successor. *Held* that, as the conditions specified in Regulation XXV of 1802, section 8, had not been observed by the former zemindar, the grant was voidable on the determination of his interest, and that consequently the disposition was legal. PITCHAKUTTICHETTI *v.* PONNAMMA NATCHIYAR . . . . . **1 Mad., 148**

4. ——— *Alienation not registered.—Permanent lease.*—A permanent lease of a village in a muttah by the muttahdar (plaintiff's father) was held to be not invalidated by section 8 of Regulation XXV of 1802, although the lease had not been registered as required by that section. *Subarayalu Nayak* v. *Rama Reddi, 1 Mad., 141,* overruled. KONDAPPA NAIK *v.* ANNAMALAY CHETTY . **4 Mad., 396**

5. ——— *Permanent lease by zemindar.*—A perpetual or permanent lease at a low fixed rent, made by a zemindar who obtained the zemindari by self-acquisition, was binding upon the zemindar's successors, although the instrument was not registered under Regulation XXV of 1802, section 8. MUTTU VIRAN CHETTY *v.* KATTAMA NATCHIYAR **[4 Mad., 463**

——— s. 11.—*Srotriyamdar.—Suit to dismiss karnam.*—Under Regulation XXV of 1802, a srotriyamdar cannot sue for the dismissal of the karnam of his village. THURGA RAMACHANDRA RAU *v.* APPAYYA. . . . **I. L. R., 7 Mad., 128**

**MADRAS REGULATION—1802—XXV,** s. 11—*continued.*

——— **1802—XXVII.**

*See* RESUMPTION—EFFECT OF RESUMPTION . . . **3 Mad., 59**

——— **XXVIII.**

*See* SMALL CAUSE COURT, MOFUSSIL—JURISDICTION—RENT . **2 Mad., 22**

——— **XXIX.**—*Karnam.—Incapacity of next heir.—Minority.—Appointment by landholder of successor without proof before Zillah Court of incapacity of heir.*—A karnam in a zemindari village having died leaving a minor son, the landholder appointed the brother of the late karnam to the office. In a suit brought by the son, after attaining majority, to establish his right to the office and to recover its emoluments,—*Held* that, under the provisions of Regulation XXIX of 1802, he was not entitled to recover. Section 7 of the Regulation provides that in filling the office of karnam, the heirs of the preceding karnam shall be chosen by the landholders, except in cases of incapacity, on proof of which before the Judge of the zillah the landholders shall be free to exercise their discretion in the nomination of persons to fill vacancies. *Held* that, where the incapacity arose from minority about which there was no dispute, an appointment by a landholder, made without proof before the Court of the incapacity of the heir, was valid. VENKATANARAYANA *v.* SUBBARAYUDU . . . **I. L. R., 9 Mad., 214**

1. ——— s. 7.—*"Heirs," Meaning of.*—The word "heirs" in section 7 of Madras Regulation XXIX of 1802 means "persons who, in the event of death, would inherit from the preceding incumbent." ARUMUGAM PILLAI *v.* VIJAYAMMAL **[I. L. R., 4 Mad., 338**

2. ——— *"Heirs of preceding karnam."*—The words "the heirs of the preceding karnam," in section 7 of Regulation XXIX of 1802, mean his next of kin according to the order of succession of several grades of legal heirs, and not heirs in the order of succession to undivided divisible ancestral property. KRISHNAMMA *v.* PAPA **[4 Mad., 234**

3. ——— The office of karnam in a zemindari village having been held by three brothers jointly in hereditary rights, the zemindar, on the death of one brother, did not fill up the vacancy, considering that the work could be well conducted by the two survivors. On the death of the survivors their sons succeeded to the office. The zemindar subsequently desiring to re-appoint a third karnam, nominated an outsider to the joint tenancy of the office. *Held* that, as there were heirs of the last holders in existence, the appointment was invalid. VENKAYYA *v.* SUBBARAYUDU **[I. L. R., 9 Mad., 283**

**MADRAS REGULATION—1802—XXX.**

*See* LANDLORD AND TENANT—LIABILITY FOR RENT . . . 1 Mad., 59

*See* LEASE—CONSTRUCTION. [6 Mad., 164, 175

*See* MADRAS REGULATION XXV OF 1802. [1 Mad., 141

**——— 1802—XXXI.**

*See* MADRAS REGULATION XXV OF 1802. [14 B. L. R., 115

**——— 1802—XXXIV.**

*See* HINDU LAW—USURY . 6 Mad., 400 [1 Mad., 5

1. ——— *Iladarwara mortgage in South Canara.—Lease.*—Madras Regulation XXXIV of 1802, which applies to usufructuary mortgages executed before the passing of Act XXVIII of 1855, does not apply in the case of an iladarwara mortgage in South Canara, which, securing to the mortgagee the use and occupation of the land for a long term, amounts to a lease of the property for the term agreed upon. PERLATHAIL SUBBA RAU *v.* MANKUDE NARAYANA . . I. L. R., 4 Mad., 113

2. ——— *Mortgages where redemption is allowed at the end of any year.*—An instrument of mortgage whereby land is made over to the mortgagee for cultivation, and a grain rent estimated at a certain quantity is to be retained yearly in lieu of interest, with a condition that on the expiry of any year the mortgage might be redeemed and possession recovered on payment of the principal, falls within the purview of Regulation XXXIV of 1802. *Perlathail Subba Rau* v. *Mankude Narayana, I. L. R., 4 Mad., 113,* distinguished. TIPPAYYA HOLLA *v.* VENKATA . . . I. L. R., 6 Mad., 74

3. ——— *Mortgage by way of conditional sale.—Mahomedan mortgagor.*—In 1832 a Mahomedan mortgaged certain land with possession, on condition that, if the money lent was not repaid within eight years, the land should be enjoyed by the mortgagee after that period as if conveyed by sale. In 1883 a suit was brought to redeem. *Held* that the title of the mortgagee became absolute by virtue of the terms of the contract on default of payment within the time specified. The obligation cast by Regulation XXXIV of 1802 upon a mortgagee to account for profits does not prevent a mortgage by way of conditional sale from becoming, after the period for redemption has elapsed, an absolute sale where no account has been rendered by the mortgagee. The rule laid down in *Pattabhiramier's case, 13 Moore's I. A., 560,* applies to a mortgage executed by a Mahomedan. MALLIKARJUNUDU *v.* MALLIKARJUNUDU . . I. L. R., 8 Mad., 185

**——— 1803—IX, s. 55.**

*See* JURISDICTION OF CIVIL COURT—REVENUE . . I. L. R., 1 Mad., 89

**——— 1804—V.**

*See* DISTRICT JUDGE, JURISDICTION OF— [I. L. R., 6 Mad., 187

**MADRAS REGULATION—1804—V—*continued.***

*See* GUARDIAN—APPOINTMENT, &c. [I. L. R., 6 Mad., 187

*See* LIMITATION ACT, 1877, s. 10. [I. L. R., 5 Mad., 91

*See* SALE IN EXECUTION OF DECREE—DECREES AGAINST REPRESENTATIVES. [I. L. R., 5 Bom., 14

**——— 1805—I.**

*See* SENTENCE—IMPRISONMENT—IMPRISONMENT IN DEFAULT OF FINE. [I. L. R., 4 Mad., 335; & 335, note

**——— s. 18.**

*See* SALT, ACTS AND REGULATIONS RELATING TO—, MADRAS. [I. L. R., 3 Mad., 17 I. L. R., 1 Mad., 278

**——— 1808—VII.**

*See* LIMITATION ACT, 1877, s. 10. [I. L. R., 5 Mad., 91

**——— 1816—IV.**

*See* CONTEMPT OF COURT—PENAL CODE, s. 174 . . I. L. R., 6 Mad., 249

*See* DISTRICT JUDGE, JURISDICTION OF— [I. L. R., 2 Mad., 336 I. L. R., 5 Mad., 222

*See* EXECUTION OF DECREE—MODE OF EXECUTION—GENERALLY, &c. [I. L. R., 9 Mad., 378

*See* LIMITATION ACT, 1877 s. 6. [I. L. R., 9 Mad., 118

*See* MUNSIF, JURISDICTION OF— [I. L. R., 7 Mad., 220 I. L. R., 8 Mad., 500

*See* SMALL CAUSE COURT, MOFUSSIL—JURISDICTION—GENERALLY. [5 Mad., 45

*See* SUBORDINATE JUDGE. [I. L. R., 5 Mad., 222

*See* TRANSFER OF CIVIL CASE—GENERAL CASES . . I. L. R., 8 Mad., 500

*See* VALUATION OF SUIT—SUITS. [6 Mad., 151

**——— 1816—V.—s. 17.**—*Vakeel's fees before village punchayats.*—Section 17 of Regulation V of 1816 has not been repealed by subsequent enactments. GOPALU *v.* VENKATADOSS [I. L. R., 7 Mad., 552

**——— 1816—VI, s. 8.**

*See* MAGISTRATE, JURISDICTION OF—COMMITMENT TO SESSIONS COURT. [7 Mad., 182

**——— s. 27.**

*See* OATH . . . 4 Mad., Ap., 3

## MADRAS REGULATION—1816—VII.

*See* PANCHAYAT . I. L. R., 8 Mad., 569

### 1816—XI.

*See* MAGISTRATE, JURISDICTION OF—SPECIAL ACTS—MADRAS REGULATION IV OF 1821 . I. L. R., 5 Mad., 268

### s. 10.

*See* MAGISTRATE, JURISDICTION OF—SPECIAL ACTS—MADRAS REGULATION XI OF 1816 . . 5 Mad., Ap., 33

*Mussulman, Status of.—Punishment in stocks.*—A Mussulman is not of the lower castes of the people punishable, under section 10 of Madras Regulation XI of 1816, by confinement in the village stocks. QUEEN *v.* NABI SAHEB. [I. L. R., 6 Mad., 247

### 1816—XII.

*See* COLLECTOR . . 4 Mad., Ap., 1 [I. L. R., 8 Mad., 569

*See* MADRAS REGULATION V OF 1822. [1 Mad., 230

*See* PANCHAYAT . I. L. R., 8 Mad., 569

### 1816—XIII.

*See* STAMP—MADRAS REGULATION XIII OF 1816. . I. L. R., 7 Mad., 440

### 1816—XIV.

*See* PLEADER—APPOINTMENT AND APPEARANCE . . 4 Mad., Ap., 43

*See* PLEADER—REMUNERATION. [1 Mad., 369

**1816—XV.**—*Procedure.—Pleading.—Allegation of division.*—According to Regulation XV of 1816 of the Madras Code, in a suit for possession of joint family property, in which the title of the plaintiff depended on the fact of a division having taken place in the family, a distinct averment of division must be made in the cause, and a direction given by the Court for the production of evidence in proof of such an averment. VIJYA RAGANADHA BODHA GOOROO SWAMY PEREIA WOODAI TAVER *v.* ANGA MOOTOO NATCHIAR [6 W. R., P. C., 50 3 Moore's I. A., 278

### 1817—VII.

*See* ACT XX OF 1863 . 5 Mad., 334 [7 Mad., 77

*See* ENDOWMENT . . 7 Mad., 306

*See* HINDU LAW—ENDOWMENT—SUCCESSION IN MANAGEMENT. [I. L. R., 7 Mad., 499

*See* JURISDICTION OF CIVIL COURT—ENDOWMENT, MANAGER OF— [7 Mad., 117

*See* JURISDICTION OF CRIMINAL COURT. [I. L. R., 1 Mad., 55

## MADRAS REGULATION—1818—VIII.

*See* APPEAL TO PRIVY COUNCIL—STAY OF EXECUTION PENDING APPEAL. [6 Moore's I. A., 309

### 1821—IV.

*See* MAGISTRATE, JURISDICTION OF—SPECIAL ACTS—MAD. REG. IV OF 1821. [I. L. R., 5 Mad., 268

### 1822—V.

*See* LANDLORD AND TENANT—LIABILITY FOR RENT . . . 1 Mad., 3

*See* RES JUDICATA—COMPETENT COURT—REVENUE COURTS . 2 Mad., 22, 475

*See* SMALL CAUSE COURT, MOFUSSIL—JURISDICTION—RENT. [2 Mad., 22, 475

**1822—V.**—*Mirasidar.*—Regulation V of 1822 is inapplicable to land held under a mirasidar or any ordinary proprietor. YANAMANDRAM VENKAYA *v.* SHILLAKURU VENKATA NARAINA REDDY . . . 1 Ind. Jur., O. S., 131

S. C. ENAMANDARAM VENKAYYA *v.* VENKATA NARAYANA REDDI . . . 1 Mad., 75

**s. 8.**—*Proprietor of permanently-settled estates.*—Regulation V of 1822, section 8, only applies to zemindars and other proprietors of estates permanently settled under the Regulations of 1802. NALLATAMBI PATTAR *v.* CHINNA DEYVANAGAYAM PILLAI . . . . . 1 Mad., 109

**s. 18.**—*Disputes regarding irrigation.—Mad. Reg. XII of 1816.*—Regulation V of 1822 does not apply to disputes respecting irrigation. The disputes mentioned in section 18 of Regulation V of 1822 are subjected to the procedure provided by Regulation XII of 1816. RAGAVENDRA RAU *v.* MAHOMED KANITARAGANAR . . 1 Mad., 230

### 1822—IX.

*See* COLLECTOR . . 2 Mad., 322

**s. 5.**—*Sale of land to recover fine imposed by Collector.—Title of purchaser.*—A sale of land under the provisions of section 5 of Regulation IX of 1822 does not convey to the purchaser a title free from prior incumbrances. RAMAN *v.* HASSAN . . . I. L. R., 9 Mad., 247

**ss. 29, 35.**—*Remedy confined to parties to suit.*—The remedies provided by section 35 of Regulation IV of 1816 against village munsifs are confined to persons who are parties to suits before such village munsifs. RAMAN *v.* PAKRICHI [I. L. R., 9 Mad., 385

### 1828—VII.

*See* COLLECTOR . . 2 Mad., 322 [I. L. R., 7 Mad., 420

### 1831—IV.

*See* ATTACHMENT—SUBJECTS OF ATTACHMENT—ANNUITY OR PENSION. [4 Mad., 277

**MADRAS REGULATION—1831—IV—*continued.***

*See* GRANT—CONSTRUCTION OF GRANTS. [12 W. R., P. C., 33

*See* INAM COMMISSIONER . 2 Mad., 341

——— 1831—VI.

*See* HEREDITARY OFFICES REGULATION, MAD. REG. VI OF 1831 . 5 Mad., 360

*See* JURISDICTION OF CIVIL COURT—OFFICES, RIGHT TO— [I. L. R., 6 Mad., 334

*See* RIGHT OF SUIT—OFFICE OR EMOLUMENT . . I. L. R., 8 Mad., 249

*See* SMALL CAUSE COURT, MOFUSSIL—JURISDICTION—DAMAGES. [5 Mad., 383

——— 1831—X.

*See* DISTRICT JUDGE, JURISDICTION OF— [I. L. R., 6 Mad., 187

*See* GUARDIAN—APPOINTMENT, &c. [I. L. R., 6 Mad., 187

——— 1832—XI.

*See* TREASURE TROVE . 7 Mad., 150

——— 1833—III.

*See* VALUATION OF SUIT—SUITS. [6 Mad., 151

**MADRAS RENT RECOVERY ACT, VIII OF 1865.**

*See* APPEAL—MADRAS ACTS. [4 Mad., 227, 251 I. L. R., 4 Mad., 167

*See* CASES UNDER JURISDICTION OF REVENUE COURT—MADRAS REGULATIONS AND ACTS.

*See* LEASE—CONSTRUCTION. [6 Mad., 164, 175

*See* REGISTRATION ACT, 1877, s. 17. [7 Mad., 234

*See* REVIEW—ORDERS SUBJECT TO REVIEW . . . . 4 Mad., 251

*See* STATUTES, CONSTRUCTION OF— [6 Mad., 122

1. ——— s. 1. — *Inamdar. — Mad. Reg. XXV of 1802.* — Section 1 of Madras Act VIII of 1865 does not confine the term "inamdar" to such inamdars as are registered. *Held*, therefore, that the purchaser of an inam village, who had not got his name registered as inamdar, was not thereby debarred from enforcing the provisions of the Act against a tenant for arrears of rent. *Valamarama* v. *Virappa, I. L. R., 5 Mad., 145*, observed upon. SUBBU *v.* VASANTHAPPAN . . I. L. R., 8 Mad., 351

2. ——— *Landholder.—Poligar of unsettled polliem.*—The definition of the word "landholders" in Madras Act VIII of 1865, section 1, includes the poligar of an unsettled polliem. Such a landholder is, therefore, entitled to sue under the Act to compel the acceptance of pottahs by his tenants. CHAUKI GOUNDEN *v.* VENKATARAMANIER [5 Mad., 208

3. ——— and s. 2.—*Inamdar.—Quit-rent.*—An inamdar entitled to receive a jodi or quit-rent from other inamdars may have recourse to the summary remedies provided by Act VIII of 1865 (Madras), for the recovery of the quit-rent. APPASAMI *v.* RAMA SUBBA . I. L. R., 7 Mad., 262

4. ——— *Landholder.—Distraint.*—*V.* leased certain fields to *S.* at a single rent. Of these fields some were held by *V.* under a ryotwari pottah, but the pottah for the rest stood in the names of *V.'s* vendors. *V.* distrained for arrears of rent under the provisions of the Rent Recovery Act. *Held* that *V.* was not a landholder within the definition in the said Act in respect of the latter fields, and, therefore, that the distraint was illegal. SUBBA *v.* VENKATA . . . . I. L. R., 8 Mad., 9

5. ——— and s. 3.—*Zemindar delegating powers to mortgagee.*—Where a zemindar executed a usufructuary mortgage-deed of part of his zemindari, and by the deed delegated all his powers under the Rent Act (Madras Act VIII of 1865) to the mortgagee,—*Held* that the mortgagee was entitled to enfore the acceptance of pottahs under the provisions of the Rent Act. GUNDA REDDI NARAYANA REDDI *v.* KRISTNA DOSS BALA MUKUNDA DOSS . . . . I. L. R., 5 Mad., 87

6. ——— and s. 79.—*Landholder.—"Farmer."—Assignee of landholder.—Mortgagee of landholder, Position of.*—A mortgagee of a "landholder," as defined in Madras Act VIII of 1865, section 1, may exercise the powers of landholder under the Act—(1) as a "farmer" if it is a condition of the mortgage that the mortgagee shall take possession of the estate in whole or in part and give credit or account for a sum certain to the proprietor on account of the collection; or (2) as an assignee of a landholder under section 79 if the powers conferred by the Act on landholders have been specially delegated to him by his mortgagor. A delegation of such powers should not be inferred from an instrument in the form of an ordinary mortgage. VELLAYAN CHETTI *v.* TIRUVAKONE [I. L. R., 5 Mad., 76

7. ——— *Landholder.—Assignee of pottah.*—A zemindar hypothecated certain villages comprised in his zemindari as security for a debt, at the same time leasing the said villages to the mortgagee at an annual rent, the amount of which was to be, as it fell due, credited in liquidation of the debt. *Held* that the plaintiff, who was the assignee of the hypothecation deed and the lease, was not a "landholder" within the meaning of Madras Act VIII of 1865. ZINULABDIN ROWTEN *v.* VIJIEN VIRAPATREN [I. L. R., 1 Mad., 49

## MADRAS RENT RECOVERY ACT, VIII OF 1865, s. 1—*continued.*

8. ——————— *Landholder.—Assignee.—Delegation of powers.*—The interest of *B.* in the farm of a jaghir, which he had obtained on lease from the jaghirdar, was sold in execution of a decree and purchased by *J.*, who assigned his interest to the plaintiff. In a suit under Act VIII of 1865 (Madras) by plaintiff to compel defendant to accept a pottah, defendant objected that plaintiff had no right to enforce acceptance of a pottah under the Act. *Held* by the Full Bench (TURNER, *C. J.*, MUTTUMSAMI AYYAR, HUTCHINS, and BRANDT, *JJ.* (KERNAN, *J.*, dissenting) that plaintiff was a landholder within the meaning of the Act and entitled to enforce acceptance of a pottah. *Zinulabdin Rowten* v. *Vijien Virapatren, I. L. R., 1 Mad., 49,* dissented from. GOUSE *v.* SUNDARA . . I. L. R., 8 Mad., 394

9. ——————— *Landholder.—Manager of estate and until debt is paid.—Increase of rent for garden cultivation and second crops.*—An instrument authorising a creditor to manage an estate, recover rent and pay certain disbursements, and retain possession until a certain debt amongst other debts to him was paid, does not create the creditor a landholder within the meaning of Act VIII of 1865. VAYTHENATHA SASTRIAL *v.* SAMI PANDITHER [I. L. R., 3 Mad., 116

——————— s. 2.—*Tenant.—Lessee of zemindar.—Limitation.*—In 1869 a village in the zemindari of *R.* was granted by the zemindar to *S.* at a favourable rent, in consideration of *S.* renouncing a claim to the zemindari. The village was not separately assessed and divided off from the zemindari. The rent having fallen into arrears, the village was sold in 1875 under the provisions of the Rent Recovery Act, and purchased at the sale by the agent of the Court of Wards on behalf of the defendants, minor sons of the deceased zemindar. In a suit brought by *S.* in 1883 to recover the village,—*Held* that the sale was binding on *S.*, and that the suit was barred by limitation. BASKARASAMI *v.* SIVASAMI. I. L. R., 8 Mad., 196

1. ——————— s. 3.—*Purchaser of zemindari village without separate assessment.—Landholder.*—A zemindar having mortgaged one of his zemindari villages to *V.*, a proportionate amount of the peshkush due by the zemindar was paid to the treasury by *V.* by agreement. Having sued the zemindar, and brought to sale and purchased the village at the Court sale, *V.* continued to pay the peshkush as before to the treasury, although the village was never separately assessed under section 8 of Regulation XXV of 1802. *Held* that *V.* was not entitled to enforce the acceptance of a pottah under the provisions of the Rent Recovery Act. VALAMARAMAYYAN *v.* VIRAPPA KANDIAN . . . . I. L. R., 5 Mad., 145

2. ——————— *Purchaser of four shares in shrotriyam village.—Landholder.*—Where the holders of shares in a shrotriyam village have not received or agreed to receive the rent separately from the tenants according to their shares, the several shareholders constitute one landholder under the Rent Act, and one sharer is not entitled to enforce

## MADRAS RENT RECOVERY ACT, VIII OF 1865, s. 3—*continued.*

acceptance of a pottah by the tenants in respect of the proportionate rent payable to him. KRISHNAMACHAN *v.* GANGARAU REDDI . I. L. R., 5 Mad., 229

3. ——————— and ss. 4, 9.—*Landlord and tenant.—Right to enforce acceptance of pottah.*—The renter of a zemindari, to whom the right to collect the kattubadi or quit-rent on inam lands and the road cess payable to Government was delegated, sued to compel the inamdars to accept pottahs and execute muchalkas for the amounts due. *Held* that the inamdars, not being cultivating tenants, were not bound, under Act VIII of 1865 (Madras), to accept a pottah. *Ramasami* v. *Collector of Madura, I. L. R., 2 Mad., 67,* referred to. RAMA *v.* VENKATACHALAM . . . . I. L. R., 8 Mad., 576

4. ——————— and ss. 8, 9, and 11.—*Agreements between landlords and tenants.*—The pottahs and muchalkas mentioned in section 3, Madras Act VIII of 1865, must be understood to embrace those written agreements only which are mutually interchanged by a landlord and those of his tenants who are actually engaged in the cultivation of the lands to which they relate, since the remedies which the Act provides in sections 8 and 9 can only be made available where the relation of landlord and tenant, or a holding of some sort, already exists upon such a basis that the landlord or the tenant, as the case may be, can come into Court and claim to have a writing granted to him. *Semble,*—If a lease granted by a zemindar to an intermediate holder could be considered a pottah within the meaning of section 3 of the Madras Act VIII of 1865, it would, under the proviso to section 11 of that Act, be liable to be set aside by the successor of the grantor if granted at a lower rate than that generally payable on such lands, and not for the purposes mentioned in the said proviso. RAMASAMI *v.* BHASKARASAMI. RAMASAMI *v.* COLLECTOR OF MADURA . . I. L. R., 2 Mad., 67

1. ——————— s. 4.—*Suit for rent.—Summary suit to enforce acceptance of pottah.*—A suit for rent is maintainable where a pottah in the form required by section 4, Madras Act VIII of 1865, and such as the defendant was bound to accept, has been tendered to the defendant, although no attempt has been made by a summary suit before the Collector to enforce its acceptance. HARAJAI KUMARA VENKATA PERUMALRAJ *v.* KANNIAPPAH. ZEMINDAR OF KARVATINUGGAR KANNIAPPAH . . . 4 Mad., 149

2. ——————— *Pottah for palmyra palm trees.*—Under Madras Act VIII of 1865 a landlord may compel a tenant to accept a pottah for palmyra trees. MUTTUSAMY MUDALY *v.* SADAGOPA GRAMANY [4 Mad., 398

3. ——————— *Landlord and tenant.—Exchange of pottahs.*—The pottahs and muchalkas required by Madras Act VIII of 1865 should be made and exchanged during the existence, but not necessarily at the commencement, of the tenancy, the terms of which they are meant to express. The 4th section of the Act requires no more than that the pottahs should mention the rate and proportion of the pro-

**MADRAS RENT RECOVERY ACT, VIII OF 1865, s. 4**—*continued.*

duce to be given, and not the specific quantity or number of measures. SESHADRI AYYANGAR *v.* SANDANAM . . I. L. R., 1 Mad., 146

4. ——— *Water tax collected for Government by landholder.—Water Cess Act, Madras, VII of 1865.—Suit to enforce pottah.*—A landlord being authorised to collect on account of Government the water tax imposed under Act VII of 1865 (Madras), sued his tenant to compel him to accept a pottah for such water tax under Act VIII of 1865 (Madras). *Held* that the tenant was not bound to accept the pottah. BACHU RAMESAM *v.* NUKALA BHANAPPA . I. L. R., 7 Mad., 182

5. ——— and ss. 7 & 87.—*Form of pottah necessary for tender by landholder.*—A pottah which professes to make the tenant liable to the person tendering it for lands not held, as well as for lands held, of such person, is an improper one, and not one which the tenant is bound to accept ALAGIRISAMI NAIKER *v.* INNASI UDAYAN [I. L. R., 3 Mad., 127

——— s. 6.—*Signing and registration of pottahs and muchalkas.*—Madras Act VIII of 1865, section 6, imposes upon village karnams the duty of signing and registering pottahs and muchalkas exchanged under the Act. Where such pottahs and muchalkas were not signed or registered by the karnam,—*Held* that a suit for rent might be maintained, founded upon the muchalka, the signature and registration by the karnam not being intended to be a condition of the right to sue. VENKATA SUBBA ROW *v.* SESHA REDDY . 4 Mad., 243

1. ——— s. 7.—*Tenant having no saleable interest in the land.*—Section 7 of Madras Act VIII of 1865 applies to cases where the landlord is the exclusive proprietor of both the melwarum and the mirasiwarum, and the tenant has no saleable interest in the land. RAMASAMI AIEN *v.* MANJEYA PILLAI [6 Mad., 61

2. ——— *Suit for arrears of rent,—Tender of pottah.*—Plaintiff sued for certain arrears of rent. The suit was dismissed as to Faslis 1271, 1272, and 1275, on the ground that no pottahs had been tendered for those Faslis. On special appeal it was contended that no tender was necessary, because a suit which had been brought before Fasli 1271 for the determination of the proper rate of rent was pending during those Faslis. *Held* that the pending of that suit did not render the tender of pottahs unnecessary, and that the present suit was rightly dismissed. PERIYANAYAGAM PILLAI *v.* VIRAPPA NAIKAN . . . . 7 Mad., 51

3. ——— *Tender of pottah through the post.*—Tender of a pottah through the post to a tenant is invalid under the provisions of Madras Act VIII of 1865. VENKATACHELLAM CHETTI *v.* KADUMTHUSI . . . I. L. R., 4 Mad., 145

4. ——— *Suit for rent dismissed—Suit for use and occupation barred.*—A landlord who has

**MADRAS RENT RECOVERY ACT, VIII OF 1865, s. 7**—*continued.*

failed in a suit for rent under the Rent Recovery Act cannot bring a fresh suit for use and occupation. ALI KHAN *v.* APPADU . I. L. R., 7 Mad., 304

5. ——— *Tender of pottah.—Unreasonable condition.*—A tenant is not bound to accept a pottah which requires him to relinquish, at the close of the Fasli, land which he has been unable to cultivate. VEDANTA CHARIAR *v.* AYYASAMI MUDALI . . . I. L. R., 4 Mad., 322

6. ——— *Tender of pottah.*—When a Collector in a suit brought under the provisions of the Rent Recovery Act has decided that a tenant is to accept a pottah on certain terms, the land holder is not bound to tender such pottah for acceptance before suing to enforce the terms thereof. COURT OF WARDS *v.* DARMALINGA . I. L. R., 8 Mad., 2

7. ——— *Pottah.—Rate of rent.—Indefinite stipulations.*—In a pottah tendered by a landlord to his tenant under section 7 of Act VIII of 1865 (Madras), the rate of rent should be ascertained and declared even where the rate may vary with the means of cultivation or the frequency of cultivation, or where the *quantum* of rent may vary with an increase or reduction in the area of the holding. A landlord tendered a pottah to his tenant which contained the following stipulations: "If you cultivate, by the aid of Sirkar services of irrigation, wet crops on dry land, you must pay water rate settled according to the highest nanjai assessment of neighbouring land. If you occupy land in excess of that entered in this pottah, you must pay the appropriate assessment, or if the assessment has not been fixed, then such assessment as our Sirkar may settle." *Held* that the pottah was not one which the tenant was bound to accept. VANKATA RAMANJULU NAYUDU *v.* RAMACHANDRA NAYUDU . . I. L. R., 7 Mad., 150

8. ——— *Landlord and tenant.—Acceptance of muchalka without delivery of pottah.—Presumption.*—When a muchalka has been taken from a tenant under the Rent Recovery Act (Madras Act VIII of 1865), but no pottah granted, this is some evidence that the tenant dispensed with the delivery of a pottah, and legal proceedings ought not to be set aside merely because no pottah and muchalka have been exchanged, without inquiry as to whether the parties have agreed to dispense with pottahs and muchalkas. VARATHACHARI *v.* BALU NAICKEN [I. L. R., 3 Mad., 255

9. ——— *Landlord and tenant.—Exchange of pottah and muchalka.*—Under section 7 of Madras Act VIII of 1865, the agreement to dispense with the exchange of pottah and muchalka need not be express, but it must appear that this provision of the law was present to the minds of the contracting parties, and that they deliberately elected not to act upon it. The mere existence of a verbal lease is insufficient to raise the presumption that the exchange of pottah and muchalka has been dispensed with. KOMIREDDI VARAHA NARASIMHAM *v.* CHEVALA RAMASAMI NAYUDU . . I. L. R., 5 Mad., 136

**MADRAS RENT RECOVERY ACT, VIII OF 1865, s. 7**—*continued.*

**10. ——— and ss. 3 and 13.**—*Suit for recovery of rent.—Exchange of pottahs and muchalkas.—Tender of pottah.*—Suits for the recovery of rent cannot be maintained in the Civil Courts by the landholders described in section 3 of Madras Act VIII of 1865, unless pottahs and muchalkas have been exchanged between the landholder and the tenant as required by section 7 of the Act, or some one of the other conditions of the section has been complied with. So held by MORGAN, *C. J.*, INNES, *J.*, and KINDERSLEY, *J.* (HOLLOWAY, *J.*, *dissentiente*). But such suit may be maintained by the landholders described in section 13 of the Act without complying with the requirements contained in section 7. So held by MORGAN, *C. J.* (KINDERSLEY, *J.*, *dissentiente*). *Held* also that in cases where pottahs must be tendered, tender must be made before the expiration of the fasli for which rent is sought to be recovered. GOPALASAWMY MUDELLY *v.* MUKKEE GOPALIER **[7 Mad., 312**

VENKATASAMI NAIK *v.* SITUPATI AMBALAM **[7 Mad., 359**

**1. ——— s. 9.**—*Rate of rent where rate is disputed.*—Before a dispute regarding the rate of rent can be decided in a suit brought under section 9 of Madras Act VIII of 1865, merely on the ground of what appears to be just, the Court must consider the reasonableness of the rate according to the local usage, and when such usage is not ascertainable, according to the rates for neighbouring lands of similar description and quality. KRISTNA RAU *v.* MAHADEVA MUDALI. KRISTNA RAU *v.* NYNIAPPA MUDALI. KRISTNA RAU *v.* SOLAYAPPA MUDALI. KRISTNA RAU *v.* CHINNA SUBBU MUDALI. KRISTNA RAU *v.* KRISHNA MUDALI . . **6 Mad., 204**

**2. ———** *Landholder.—Tender of pottah.—Notice.—Zemindar and ryot.*—Where the parties are bound to exchange written engagements in the shape of pottahs and muchalkas, the landlord must, in order to maintain a suit under section 9 of Madras Act VIII of 1865 to enforce acceptance of a pottah, show that he has tendered a pottah in writing. A mere indefinite demand or notice, whether written or unwritten, is not sufficient to sustain such a suit. CHANDA MIAH SAHIB *v.* LAKSHMANA AIYANGAR **[I. L. R., 1 Mad., 45**

**3. ——— and s. 7.**—*Demand of pottah.*—The Rent Recovery Act does not require that a tenant demanding a pottah shall apply in writing to the landholder specifying the lands and the fasli for which the pottah is required. STRINIVASA *v.* NARAYANASAMI . . . . **I. L. R., 8 Mad., 1**

**4. ——— and s. 10 and s. 7.**—*Suit to enforce terms of tenancy.—Suit to determine terms of tenancy.—Pottah.—Jurisdiction of Revenue Court.*—A suit under section 9 of Madras Act VIII of 1865 to enforce the acceptance of a pottah is not a suit to enforce the terms of a tenancy within the meaning of section 7 of the same Act, but a suit to determine those terms. ZEMINDAR OF DEVARACOTA *v.* VEMURI VENKAYYA **[I. L. R., 1 Mad., 389**

**MADRAS RENT RECOVERY ACT, VIII OF 1865**—*continued.*

**1. ——— s. 10.**—*Power of Collector to enforce ejectment for default.—"Default," Meaning of.—Quære,*—Whether a Collector can enforce ejectment for the default specified in section 10 of the Rent Act where the ultimate judgment in the case has been that of an Appellate Court and not of his own Court. *Semble,*—"Default" in section 10 of the Rent Act means wilful default. YAKUB SAHIB *v.* JAFFER ALI SAHIB . **I. L. R., 4 Mad., 167**

**2. ——— and s. 69.**—A landlord having sued his tenant under the Rent Recovery Act to compel him to accept a pottah, the Revenue Court directed the tenant to accept the pottah as amended by the Court. On appeal by the tenant, the District Court directed a further amendment of the pottah. Three months after the decree of the District Court, the landlord applied to the Revenue Court to eject the tenant under section 10 of the Rent Recovery Act for not accepting the pottah and executing a muchalka, and six months after the date of that decree the Revenue Court ordered the tenant to be ejected. *Held* that section 10 of the Rent Recovery Act (which provides that, if within ten days from the date of the Collector's judgment the defendant shall not have accepted the pottah as approved or amended by the Collector, and shall not have executed a muchalka in the terms of the said pottah, the Collector, on proof of such default, shall pass an order for ejecting the defendant), did not warrant the order. YAKUB *v.* NARASINGA . . . **I. L. R., 7 Mad., 572**

**1. ——— s. 11, cls. 1, 2, 3, 4.**—*Improvements effected by tenant.—Enhancement of rent.—Sanction of Collector.*—The sanction of the Collector required by the proviso to clause 4, section 11 of the Rent Recovery Act, as a condition precedent to the enhancement of rent when the landlord has improved the land or has had to pay additional assessment to Government, is not requisite when, improvements having been made by the tenant, the landlord seeks to enhance the rent. *Per* MUTTUSAMI AYYAR, *J.*—The proviso to clause 4 of section 11 of the Rent Recovery Act implies that when the tenant has improved the land at his own expense the landlord is not entitled on that ground to enhance the rent. *Semble,*—Clause 1 of section 11, which provides that all contracts for rent, express or implied, shall be enforced, cannot be so applied as to deprive a tenant of the benefit of improvements made at his own expense. *Per* HUTCHINS, *J.* When improvements have been made by the tenant, the proper rate of rent has to be determined with reference to the several provisions of section 11, quite irrespective of the improvements. VENKATAGIRI RAJA *v.* PITCHANA . . **I. L. R., 9 Mad., 27**

**2. ——— rule 3.**—*Rate of rent, Determination of.—Neighbouring lands of similar kind.*—The provision in Madras Act VIII of 1865, section 11, rule 3,—"And when such usage is not clearly ascertainable, then according to the rates established or paid for neighbouring lands of similar description and quality,"—does not admit of rates of rent being determined on an average of varying rates paid for neighbouring lands; but it does not require,

**MADRAS RENT RECOVERY ACT, VIII OF 1865, s. 11, rule 3—*continued.***

for determination of the proper rate of rent for particular lands, the existence of a fixed general rate of rent for neighbouring lands of similar description and quality. The words "according to the rates established or paid" import clearly the power to determine the rate of rent in accordance with either the general rate at which neighbouring lands of a similar kind are let, or where the rents of such lands vary, the rate at which rents had for any time been actually paid by some of the tenants of such lands. MAHA SINGAVASTHA AYYAR *v.* GOPALA AYYAN **[6 Mad., 239**

3. ——————— *Implied contract.*—Where a landlord, having for many years accepted rent at "dry" rates from a tenant for certain land, sued the tenant to enforce acceptance of a pottah at "garden" rates, on the ground that the tenant had raised a crop with water taken from a well constructed by the tenant,—*Held* that there was an implied contract within the meaning of section 11 of the Rent Recovery Act to accept rent at "dry" rates, and that plaintiff was, therefore, not entitled to enhance the rate of rent, the improvement having been effected at the expense of the tenant. KRISHNA *v.* VENKATASAMI . . . . **I. L. R., 8 Mad., 164**

4. ——————— *Provision in pottah for increasing rate of assessment for garden cultivation.* A provision in a pottah for increasing the rate of assessment if garden cultivation is carried on, or if a second crop is raised, is not illegal, but comes within the provisions of section 11 of Act VIII of 1865. VAYTHENATHA SASTRIAL *v.* SAMI PANDITHER **[I. L. R., 3 Mad., 116**

5. ——————— rule 4.—*Hindu law.—Alienation.—Power to make leases.*—The second proviso contained in rule 4, section 11, Madras Act VIII of 1865, does not apply to a lease which is *bonâ fide* and valid under the general Hindu law, and, as such, falls under rule 1. This proviso does not amount to a repeal of the Hindu law regarding ordinary leases, but applies only to such leases when, in the circumstances in which they are made, they amount to a fraud upon the power of the grantor's successor as manager or to alienations made for the personal benefit of the grantee and to the prejudice of the successor. RAMANADAN *v.* SRINIVASA MURTI **[I. L. R., 2 Mad., 80**

6. ——————— *Change of cultivation.—Sanction of Collector.*—Where a landlord claimed to revert to nanjai rates (assessed on irrigated land) of rent on the ground that he had repaired a tank, which for years had been unrepaired,—*Held* that the sanction of the Collector was not required by section 11 of the Rent Recovery Act. LAKSHMANAN CHETTI *v.* KOLANDAIVELU KUDUMBAN **[I. L. R., 6 Mad., 311**

7. ——————— *Sanction of Collector.—Suit for increased assessment on ground of improvements.*—In a suit before the Collector under Madras Act VIII of 1865, brought by a zemindar to compel

**MADRAS RENT RECOVERY ACT, VIII OF 1865, s. 11, rule 4—*continued.***

his tenants, the defendants, to accept a pottah at enhanced rates of assessment, on the ground that he had at his own expense repaired a tank and rendered the land formerly cultivated as dry land capable of being cultivated as wet land,—*Held* that the plaintiff could not maintain the suit, inasmuch as he had not obtained the sanction of the Collector to raise the rent, and such a condition was a condition precedent to such a suit. *Semble,*—That the right of the plaintiff to recover was dependent on the further condition that an additional revenue was levied on him consequent upon the improvement made. KATTASAWMY *v.* SANDAMA NAIK . . . **5 Mad., 294**

8. ——————— *Suit to assess proper rate of rent.—Determination of rate of rent.*—In a suit by the plaintiffs as inamdars to compel the defendants, occupiers of plaintiffs' land, to accept pottahs under Madras Act VIII of 1865, the defendants objected to the rates of rent claimed by the plaintiffs. There was no contract between the parties as to the rent to be paid, nor was there any assessment made under a survey made previous to the 1st January 1859. *Held* that the proper rent to be paid by the defendants was to be determined according to the rates established or fixed for neighbouring lands of a similar kind. MAHASINGAVASTHA AIYA v. GOPALIYAN. GOPALIYAN *v.* MAHASINGAVASTHA AIYA **[5 Mad., 425**

9. ——————— *Contract to pay a certain rent implied from payment in past years.*—Section 11 of the Rent Recovery Act provides that in the decision of suits involving disputes regarding rates of rent which may be brought before Collectors under sections 8, 9, and 10, all contracts for rent, express or implied, shall be enforced. *Held* that payment of rent in a particular form at a certain rate for a number of years is not only presumptive evidence of the existence of a contract to pay rent in that form or at that rate for those years, but is also presumptive evidence that the parties have agreed that it is obligatory on the one party to pay and the other to receive rent in that form and at that rate, so long as the relation of landlord and tenant may continue. VENKATAGOPAL *v.* RANGAPPA **[I. L. R., 7 Mad., 365**

10. ——————— *Assignee of revenue.—Suit to enforce acceptance of pottah by ryot.—Terms of pottah.*—An inamdar, who was assignee of the revenue of land, sued to compel a ryot to accept a pottah for the land at varam rates under the provisions of section 11 of the Rent Recovery Act. *Held* that the only pottah which the defendant was bound to accept was a pottah prescribing payment of the revenue charged on the land. PALANIAPPA *v.* RAYA **[I. L. R., 7 Mad., 325**

——————— **s. 12.**

*See* JURISDICTION OF REVENUE COURT—MADRAS REGULATIONS AND ACTS. **[7 Mad., 53**

MADRAS RENT RECOVERY ACT, VIII OF 1865, s. 12—*continued.*

——— "*Tenants.*" — *Term not restricted to agricultural tenant.*—Section 12 of the Rent Recovery Act provides that tenants ejected without due authority by landholders may bring a summary suit before the Collector to obtain reinstatement with damages. *Held* that the word "tenants" is not restricted to agricultural tenants only, but includes the permanent lessee of a mitta. SUBBARAYA *v.* SRINIVASA . . I. L. R., 7 Mad., 580

*See* BASKARASAMI *v.* SIVASAMI [I. L. R., 8 Mad., 196

——— ss. 15, 17.—Where a landlord has distrained for rent, and the distraint has been set aside under the provisions of the Rent Recovery Act, the landlord is debarred by section 17 from taking further proceedings under the Act in respect of the arrears for which the distraint was made. RAMA *v.* CHENGALVARAYA . . I. L. R., 7 Mad., 429

1. ——— s. 17 and ss. 18 & 49.—*Suit to recover produce illegally distrained for rent.—Wrongful distraint.*—The defendants, the landlords, distrained certain produce, the property of plaintiff, their lessee, in view to selling it for alleged claims for rent. The Sub-Collector, finding that the formalities required by the Act had not been observed, removed the attachment and directed the restoration of the property. The defendants having refused to restore the property, the plaintiff brought this suit under Madras Act VIII of 1865 to recover the value of the produce. *Held* that such wrongful withholding of the property, being an act in direct disregard and defiance of the Act, did not constitute a cause of action triable by a summary suit under that Act. SRINIVASA *v.* EMPERUMANAR PILLAI [I. L. R., 2 Mad., 42

2. ——— and s. 20.—*Summary suit for wrongful distraint.—Limitation.—Cause of action.*—A refusal to restore property improperly distrained under the Rent Recovery Act (Madras Act VIII of 1865) after the attachment has been set aside and the property ordered to be restored under section 17 of the Act, is not a cause of action upon which a summary suit can be brought under section 20. The cause of action in such a case is the illegal distraint, and the continued detention of, and refusal to restore, the property are only aggravations of that wrong. *Semble,*—A summary suit under section 17 would lie under such circumstances for loss or damage sustained when the distress has been declared illegal, and the right to bring a summary suit is not limited to the loss sustained prior to the order declaring the distress illegal as suggested in *Srinivasa* v. *Emperumanar Pillai, I. L. R., 2 Mad., 42.* The period of limitation for a suit under section 17 must be computed, if not from the date of the distress, at any rate from the date the distress was declared illegal. BHAGIRATHI PANDA *v.* PADALA GOPALUDU [I. L. R., 3 Mad., 121

——— s. 27.

*See* SMALL CAUSE COURT, MOFUSSIL—JURISDICTION—WRONGFUL DISTRAINT. [4 Mad., 401

MADRAS RENT RECOVERY ACT, VIII OF 1865—*continued.*

——— s. 33.

*See* SALE FOR ARREARS OF RENT—SETTING ASIDE SALE—OTHER GROUNDS. [I. L. R., 8 Mad., 6

——— s. 35.

*See* STAMP ACT, 1869, s. 3. [8 Mad., 112

——— and s. 76.—*Sale of tenant's interest.—Refusal of Collector to give certificate.*—A sale of the tenants' interest in certain land having taken place under sections 39 and 40 of the Rent Recovery Act, the Deputy Collector refused to issue a sale certificate to the purchaser, on the ground that the sale had been irregularly conducted. *Held* that, under section 35 of the Rent Recovery Act, the purchaser was entitled to a sale certificate. VELLI PERIYA MIRA *v.* MOIDIN PADSHA . I. L. R., 9 Mad., 332

——— s. 38.

*See* ATTACHMENT—ALIENATION DURING ATTACHMENT . I. L. R., 8 Mad., 573

*See* SALE FOR ARREARS OF RENT—MADRAS ACT VIII OF 1865.
[I. L. R., 6 Mad., 428
I. L R., 7 Mad., 428
I. L. R., 8 Mad., 573

——— s. 39.—*Sale of immoveable property under.—Irregularity in sale, Effect of.*—A suit lies to set aside a sale of immoveable property irregularly conducted under the provisions of Act VIII of 1865. If notice of sale is not served in the way prescribed by section 39, the sale must be set aside. NATTU ACHALAI AYYANGAR *v.* PARTHASARADI PILLAI. [I. L. R., 3 Mad., 114

——— s. 40.

*See* STAMP ACT, 1869, s. 3 . 8 Mad., 112

——— s. 41.

*See* JURISDICTION OF CIVIL COURT—RENT AND REVENUE SUITS, MADRAS. [5 Mad., 289

——— s. 44.—*Delivery of possession.—Appeal.—Limitation.*—*A.* obtained a warrant ejecting *B.* for arrears of rent under section 41 of the Rent Recovery Act. *B.* appealed within fifteen days, but *A.* was put into possession on 13th May 1882. *B.'s* appeal came on for hearing and was dismissed on 30th June 1883. *B.* instituted this suit to recover possession of the land on 28th July 1883. *Held* that *B.'s* suit was not time-barred under section 44 of the Rent Recovery Act. PADSHA *v.* TIRUVEMBALA [I. L. R., 9 Mad., 479

1. ——— s. 50.—*Petition sent by post.—Presentation of plaint.*—A petition sent by post is not a substitute for the presentation of a plaint as required by section 50 of Madras Act VIII of 1865. MOPARTI PITCHI NAIDU *v.* VUPPALA KONDAMMA [6 Mad., 136

## MADRAS RENT RECOVERY ACT, VIII OF 1865, s. 50—*continued.*

2. ——— and s. 69.—*Plaint.—Amendment.—Irregular procedure.—Joint petition.—Order to file separate plaints.—Limitation.*—A landlord having tendered pottahs to his ryots which were not accepted by them, distrained, for rent due under the pottahs tendered, on the 10th of March 1882. On the 13th of March thirteen ryots presented a joint petition to the head Assistant Collector complaining of the landlord's acts. This petition was referred to the Tehsildar for report and not treated as a plaint under Act VIII of 1865 (Madras); but subsequently, having been brought before the Deputy Collector for orders, it was treated as a joint plaint under the said Act, and the petitioners were directed by that officer each to file a separate plaint. Thirteen plaints were accordingly filed on the 27th of May. *Held* that, under section 50 of the Act, which allows irregular plaints to be amended at the discretion of the Collector, the petition of the 13th March, which contained all the necessary allegations, could be treated as a plaint capable of amendment; and that the order of the Deputy Collector directing the petitioners to file separate suits was an amendment within the meaning of that section. *Held,* also, that by the provisions of section 69, which provides that substantial justice shall not be defeated by want of form or irregularity in procedure, the said order, even if irregular, having done substantial justice, ought not to be set aside. ATTIPAKULA MUNAPPA *v.* DASINANI CHENCHU NAYUDU [I. L. R., 7 Mad., 138

——— s. 51.—*Presentation of plaint.—Acceptance by Court of plaint sent by post.*—*K.* sent a plaint by post to a revenue officer, who was on tour, and, in obedience to an order issued by such officer to pay batta within a certain date, presented himself and paid the amount demanded within thirty days from the date of the cause of action. *Held* that the suit was instituted within the time prescribed by section 51 of the Rent Recovery Act. *Moparti Pitchi Naidu* v. *Vuppala Kondamma, 6 Mad., 136,* approved and distinguished. SANKARANARAYANA *v.* KUNJAPPA . . . I. L. R., 8 Mad., 411

——— ss. 57, 66.—*Ex parte decision.—Semble,*—The terms of section 57 of Act VIII of 1865 are wide enough to justify a Collector in treating as *ex parte* a defendant not appearing on the day to which the hearing of the suit may have been adjourned under section 66 of the Act. SUBBRAMANIYA PILLAY *v.* PERUMAL CHETTY . 4 Mad., 251

——— s. 69.—*Appeal.—Computation of time for.—Time required to file copy of decision.*—An appeal under Madras Act VIII of 1865 must be presented within thirty days from the date of the decision appealed against. The appellant is not required to file a copy of such decision with his appeal. IN THE MATTER OF THE PETITION OF MOHIDIN HUSSEN SAHEB . . . . . 8 Mad., 44

——— s. 79.

*See* s. 1 . . I. L. R., 5 Mad., 76

*See* s. 9 . . I. L. R., 8 Mad., 394

## MADRAS REVENUE RECOVERY ACT, II OF 1864.

*See* MADRAS ABKARI ACT, III OF 1864, s. 10 . . I. L. R., 7 Mad., 434

——— ss. 1, 2, 3, 38, 39.—*Landholder.—Defaulter.—Pottah allowed to stand in name of another.—Estoppel.—Notice.—Sale.*—Where a landholder allows the registry of land to stand in the name of another and the revenue falls into arrears, a sale of the land under the provisions of the Revenue Recovery Act (Madras Act II of 1864), effected after the service of notice upon the person in whose name the pottah stands, will pass the landholder's interest to the purchaser at the revenue sale. ZAMORIN OF CALICUT *v.* SITARAMA [I. L. R., 7 Mad., 405

——— ss. 2, 25, 37.—*Sale for arrears of revenue.—Liability of all fields included in pottah.*—By accepting a ryotwari pottah, the landholder pledges each and every field included therein as security for the whole assessment. Several fields separately assessed to revenue were held under one pottah by *K.* Default having been made by *K.* in payment of revenue, one of such fields, of which *N.* was the owner, was attached under the Revenue Recovery Act. *N.* claimed to have it released from attachment on payment of the assessment due upon it. The claim was rejected and the field sold. *Held,* in a suit by *N.* to set aside the sale, that the sale was valid. SECRETARY OF STATE FOR INDIA *v.* NARAYANAN. SITARAMA *v.* NARAYANAN . I. L. R., 8 Mad., 130

——— s. 36.—*Extension of time by Government for payment of balance of purchase-money.*—Section 36 of Madras Act II of 1864 does not make it compulsory for Government to forfeit the money deposited by a bidder at a sale of land for arrears of revenue when the balance of the purchase-money is not paid within thirty days and to re-sell the land. SONAYA PILLAI *v.* KALAMEGAM [I. L. R., 5 Mad., 130

——— ss. 38, 39.—*Suit to set aside alleged fraudulent sale.—Limitation.*—Non-compliance by the Collector with the directions of sections 38 and 39 of the Revenue Recovery Act (Madras Act II of 1864) does not invalidate the title of the purchaser of land sold for arrears of revenue. KARUPPA *v.* VASUDEVA SASTRI . . I. L. R., 6 Mad., 148

## MADRAS TOWNS IMPROVEMENT ACT, III OF 1871.

*See* ESTOPPEL—ESTOPPEL BY CONDUCT. [I. L. R., 2 Mad., 104

*See* LIMITATION ACT, 1877, ART. 120 (1871, ART. 118) . I. L. R., 3 Mad., 124

——— s. 1.—*Washerman.—Artizan.*—A washerman is not an artizan within the meaning of Madras Act III of 1871. EX PARTE POONEN [I. L. R., 1 Mad., 174

——— s. 9.—*Power of Governor in Council to dismiss elected Municipal Commissioner.*—Section 9 of the Towns Improvement Act (Madras Act

**MADRAS TOWNS IMPROVEMENT ACT, III OF 1871, s. 9**—*continued.*

III of 1871) provides that the Governor in Council may remove an elected Municipal Commissioner for misconduct. In a suit for damages brought against the Secretary of State by a Municipal Commissioner for wrongful removal from office,—*Held* that the defendant not having proved misconduct, the plaintiff was entitled to damages. VIJAYA RAGAVA *v.* SECRETARY OF STATE FOR INDIA **[I. L. R., 7 Mad., 466**

——— **s. 27.**

*See* ss. 61, 62 . **I. L. R., 7 Mad., 65**

——— **s. 38.**—*Tax due before approval of Government to Act.—Illegal levy of tax.—Omission to give notice.*—Plaintiff sued the Municipal Commissioners for the town of Bellary for a certain sum, alleged to have been illegally levied by them from him as his trade and profession tax. The sanction of the Governor in Council, under section 38 of Madras Act III of 1871, was obtained on the 4th July 1871, with authority to levy the tax from 1st May 1871. Plaintiff alleged that no notice under section 61 of the Act had been served upon him, that the levying the tax was illegal, as the approval of Government was obtained three months after the commencement of the official year, and that the Act could not have retrospective effect. *Held*, on a reference, that the levy from the plaintiff was illegal. BATES *v.* MUNICIPAL COMMISSIONERS FOR THE TOWN OF BELLARY . . . **7 Mad., 249**

——— **s. 57.**

*See* s. 85 . **I. L. R., 1 Mad., 158**

——— **s. 58.**

*See* s. 85 . **I. L. R., 1 Mad., 158**

——— *Liability for carriage and horse tax.—Temporary residence.—Payment of tax where person resides permanently.*—The defendant, a Judge of the Small Cause Court at Madura, visited Dindigal once a year and remained there for more than thirty days each year. The defendant took with him to Dindigal his horses and carriages which he used there, and in respect of which he paid the taxes imposed by law to the Municipality of Madura, where he resided. In a suit by the Municipality of Dindigal to recover the tax payable in respect of the same horses and carriages,—*Held* that the defendant was not liable. SNAITH *v.* MCQUHAE . **7 Mad., 332**

——— **ss. 58-62.**—*Liability to professional tax.—Fiscal statutes.—Construction of statutes.*—In construing enactments creating fiscal obligations, provisions declaring the liability to the tax are to be distinguished from those providing for its imposition. The machinery for the imposition of the tax may be independent of the obligation of the tax-payer. The duty of paying profession tax under section 58, Madras Act III of 1871, is independent of the obligations of registration and taking out a certificate which precede it in the same section. *Per* HUTCHINS, *J.*—Section 61 is not to be construed so as to prevent the Commissioners from adding to the list new names or persons not in the town at the beginning of the year. VICE-PRESIDENT OF THE MUNICIPAL COMMISSION, CUDDALORE, *v.* NELSON . . . **I. L. R., 3 Mad., 129**

**MADRAS TOWNS IMPROVEMENT ACT, III OF 1871, ss. 58-62**—*continued.*

——— **ss. 61, 62.**—*Maxim "Quod fieri non debet factum valet."*—The Vice-President of a Municipal Commission, purporting to act under the provisions of section 61 of the Towns Improvement Act, 1871, which empowers the Commissioners to prepare and revise the list of tax-payers, and to issue notices of assessment to persons liable to the profession tax, issued a notice of assessment to *D.*, although no case of emergency existed, within the meaning of section 27 of the Act, enabling the President, or, in his absence, the Vice-President, to exercise the powers vested by the Act in the Commissioners. *Held* that the insufficiency of the notice of assessment was no answer to a charge under section 62 of the Act against *D.* for exercising his profession without paying tax. MUNICIPAL COMMISSIONERS OF MANGALORE *v.* DAVIES . . . **I. L. R., 7 Mad., 65**

1. ——— **s. 62.**—*"Person."—Joint trade.—Tax.*—In section 62 of the Madras Towns Improvement Act, 1871, the word "person" must be construed to include any company or association or body of persons, whether incorporated or not, where such construction is not repugnant to the context. Where, therefore, two undivided Hindu brothers carried on a joint trade in one shop and tax had been paid by one brother,—*Held* that no tax was payable by the other brother. MUNICIPAL COMMISSIONERS OF NEGAPATAM *v.* SADAYA . . . **I. L. R., 7 Mad., 74**

2. ——— **and s. 169.**—*Profession tax, Non-payment of.—Offence, Nature of.—Prosecution.—Limitation.*—A complaint having been laid (on the 26th March 1885), under section 62 of Act III of 1871 (Madras), against *O.* for having exercised his profession for more than two months in the official year 1884-85 in a municipality without paying the tax in respect thereof, the Magistrate dismissed the complaint, on the ground that the prosecution was barred by section 169 of the Act, inasmuch as five months had elapsed since the last payment in respect of the tax became due. *Held* that the complaint if laid within three months from the close of the official year, or, if *O.* ceased to exercise his profession before the close of the official year, within three months from such date, was not barred by section 169 of the Act. OOTACAMUND MUNICIPALITY *v.* O'SHAUGHNESSY . . **I. L. R., 9 Mad., 38**

——— **ss. 64, 72.**—*Tax on animals.—License, Extent and limit of.*—*N.* having taken out a license under the provisions of the Towns Improvement Act, 1871, for a bullock, the bullock died and *N.* bought another bullock, but did not take out a second license. *N.* was convicted for keeping this bullock without a license. *Held* (by TURNER, *C. J.*, and HUTCHINS, *J.*, BRANDT, *J.*, dissenting) that the conviction was right. MUNICIPAL COMMISSIONERS OF MANNARGUDI *v.* NALLAPA **[I. L. R., 8 Mad., 327**

**MADRAS TOWNS IMPROVEMENT ACT, III OF 1871**—*continued.*

——— **s. 85.**—*Suit to recover money illegally levied as tax on profession.*—Section 85 of Madras Act III of 1871 is not a bar to a suit to recover money wrongfully levied as a tax because such so-called tax had no legal existence. There is no provision in that Act for levying any tax described in section 57 of the Act at all otherwise than by the prescribing of the machinery for its levy in sections 58-61. If that machinery is not applied, no liability to pay such tax can arise. Where the Municipal Commissioners of a town had not determined on the imposition of a tax of that description till 22nd April of the official year for which such tax was imposed, and the list of persons to be taxed for that year was not completed till 14th July of the same year, and notice to *A.* of his assessment under such tax was not given him till 8th October in that year,—*Held* that the tax had no legal existence, and that *A.* was entitled to recover from the Commissioners money which they had collected from him as and for such so-called tax. *Bates* v. *Municipal Commissioners for the Town of Bellary, 7 Mad., 249,* followed. LEMAN *v.* DAMODARAYA . . . **I. L. R., 1 Mad., 158**

——— **ss. 138, 139.**—*Street.—Encroachment.—Possession.—Private property.—Onus probandi.*—*H.* owned a house in the town of A., to which the Towns Improvement Act, 1871, was extended in 1879. In 1882 the Municipal Commissioners, professing to act under section 139 of the said Act, removed a pial which projected beyond the main walls of *H.'s* house and abutted on a lane which was used by the public. *H.* proved that the pial had existed for fifty years. *Held* that the action of the Municipal Commissioners was illegal. HANUMAYYA *v.* ROUPELL . . .. . **I. L. R., 8 Mad., 64**

——— **s. 154.**—*Omission to take out licenses.—Criminal Procedure Code, 1869, ss. 43, 66.*—Section 154 of Madras Act III of 1871 was not intended to apply to omissions to take out licenses. It applies to breaches of the Act which, in a policeman's view, are offences, and regarding which, if committed within his view, one of two courses is open to him,—*viz.,* to arrest without warrant, or to lay an information before a Magistrate, and apply for a summons or warrant. If he adopts the latter course, then sections 43 and 66 of the Criminal Procedure Code require that the information should be reduced to writing, and given on oath or solemn affirmation, before any process is issued thereon. Section 68 of the Code is limited to cases in which no complaint has been made, and the Magistrate, *proprio motu,* institutes a prosecution. ANONYMOUS **[6 Mad., Ap., 50**

——— **s. 165.**—*Penal clause sanctioned by Government with respect to other bye-laws, not with respect to that to which it is attached.*—The mere publication of a bye-law with a penal clause at the end which had not been passed by the Municipal Commissioners or approved by the Government as applicable to the bye-law in question, though it was so passed and approved in reference to other bye-laws, cannot avail to legalise the infliction of the penalty. Bye-laws requiring licenses in cases in which Madras Act III of 1871, by specifying the cases in which they shall be required, has impliedly declared they shall not be required, are in violation of the Act. ANONYMOUS . **8 Mad., Ap., 3**

——— **s. 168.**—*Suit on a contract against Municipal Commissioners.—Notice.*—A suit was brought to recover from the Municipal Commissioners of Madura the balance of a sum of money due for timber supplied under a contract duly made with them. *Held* that the plaintiff was entitled to sue on the breach of contract without giving notice, such a suit not falling under the provisions of section 168 of the Towns Improvement Act (III of 1871, Madras). MAYANDI *v.* MCQUHAE **[I. L. R., 2 Mad., 124**

——— **sch. B, cl. 4.**—*"Pleader and Practising Vakil."—Magistrates' Court Vakil.*—The words "Pleader and Practising Vakil" used in clause 4, schedule B of the Madras Towns Improvement Act, 1871, are not restricted to persons who have obtained sanads from the District or High Court, but include all practitioners in Courts of criminal jurisdiction within the municipal limits. PALAMCOTTAH MUNICIPALITY *v.* ANNASAMI **[I. L. R., 6 Mad., 100**

——— **sch. C.**—*Horse.—Pony under thirteen hands.*—In the Madras Towns Improvement Act, 1871, the word "horse" includes a pony except when, by reference to the number of hands, the articles of schedule C show a contrary intention. Schedule C is part of the Act. No tax is leviable under the Act on a four-wheeled carriage on springs drawn by one pony under thirteen hands. VIZAGAPATAM MUNICIPALITY *v.* WALKER **[I. L. R., 5 Mad., 269**

**"MAFEE BIRT" TENURE.**

*See* GRANT—CONSTRUCTION OF GRANTS. **[19 W. R., 211**

**MAGISTRATE.**

*See* CASES UNDER POSSESSION, ORDER OF CRIMINAL COURT AS TO—

*See* SANCTION TO PROSECUTION—POWER TO GRANT SANCTION.
**[I. L. R., 2 Bom., 384**
**I. L. R., 2 All., 205**
**I. L. R., 6 Mad., 146**

*See* SANCTION TO PROSECUTION—NON-COMPLIANCE WITH SANCTION. **I. L. R., 4 Calc., 712**

*See* CASES UNDER WARRANT OF ARREST—CRIMINAL CASES.

*See* WITNESS—CRIMINAL CASES—PERSON COMPETENT TO BE WITNESS.
**[8 Bom., Cr., 126**
**16 W. R., Cr., 49**
**20 W. R., Cr., 76**
**I. L. R., 2 Calc., 405**
**I. L. R., 3 All., 573**

**MAGISTRATE**—*continued.*

——— **Appearance of, to show cause.**

*See* PRACTICE—CRIMINAL CASES—RULE TO SHOW CAUSE.

[I. L. R., 4 Calc., 20

——— **Attestation of—**

*See* CASES UNDER EVIDENCE—CRIMINAL CASES—EXAMINATION AND STATEMENTS OF ACCUSED.

*See* CASES UNDER EXAMINATION OF ACCUSED PERSON.

——— **Liability of—**

*See* CASES UNDER JUDICIAL OFFICERS, LIABILITY OF—

——— **Duty of—**

1. ——— **Duty in judicial capacity.**—The necessity of a Magistrate acting in a dispassionate and impartial manner, and not in the spirit of a prosecutor, observed upon. IN THE MATTER OF MAHESH CHANDRA BANERJEE. QUEEN *v.* PURNA CHANDRA BANERJEE. QUEEN *v.* KALI SIRKAR

[4 B. L. R., Ap., 1: 13 W. R., Cr., 1

2. ——— *Acting on private knowledge of accused.*—A Magistrate acting judicially should not import into the case before him his previous knowledge of the character of the accused, but should determine his guilt or innocence upon the evidence given in the case. REG. *v.* VYANKATRAV SHRINIVAS . . . . 7 Bom., Cr., 50

*See* MEHEROONISSA *v.* BHASHAYE MADHA

[2 W. R., Act X, 29

LOPOTEE DOMNEE *v.* TIKHA MOODAI

[8 W. R., Cr., 67

3. ——— *Deciding on evidence when collected by police.*—Magistrates should clearly understand that whilst the police perform their proper duty in collecting evidence, it is the function of the Magistrate alone to decide upon the sufficiency or credibility of such evidence when collected. GOVERNMENT *v.* KARIMDAD

[I. L. R., 6 Calc., 496: 7 C. L. R., 467

4. ——— *Commitment of accused for trial.*—The duty of a committing Magistrate is to ascertain whether by the evidence for the prosecution a *primâ facie* case is made out against an accused. QUEEN *v.* MAHA SINGH . 3 N. W., 27

QUEEN *v.* KISHTO DOBA . 14 W. R., Cr., 16

5. ——— *Re-trial.—Record of former trial.*—A Magistrate trying a case is as much bound by strict rules of evidence as any Sessions Judge or Civil Court. Where proceedings, which had already been taken against the accused before another Magistrate, had been quashed, and a new trial directed, the Magistrate holding the second trial is not justified in referring to the former record as a whole, but only to such portions of it as have been specially put in evidence before him. IN THE MATTER OF DEVI DUTT . . . 7 C. L. R., 193

**MAGISTRATE.—Duty in judicial capacity** —*continued.*

6. ——— *Trial by Magistrate who as Collector instituted proceedings.*—The District Magistrate should not himself try a case in which he instituted the prosecution as Collector. QUEEN *v.* NADI CHAND PODDAR . 24 W. R., Cr., 1

7. ——— *Conviction by Magistrate for practising in Collector's Court without certificate.—Officer both Magistrate and Collector.*—Where an officer is acting in two capacities,—*viz.*, as Assistant Collector and Assistant Magistrate,—he should not, in his capacity of Magistrate, convict a person of an offence committed before him as Collector: therefore he has no authority as Magistrate to fine a person under section 34, Act XX of 1865, for practising in his Court as Collector without a certificate. IN THE MATTER OF RAMDYAL SINGH

[5 B. L. R., Ap., 89

*See* QUEEN *v.* HIRALAL DAS

[8 B. L. R., F. B., 422

S. C. GOVERNMENT OF BENGAL *v.* HIRALAL DAS

[17 W. R., Cr., 39

8. ——— *Conviction of public servant.—Sentence.*—Where a person in the employment of the Court is convicted of a criminal offence punishable by fine or imprisonment, it is quite competent to the Magistrate in his administrative capacity to dismiss him from his office. QUEEN *v.* CHUNDER COOMAR SEN

[1 Ind. Jur., N. S., 97: 5 W. R., Cr., 4

9. ——— *Judge.—Bias.—Magistrate's jurisdiction where complainant is his private servant.—Legality of conviction and sentence passed by such Magistrate in such a case.*—The mere circumstance that a trying Magistrate is the master of the complainant does not deprive the Magistrate of his jurisdiction, though it is expedient that such a complaint should be referred to another Magistrate. IN RE THE PETITION OF BASAPA

[I. L. R., 9 Bom., 172

10. ——— *Translations of findings, Record of.*—Magistrates are bound to record translations of their findings in criminal cases. REG. *v.* KATUNJI BHUKAN . . . 1 Bom., 17

11. ——— *Comments on proceedings of Sessions Judge.*—Comments by a Magistrate, in the form of a supplementary statement on the proceedings of the Sessions Judge, disapproved of. REG. *v.* GOVINDA BIN BABAJI

[5 Bom., Cr., 15

12. ——— *Witness.—Threatening witness.*—In cross-examination before the Court of Session, a witness stated that, when she was before the committing Magistrate, that officer, addressing her, said:—"Recollect, or I will send you into custody." *Held* that if the Magistrate did so address the witness, he exceeded his duty. QUEEN-EMPRESS *v.* ISHRI SINGH . I. L. R., 8 All., 672

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### 1. APPEARANCE OF JURISDICTION ON PROCEEDINGS.

**1. ——— Magistrate with power to do particular act or make particular order.**—*Order for maintenance under s. 536, Criminal Procedure Code.*—Where the law empowers Magistrates of a particular grade to do a particular act, or make a certain order, it should always appear upon the proceedings that the Magistrate making the order or doing the act is a Magistrate who had jurisdiction to do it. An order under section 536, Criminal Procedure Code, 1872, cannot be made by a Magistrate of the second class. SOMBEE *v.* JITUN SONAR
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### 2. GENERAL JURISDICTION.

**1. ——— "Magistrate," Meaning of.**—*Jurisdiction of Criminal Procedure Code, 1861, s. 149.—Meaning of "Magistrate."*—The words "a Magistrate," in section 149 of the Code of Criminal Procedure, mean "any Magistrate," and not merely "the Magistrate having jurisdiction." REG. *v.* VAHALA JETHA . . . 7 Bom., Cr., 56

**2. ——— "Magistrate."**—*Criminal Procedure Code, 1861, s. 15.—Head of the village.*—The head of a village is within the definition of a Magistrate as defined in section 15 of the Criminal Procedure Code. ANONYMOUS . 4 Mad., Ap., 2

**3. ——— "Magistrate of District," Meaning of.**—*Criminal Procedure Code, 1861, s. 61.*—Meaning of the words "Magistrate of the District" in Section 61 of the Criminal Procedure Code. ANONYMOUS . . . 3 Mad., Ap., 29

**MAGISTRATE, JURISDICTION OF—** *continued.*

2. GENERAL JURISDICTION—*continued.*

**4. ——— District Magistrate.**—*Criminal Procedure Code, 1882, s. 488.*—The expression "The District Magistrate, a Presidency Magistrate, a Subdivisional Magistrate, and a Magistrate of the first class" in section 488, Criminal Procedure Code, 1882, means the Magistrate of the particular district in which the person resides, against whom such a complaint is made. IN RE THE PETITION OF FAKRUDIN **[I. L. R., 9 Bom., 40**

**5. ———** *Criminal Procedure Code (Act X of 1882), s. 488.—Complaint by a wife against her husband for maintenance.*—A complaint under section 488 of the Criminal Procedure Code (Act X of 1882) falls within the cognisance of the Magistrate competent to entertain such complaint, and within the local limits of whose jurisdiction the husband or the father is actually residing at the date of such complaint. IN RE THE PETITION OF FAKRUDIN . . . . **I. L. R., 9 Bom., 40**

**6. ——— Head Assistant Magistrate.**—*Power of Magistrate to order trial of cases of offences committed in town outside his division.*—An objection was taken before the Sessions Judge in the hearing of an appeal that the head Assistant Magistrate had no jurisdiction to try the case, he having a distinct local jurisdiction which did not include the town where the offence was committed. It appeared that the head Assistant Magistrate had received general instructions from the Magistrate of the district, as a temporary arrangement, to take up criminal cases arising within the limits of the said town which was not within his division. *Held*, upon these facts, that the head Assistant Magistrate had no jurisdiction. ANONYMOUS . **6 Mad., Ap., 43**

**7. ——— Village Magistrate.**—*Power to issue summons.*—A Village Magistrate has authority to issue a summons to persons within, but not without, the local area of his jurisdiction, whose attendance may be required in cases which he is empowered to try. QUEEN *v.* KRISHNAMA **[I. L. R., 5 Mad., 230**

**8. ——— Magistrate also Justice of Peace.**—*53 Geo. III, c. 155, s. 105.—Act VII of 1853.*—A Magistrate being also a Justice of the Peace had no jurisdiction to try a British-born subject under the Penal Code. His jurisdiction in the trial of such subjects was governed and limited by 53 George III, cap. 155, section 105, and Act VII of 1853, neither of which gave him power to award imprisonment in default of payment of a fine. REG. *v.* DIXON **[6 Bom., Cr., 14**

3. TRANSFER OF MAGISTRATE DURING TRIAL.

**9. ——— Summary jurisdiction.**—*Transfer.—Criminal Procedure Code, ss. 56 and 222.—Furlough.*—The petitioner had been convicted by Mr. *C.*, the Assistant Commissioner of Kamroop, in the exercise of a summary jurisdiction, under section

**MAGISTRATE, JURISDICTION OF—** *continued.*

3. TRANSFER OF MAGISTRATE DURING TRIAL—*continued.*

**Summary jurisdiction**—*continued.*

222 of Act X of 1872. This officer was, in the year 1872, in charge of the Jorehaut Division in the district of Seebsaugor, "with first-class powers and powers under section 222" of the Act. In 1874 he proceeded on furlough to England, and, on his return in 1875, was posted to the district of Kamroop, and invested with the powers of a Magistrate of the first class. *Held* that section 56 of Act X of 1859 did not apply, and that Mr. *C.* had no summary jurisdiction in Kamroop; *per* MARKBY, *J.*, on the ground that, by the terms in which the Government had conferred that jurisdiction on Mr. *C.*, it had in effect "directed," within the meaning of section 56 of Act X of 1872, that he should not exercise that jurisdiction anywhere but in Seebsaugor; *per* MITTER, *J.*, on the ground that the office to which Mr. *C.* was appointed in Kamroop was not equal to, or higher than, that which he had held in Seebsaugor. *Quære, per* MARKBY, *J.*,—Whether the posting of Mr. *C.* to Kamroop, after his return from furlough, was a transfer from Seebsaugor within the meaning of section 56 of Act X of 1872. IN THE MATTER OF PURSOORAM BOROOA **[I. L. R., 2 Calc., 117: 25 W. R., Cr., 52**

**10. ——— Jurisdiction to complete trial.**—*Transfer of Magistrate while trying a case.*—Mr. *M.* was appointed by the Local Government, under section 37 of Act X of 1872, a Magistrate of the first class, under the designation of Joint Magistrate, in the district of Meerut. He was subsequently appointed to officiate as Magistrate of the district of Meerut during the absence of Mr. *F.* or until further orders. While so officiating he was appointed by a Government notification, dated the 10th July 1880, to officiate as Magistrate and Collector of Gorakhpur, "on being relieved by Mr. *F.*" He was relieved by Mr. *F.* in the forenoon of the 23rd July 1880; and in the afternoon of that day, under the verbal order of Mr. *F.*, he proceeded to complete a criminal case which he had commenced to try while officiating as Magistrate of the district of Meerut. All the evidence in this case had been recorded, and it only remained to pass judgment. Mr. *M.* accordingly passed judgment in this case and sentenced the accused persons to various terms of imprisonment. *Held* (SPANKIE, *J.*, dissenting) that Mr. *M.* retained his jurisdiction in the district of Meerut so long as he stood appointed by the Government to that district and no longer, and the effect of the order of the 10th July 1880 was to transfer him from the district of Meerut from the moment he was relieved by Mr. *F.* of the office of Magistrate of that district, and from that moment he no longer stood appointed to that district and could exercise no jurisdiction therein as a Magistrate of the first class; and that, therefore, the conviction of such accused persons had been properly quashed on the ground that Mr. *M.* had no jurisdiction. EMPRESS OF INDIA *v.* ANAND SARUP **[I. L. R., 3 All., 563**

**MAGISTRATE, JURISDICTION OF—** *continued.*

3. TRANSFER OF MAGISTRATE DURING TRIAL—*continued.*

**11. ——— Change of powers of Magistrate while case is proceeding.**—*Notification taking effect retrospectively.*—On the 22nd of May 1878 a Deputy Magistrate invested with third class powers only, sentenced an accused person to three months' imprisonment under section 417 of the Penal Code, thus exercising second class powers. On appeal the Magistrate, on the 18th June, annulled the sentence and directed a new trial, under section 284 of the Code of Criminal Procedure. On the 26th of June the Government issued a notification, investing the Deputy Magistrate with second class powers, to take effect from the 25th of March to the 31st of May 1878. *Held* that the notification did not render the Magistrate's order illegal, as the Deputy Magistrate had no jurisdiction to exercise second class powers on the 22nd of May. IN THE MATTER OF SURGEE **[3 C. L. R., 281**

**12. ——— Appointment of Magistrate.**—*Time from which order of appointment dates.*—An Assistant Magistrate convicted an accused on the 12th August, and by an order of even date such Magistrate was invested with power to act as a Magistrate of the first class, although the fact that he had been so invested with full powers was not communicated to him until the 23rd idem. The accused appealed to the District Magistrate and was acquitted. On motion made to the High Court to set aside the acquittal, on the ground that, after the date of the order of the Lieutenant-Governor investing the Assistant Magistrate with further powers, no appeal lay to the District Magistrate,—*Held* that, even supposing the Lieutenant-Governor's order conferred first class powers upon the Assistant Magistrate from the moment it was made, it must be shown, before the District Magistrate's decision could be set aside, that the order of the Lieutenant-Governor was signed before the conviction. *Quære,*—Whether an order investing a Magistrate with first class powers is of any force, or amounts to an authority to exercise such powers, until the order has been officially communicated to the Magistrate. IN THE MATTER OF THE PETITION OF MOHAMED ESHAK. CHUNDRO MARWARI *v.* MOHAMED ESHAK **[I. L. R., 6 Calc., 476**

*See* EMPRESS OF INDIA *v.* ANAND SARUP **[I. L. R., 3 All., 563**

4. POWERS OF MAGISTRATES.

**13. ——— Magistrate of first class.**—*Sentence.—Appellate Court.—Enhancement of punishment.*—As an Appellate Court, a first class Magistrate has power to pass any sentence which a Subordinate Magistrate might have passed. ANONYMOUS CASE . . . . **I. L. R., 1 Mad., 54**

**14. ——— Magistrate of second class.**—*Criminal Procedure Code, 1882, s. 206, and sch. III, arts. II, III (7).—Power to commit for trial.—Case triable by Court of Session and Magistrate of the first class.—Discharge of accused.*—A complaint of an offence made punishable by section 392 of the Penal Code was brought in the Court of a Magistrate of the second class, who had been invested with the powers described in section 206 of the Criminal Procedure Code. The Magistrate passed an order directing that the inquiry should be held in his Court, and accordingly an inquiry was held under the provisions of chapter XVIII of the Criminal Procedure Code, and the accused was discharged. *Held* that powers conferred under section 206 of the Criminal Procedure Code convey authority to carry into effect any of the provisions of chapter XVIII of the Code; that the procedure to be adopted under chapter XVIII is not confined to cases exclusively triable by a Court of Session, but is also applicable to cases which, in the opinion of the Magistrate concerned, ought to be tried by such Court; that the order of the Magistrate in the present case, directing inquiry to be held in his Court, must be taken to mean that, in his opinion, the case referred to was one which ought to be tried by a Court of Session; and that his order discharging the accused was therefore legal. RAMSUNDAR *v.* NIROTAM . . . . **I. L. R., 6 All., 477**

**15. ——— *Penal Code, s. 71.***—*Criminal Procedure Code, ss. 39, 235.—Rioting, grievous hurt, and hurt.—Punishment for more than one of several offences.—Powers of Magistrate of first class conferred on Magistrate of second class during trial.—Power to sentence as first class Magistrate.*—On the 8th August 1884, a Magistrate of the second class began an inquiry in a case in which several persons were accused of rioting and of voluntarily causing grievous hurt. On the 6th September, the powers of a Magistrate of the first class were conferred on the Magistrate by an order of Government, which was communicated to him on the 8th September. On the 9th September, the case for the prosecution having closed, the Magistrate framed charges against each of the accused under sections 323 and 325 of the Penal Code, recorded the statements of the accused and the evidence for the defence, and, on the 10th September, convicted the accused of all the charges, passing upon each of them, in respect of each charge, sentences which he could pass as a Magistrate of the first class, but could not have passed as a Magistrate of the second class. On appeal, the Sessions Judge, on the ground that the prisoners had committed the offence described in section 148 of the Penal Code, held that the sentences passed by the Magistrate were illegal, as being inconsistent with the provisions of section 71, paragraphs 2 and 4, and he accordingly reduced the sentences of imprisonment which the Magistrate had passed to the maximum of imprisonment which the Magistrate could have inflicted under section 148. *Held,* by the Full Bench (PETHERAM, *C. J.,* and BRODHURST, *J.,* dissenting), that the sentences passed by the Magistrate were legal. *Per* OLDFIELD, MAHMOOD, and DUTHOIT, *JJ.,* that, with reference to the terms of section 39 of

**MAGISTRATE, JURISDICTION OF—** *continued.*

4. POWERS OF MAGISTRATES—*continued.*

**Magistrate of second class**—*continued.*

the Criminal Procedure Code, a Magistrate of the second class who has begun a trial as such and continued it in the same capacity up to the passing of sentence, and who, prior to passing sentence has been invested with the powers of a Magistrate of the first class, is competent to pass sentence in the case as a Magistrate of the first class. *Per* PETHERAM, *C. J.*, that a case must be taken to be tried upon the day the trial commences; that, for all the purposes of the trial, the Magistrate in this case retained the status of a Magistrate of the second class, and that he was therefore not competent to pass sentence as a Magistrate of the first class. *Per* BRODHURST, *J.*, that the sentences passed by the Magistrate were, as a whole, illegal; that if he had convicted the accused under section 148 of the Penal Code, his order would, under the circumstances, have been legal. QUEEN-EMPRESS *v.* PERSHAD . **I. L. R., 7 All., 414**

**16. ——— Joint Magistrate with powers of Magistrate of district.**—*Criminal Procedure Code, 1861, ss. 15, 23, and 68.*—A Joint Magistrate who has been vested with the full powers of a Magistrate of a district, and to whom a case is duly made over by the Magistrate, is competent, under sections 15, 23, and 68 of the Code of Criminal Procedure to initiate proceedings without any formal complaint against parties other than those mentioned in the original complaint. IN THE MATTER OF THE PETITION OF LUCHMIPUT SINGH . **18 W. R., Cr., 43**

**17. ——— Subordinate Magistrate.**—*Power of, to try case on report of police or on complaint.*—A Subordinate Magistrate (second class), who is not specially vested with powers under section 66 (*a*) of the Code of Criminal Procedure, 1861 (as amended by Act VIII of 1869), has no jurisdiction to try a case on the report of a police officer, or on a complaint directly preferred to him. IN THE MATTER OF THE PETITION OF SHANKAR ABAJI HOSHING . . . . . **6 Bom., Cr., 69**

**18. ——— Magistrate of third class.**—*Power to entertain charge in police report.—Criminal Procedure Code, 1872, s. 123.*—A Magistrate of the third class can try a person accused of a cognisable offence, who has been forwarded to him by an officer in charge of a police station, under section 123 of the Code of Criminal Procedure. REG. *v.* LALA SHAMBHU . . . . . **10 Bom., 70**

**19. ——— Deputy Magistrate.**—*Default in appearance of party bailed.*—In consequence of the default in appearance of a person bailed, the surety was compelled to pay the penalty mentioned in the recognisance. The Deputy Magistrate applied for and received the permission of the District Magistrate to try the accused under section 174 of the Penal Code. *Held* that the Deputy Magistrate had no jurisdiction to try the case, it not having been referred to him "either on complaint preferred directly to the Magistrate or on the report of a police officer." QUEEN *v.* TAJUMADDI LAHORY

**[1 B. L. R., A. Cr., 1: 10 W. R., Cr., 4**

**MAGISTRATE, JURISDICTION OF—** *continued.*

4. POWERS OF MAGISTRATES—*continued.*

**20. ——— Power of delegation of authority to receive complaints.**—*Criminal Procedure Code, 1869, ss. 23 (d) and 66 (b).—Order of Local Government, Effect of.*—The power of a Magistrate to delegate the receiving of complaints under section 66 (*b*), Code of Criminal Procedure, is not equivalent to the power of the Local Government to invest with local jurisdiction under section 23 (*d*), and no Magistrate can act under chapter XX who has not been legally invested with the local jurisdiction. No order of the Local Government under the latter section can legally have retrospective effect. MACDONALD *v.* RIDDELL . . **16 W. R., Cr., 79**

**21. ——— Power to refer case where no jurisdiction to try it.**—*Power to try case without complaint.*—A Subordinate Magistrate has no power to refer a case, which he has himself no jurisdiction to try, to a full-power Magistrate, and the latter has, therefore, under such circumstances, no jurisdiction to take up the case without a complaint being made to him. REG. *v.* BAGU VALAD OWSARI . . . . **4 Bom., Cr., 34**

**22. ——— Power to refer case sent for investigation by Civil Court.**—*Power to try case without complaint.—Held* that the Magistrate of a district, to whom a case has been sent for investigation by a Civil Court, has no power to refer it to a full-power Magistrate, and the latter has, therefore, under such circumstances, no jurisdiction to take up the case without complaint made to him. REG. *v.* DIP CHAND KHUSHAL . . **4 Bom., Cr., 30**

**23. ——— Magistrate trying case himself after referring it.**—*Trial without recording proceeding under s. 36, Criminal Procedure Code, 1869.*—A Magistrate of a district, before whom a complaint had been made, without complying with the provisions of section 66, Act XXV of 1861, sent the petition to be disposed of by a Deputy Magistrate; and when the Deputy Magistrate had proceeded to some extent with the case, the Magistrate took it up and tried it himself. *Held* that the Magistrate, having once sent the case to the Deputy Magistrate for trial, had no power to try the case himself without formally recording a proceeding under section 36 of Act VIII of 1869. QUEEN *v.* GIRISH CHANDRA GHOSE

**[7 B. L. R., 513: 16 W. R., Cr., 40**

**24. ——— Order for dismissal of complaint.**—*Discharge of accused.—Code of Criminal Procedure, Act X of 1882, ss. 253, 259.*—A Magistrate is not competent to pass an order of dismissal or discharge in consequence of the absence of the complainant in warrant cases not coming within section 259 of the Code of Criminal Procedure, except in cases coming within the last clauses of section 253 of the same Code. GOVINDA DASS *v.* DULALL DASS

**[I. L. R., 10 Calc., 67: 13 C. L. R., 408**

**25. ——— Removal of case from file of Deputy Magistrate.**—*Criminal Procedure Code (Act XXV of 1861), s. 66.—Act VIII of 1869,*

**MAGISTRATE, JURISDICTION OF**—*continued.*

4. POWERS OF MAGISTRATES—*continued.*

**Removal of case from file of Deputy Magistrate**—*continued.*

*s. 36.—Discretion of Court.*—Interference by the High Court in a case where the Magistrate had improperly exercised his discretion in removing a case from the file of a Deputy Magistrate. IN THE MATTER OF THE PETITION OF NABA KUMAR BANERJEE **[5 B. L. R., Ap., 45**

**26. ——— Power to refer to Subordinate Magistrate.**—A full-power Magistrate has no authority to refer for disposal to a Subordinate Magistrate a complaint made originally to such full-power Magistrate. REG. *v.* PAPIDIO MUTHDO **[9 Bom., 167**

**27. ——— Reference to District Magistrate.**—*Powers of second class Magistrate.—Committal to Court of Sessions.—Criminal Procedure Code, 1882, s. 349.*—An Assistant Magistrate convicted a person under sections 406 and 417 of the Penal Code, and referred the case to the District Magistrate for sentence under the provisions of section 349 of the Code of Criminal Procedure. The District Magistrate was of opinion that the offence was one properly punishable under section 420 of the Penal Code, and one which the Assistant Magistrate had no jurisdiction to deal with, and that therefore the reference under section 349 was *ultra vires* and illegal. On a reference to the High Court,—*Held* that the Assistant Magistrate was not wholly without jurisdiction, as he was competent to commit the accused to the Court of Session, though not to hold a trial, and that the District Magistrate might, if he thought proper, commit the accused to the Court of Session. ABDUL WAHAB *v.* CHANDIA **[I. L. R., 13 Calc., 305**

**28. ——— Magistrates not Justices of the Peace.**—*Madras Boat Rules.—Act IV of 1842.—Act IX of 1846.—Liability of owner under rule 7.—Burden of proof.*—Under Act IX of 1846, the Madras Government is authorised to make, in respect of ports in the presidency, such regulations for the management of boats and such other matters as are provided for by Act IV of 1842 in respect of the Madras roads, being similar in principle to the provisions of the said Act, but varying in detail as local circumstances may require. Act IV of 1842, section 24, empowers a Justice of the Peace of the town of Madras to hear and determine all pecuniary forfeiture and penalties had or incurred under or against that Act. *Held* that it was competent to the Government of Madras to provide that cases cognisable under the rules passed in accordance with Act IX of 1846 should be heard and determined by Magistrates not being Justices of the Peace. IN RE ROUTHAKONNI **[I. L. R., 9 Mad., 431**

**29. ——— Reference to first class Magistrate.**—*Criminal Procedure Code, 1882, s. 349.*—A second class Magistrate having convicted a person of theft and sent him to a first class Magistrate for enhanced punishment as an old offender, under section 349 of the Code of Criminal Procedure, the first class Magistrate returned the prisoner to the second class Magistrate and directed that officer to commit the case to the Sessions. On a reference by the Sessions Judge, the High Court, while allowing the committal to stand, directed that in all cases referred under section 349 of the Code of Criminal Procedure, the Court to which the case is referred should dispose of the case itself and not send it back to the Court by which the reference is made for committal to the Sessions. QUEEN-EMPRESS *v.* VIRANNA **[I. L. R., 9 Mad., 377**

**30. ——— Return by Subdivisional Magistrate of case referred to him.**—*Criminal Procedure Code, s. 349.—Order.—Committal.*—Under section 349 of the Criminal Procedure Code (Act X of 1882), a second class Magistrate transmitted a case to a Subdivisional Magistrate, being of opinion that a more severe punishment was deserved than he (the second class Magistrate) was empowered to inflict. The Subdivisional Magistrate, instead of disposing of the case himself, returned it to the second class Magistrate for committal, and thereupon the latter committed it. *Held* that the action of the Subdivisional Magistrate, in returning the case to the second class Magistrate, was illegal, as he was bound to pass a final judgment, sentence, or order. His order was, therefore, annulled, and he was directed to dispose of the case himself. QUEEN-EMPRESS *v.* HAVIA TELLAPA . **I. L. R., 10 Bom., 196**

**31. ——— Deputy Magistrate in charge of District Magistrate's office.**—*Criminal Procedure Code, 1882, s. 437.*—A Deputy Magistrate placed in charge of the current duties of the District Magistrate's office is not thereby vested with jurisdiction under section 437 of the Code of Criminal Procedure. RAMANUND MAHTAN *v.* KOYLASH MAHTAN . . . **I. L. R., 11 Calc., 236**

**32. ——— Reference to Deputy Magistrate for enquiry.**—*Criminal Procedure Code, 1861, s. 273.*—Where a case was referred to a Deputy Magistrate for inquiry only, that inquiry cannot be regarded as a trial. Where a Deputy Magistrate is competent to try a case, it is doubtful whether it is in accordance with the spirit of section 273 of the Criminal Procedure Code for the Magistrate to refer it to him for inquiry only. QUEEN *v.* BAWUL SINGH **[1 N. W., Ed. 1873, 306**

**33. ——— Reference to District Magistrate by Civil Court for inquiry.**—*Power to refer it to Deputy Magistrate.*—A District Magistrate to whom a case in which four persons were specially committed by a Munsif for investigation of charges of forgery, perjury, &c., has no power under section 273 of the Criminal Procedure Code, 1861, to refer it to the Deputy Magistrate. QUEEN *v.* KUTTER RAM . . . . . **2 N. W., 21**

QUEEN *v.* ASSUF ALI KHAN . **3 N. W., 126**

**MAGISTRATE, JURISDICTION OF—** *continued.*

4. POWERS OF MAGISTRATES—*continued.*

**34. ——— Power to transfer case sent for inquiry.**—*Reference by Civil Court.—Order of commitment by Subordinate Magistrate.—Criminal Procedure Code, 1869, ss. 273 and 171.*—A Small Cause Court Judge sent a case for investigation to the head Assistant Magistrate under the provisions of section 171 of the Criminal Procedure Code. The head Assistant Magistrate transferred the case for investigation to the Subordinate Magistrate, who committed the case to the Sessions. *Held* that the order of commitment was bad. Section 273 of the Code of Criminal Procedure is inapplicable to a case referred to a Magistrate under section 171. ANONYMOUS **[6 Mad., Ap., 41**

**35. ——— Reference by District Magistrate to Subordinate Magistrate.**—*Criminal Procedure Code, 1861, ch. XIX.*—The Magistrate of a district or division is authorised, under section 273 of the Criminal Procedure Code, to transfer proceedings under chapter XIX of that Code to his subordinates. QUEEN *v.* ABDOOLLAH **[2 N. W., 401**

**36. ——— Reference to full-power Magistrate.**—*Subordinate Magistrate.—Criminal Procedure Code, 1861, ch. XVI.—Held* that the Magistrate of a district before whom a criminal case is brought, either on complaint preferred directly to such Magistrate, or on the report of a police officer, cannot, under section 273 of the Criminal Procedure Code, refer such case to a full-power Magistrate. A full-power Magistrate, though executively inferior to the Magistrate of the district, was not a Subordinate Magistrate within the meaning of chapter XVI of the Criminal Procedure Code, nor was he "immediately subordinate" to the District Magistrate within the meaning of section 434 of the same Code. REG. *v.* KRISHNA PARASHRAM . . **5 Bom., Cr., 69**

**37. ——— Power to refer cases for inquiry.**—*Criminal Procedure Code, 1861, s. 273.*—Under section 273 of the Criminal Procedure Code, a full-power Magistrate may refer for inquiry to a Subordinate Magistrate (criminal cases, that is, *primâ facie*, any criminal case). The reference may be for inquiry or for trial by the Subordinate Magistrate, or with a view to commitment either to a Court of Session or the High Court. ANONYMOUS **[4 Mad., Ap., 40**

**38. ———** *Criminal Procedure Code, 1869, ss. 68, 273.*—Section 273 of the Criminal Procedure Code, 1869, applies only to criminal cases brought before the Magistrate of the district, and either on complaint preferred direct to such Magistrate or on the report of a police officer. There is no provision of the Code which authorises a Magistrate acting under section 68 of the Code to refer the case for enquiry or trial to another Magistrate. Section 68 merely authorises him to take cognisance of offences without complaint and to issue summons or warant. ANONYMOUS **[7 Mad., Ap., 2**

**MAGISTRATE, JURISDICTION OF—** *continued.*

4. POWERS OF MAGISTRATES—*continued.*

**Power to refer cases for inquiry—***continued.*

**39. ———** *Criminal Procedure Code, 1861, s. 273.—Criminal Procedure Code, 1869, s. 23 (g).—Power to refer cases to other Magistrates.*—Section 23 (*g*) of the Code of Criminal Procedure, 1869, makes the Magistrate of a district competent to refer cases under section 273 of the Code to a Divisional Magistrate exercising full powers. ANONYMOUS . . . . **7 Mad., Ap., 5**

**40. ———** *Criminal Procedure Code (Act XXV of 1861), s. 273.—Grievous hurt.*—A Magistrate has no power, under section 273 of the Code of Criminal Procedure, to refer a case of grievous hurt for trial to a Deputy Magistrate having only the power of a Subordinate Magistrate of the second class. GABIND CHANDRA BISWAS *v.* HEM CHANDRA BARDER . **6 B. L. R., Ap., 115**

**41. ———** *Reference of case after initiation to Subordinate Magistrate.—Criminal Procedure Code, 1872, ss. 44, 45, 47, 49.*—In all cases in which a Magistrate refers a complaint already initiated to a Subordinate Magistrate for inquiry, the Procedure adopted for the purpose ought to conform either to section 44 or section 49 of the Criminal Procedure Code. RAMZAN ALI *v.* DURPO KOMILLA **[24 W. R., Cr., 58**

**42. ———** *Criminal Procedure Code, 1872, s. 45.*—Pending inquiry into a charge of house-breaking, the second class Magistrate of B. Division was transferred to A. Division. The case was transferred to his file by the District Magistrate. In the course of inquiry it appeared to the second class Magistrate that the offence committed was robbery, and therefore not triable by him. Proceedings were accordingly stayed and the case submitted to the Magistrate of the division. The Magistrate of the division, considering he had no jurisdiction as the offence was not committed in his division, forwarded the case to the Magistrate of the district. The Magistrate of the district ordered that an inquiry should be held, and that the case should be committed to the Sessions by the second class Magistrate if there was sufficient evidence. The second class Magistrate accordingly committed the case to the Sessions. *Held* that the order of the District Magistrate was illegal. QUEEN *v.* ADAPA VENKANNA . . . **I. L.R., 4 Mad., 327**

**43. ——— Power of District Magistrate to refer case referred to him for trial.**—*Reference to full-power Magistrate.—Criminal Procedure Code, 1861, s. 276.*—It is competent for the Magistrate of a district to refer for trial to a full-power Magistrate a case submitted, under section 276 of the Code of Criminal Procedure, to such Magistrate of the district by a Subordinate Magistrate. REG. *v.* MANGLA BHULIA . . **7 Bom., Cr., 69**

MAGISTRATE, JURISDICTION OF—*continued.*

5. REFERENCE BY OTHER MAGISTRATES.

**44. ——— Power in case referred for enhancement of punishment.**—*Criminal Procedure Code, 1872, s. 46.—Power to order committal for trial.*—A Magistrate, to whom a case is referred for enhancement of punishment under section 46 of the Criminal Procedure Code, may order the committal of the case for trial by the Sessions Court. IN THE MATTER OF CHINNIMARRIGADU.

**[I. L. R., 1 Mad., 289**

**45. ———** *Criminal Procedure Code, 1872, s. 46.*—A Magistrate to whom a case is referred for enhanced punishment has no power to send the case for inquiry to another Magistrate. QUEEN *v.* VELAYUDUM

**[I. L. R., 4 Mad., 233**

**46. ———** *Criminal Procedure Code, 1872, s. 46.—Return of case referred under s. 46.*—It is not competent for a Magistrate, to whom a case has been referred under section 46 of the Code of Criminal Procedure, to return the case to the referring Magistrate, on the ground that in his opinion the latter has power to pass an adequate sentence. All orders passed after a case has been so returned are illegal. DULA FAQUEER *v.* BHAGIRAT SIRCAR . . . . . **6 C. L. R., 276**

**47. ———** *Criminal Procedure Code, 1872, ss. 46, 143.—Order.—Committal.*—The word "order" in section 46 of the Code of Criminal Procedure, associated as it is with the words "judgment and sentence," means a final order,—*i.e.*, one disposing of a case so far as the Magistrate, to whom a Subordinate Magistrate submits the proceedings of the case for higher punishment, is concerned. It does not deprive that Magistrate of the exercise of his discretion as to its being a proper case for the Sessions, and of the power of committing it for trial given by section 143 of the Code of Criminal Procedure. IMPERATRIX *v.* ABDULLA

**[I. L. R., 4 Bom., 240**

**48. ———** *Criminal Procedure Code, 1872, ss. 41, 44, 46, & 284.—Covenanted Magistrate of the third class on tour in division of a district.—Subordination to Magistrate of the division.*—A Magistrate of a division of a district made over, under section 44 of Act X of 1872, a case of theft for trial to a Magistrate of the third class, who was on tour in his division, in the discharge of his public duties. The latter, who had jurisdiction, found the accused person guilty, and considering that the accused person ought to receive more severe punishment than he was competent to inflict, under the provisions of section 46 of Act X of 1872, submitted his proceedings to the former, who thereupon, under the provisions of the same section, passed sentence on the accused person. *Held* that the third class Magistrate was "subordinate" to the Magistrate who originally made over the case to him, within the meaning of section 41 of Act X of 1872, and the procedure of the Magistrates was therefore according to law. *Held* also that, assuming that he was not so "subordinate," the provisions of section 284 of Act X of 1872 would not have been applicable, as those provisions do not refer to the illegality of a sentence, or to the case of a Magistrate transferring a case who has no power of transfer, but to the invalidity of a conviction for want of jurisdiction. EMPRESS *v.* KALLU . . . . **I. L. R., 4 All., 366**

MAGISTRATE, JURISDICTION OF—*continued.*

5. REFERENCE BY OTHER MAGISTRATES—*continued.*

**Power in case referred for enhancement of punishment**—*continued.*

**49. ——— Power to annul conviction in offence not triable by Subordinate Magistrate.**—*Criminal Procedure Code, 1872, s. 284.*—Where, on appeal from a conviction, by a Subordinate Magistrate, of an offence triable by him, the Magistrate of the district is of opinion that the evidence in the case establishes a graver offence against the accused not triable by the Subordinate Magistrate,—*Held* that the Magistrate of the district has no power to annul the conviction and sentence under section 284 of the Code of Criminal Procedure, but should report the matter for the orders of the High Court. REG. *v.* TUKARAM RAGHO . **12 Bom., 234**

**50. ——— Reference to Magistrate with power to hear appeals.**—*Criminal Procedure Code, 1861, s. 276.—Reference of cases by Subordinate Magistrates.—Held* that a full-power Magistrate, though empowered to hear appeals, is not thereby placed in the position of the Magistrate of the district, and that, therefore, Subordinate Magistrates should not refer cases, under section 276 of the Code of Criminal Procedure, to such Magistrate, but to the Magistrate of the district, to whom alone they are subordinate. REG. *v.* BHAGU BIN SHABAJI

**[5 Bom., Cr., 47**

**51. ——— Reference to Magistrate under s. 277, Criminal Procedure Code, 1861.**—*Power to send to Sessions for higher sentence.*—Where a case is referred to a Magistrate under section 277 of the Code of Criminal Procedure, the Magistrate alone has jurisdiction, and cannot commit to the Sessions, on the ground that he considers the sentence which he is empowered to inflict is insufficient. IN RE BHICKAREE MULLICK

**[10 W. R., Cr., 50**

**52. ———** *Subordinate Magistrate.—Held* that a Subordinate Magistrate acted correctly, under section 277 of the Code of Criminal Procedure, 1861, in referring a case, not to the Magistrate of the district, but to the Assistant Magistrate in charge of the subdivision to which he was attached. IN THE MATTER OF NIDHEE TELHINEE . . . . . **11 W. R., Cr., 7**

**53. ———** *Issue of circulars.*—Circulars issued by a District Magistrate forbidding all the Subordinate Magistrates from taking up cases, if they thought they should have to act under the provisions of section 277 of the Criminal Procedure Code, 1861, were, on reference by a Ses-

**MAGISTRATE, JURISDICTION OF—** *continued.*

5. REFERENCE BY OTHER MAGISTRATES —*continued.*

**Reference to Magistrate under s. 277, Criminal Procedure Code, 1861**—*continued.*

sions Judge, annulled as beyond the competence of the District Magistrate, and based on a misunderstanding of section 277. REG. *v.* GUNA BIN REGNAK **[3 Bom., Cr., 29**

**54.** ——————— *Power to dispose of case.*—On reference by a District Magistrate, a sentence passed by a full-power Magistrate, in a case submitted to him by a second class Subordinate Magistrate, under section 277 of the Criminal Procedure Code, 1861, annulled, as the Magistrate of the district alone had power to dispose of cases under that section. REG. *v.* KUBERIO RATNO **[4 Bom., Cr., 8**

ANONYMOUS . . . **5 Mad., Ap., 43**

6. COMMITMENT TO SESSIONS COURT.

**55.** ——— **Obligation to commit.**—*Perjury committed in proceeding under s. 318, Criminal Procedure Code, 1861.*—A Magistrate has no jurisdiction to try, but must commit to the Sessions, a case of perjury committed before him in the course of a proceeding taken under section 318 of the Code of Criminal Procedure. QUEEN *v.* BULORAM **[7 W. R., Cr., 104**

**56.** ——— **Power to commit.**—*Criminal Procedure Code, 1861, s. 171.—False evidence.—Preliminary inquiry.*—A Munsif sent a witness before a Magistrate, in order that the latter might hold a preliminary investigation on a charge of giving false evidence, under section 193 of the Penal Code. The Magistrate, without completing the investigation, sent the case back to the Munsif, who finally committed the prisoner. *Held* that, while the Munsif could have committed the prisoner himself under section 173 of the Criminal Procedure Code, without sending him before the Magistrate to conduct the preliminary investigation on a charge of giving false evidence, the Magistrate had acted irregularly in not himself completing the inquiry. Case remanded to the Magistrate accordingly. QUEEN *v.* JAN MAHOMED . **3 B. L. R., A. Cr., 47: 12 W. R., Cr., 41**

**57.** ——————— *Case sent by Civil Court for investigation under s. 171, Criminal Procedure Code, 1861.*—When a Civil or Criminal Court sends a case for investigation to a Magistrate under section 171 of the Code of Criminal Procedure, the Magistrate to whom the case is sent must himself hold the investigation. ANONYMOUS **[6 Mad., Ap., 2**

**58.** ——————— *Commitment by Subordinate Magistrate in case not exclusively triable by Sessions Court.*—A commitment by a Subordinate Magistrate to the Sessions Court with respect to offences not exclusively triable by the Sessions Court is good. ANONYMOUS . . **6 Mad., Ap., 17**

**MAGISTRATE, JURISDICTION OF—** *continued.*

6. COMMITMENT TO SESSIONS COURT —*continued.*

**59.** ——— **Power to direct committal.** —*Sessions Judge, Power of.*—A Magistrate of the district has no power to direct a Subordinate Magistrate to commit for trial in the Sessions Court accused persons who have been discharged by the Subordinate Magistrate, and such committal when made by the Subordinate Magistrate is illegal. The Sessions Court is the only authority empowered by law to direct a committal. ANONYMOUS **[4 Mad., Ap., 31**

**60.** ——————— *Commitment by Sessions Judge to Magistrate.—Trial by Joint Magistrate.*—Where a Magistrate of a district who had discharged a prisoner was subsequently directed by the Sessions Judge to commit him for trial, and the commitment was eventually made by the Joint Magistrate,—*Held* that such commitment was not illegal. Although ordinarily the order of the Sessions Judge would be directed to the Magistrate who had discharged the accused person, yet there is nothing in the Criminal Procedure Code to prevent such Sessions Judge from directing a committal by any Magistrate who is authorised to make commitments. QUEEN *v.* LEKHRAJ . . . **2 N. W., 132 [S. C. Agra, F. B., Ed. 1874, 206**

**61.** ——————— *Reference to Sessions Court.—Criminal Procedure Code, 1861, 1869, s. 435.*—Where a Magistrate of the district thinks that in any case tried by a Magistrate subordinate to him a failure of justice has occurred, in consequence of the latter not committing the accused for trial at the Court of Session, he should refer the case, with an expression of his opinion, to the Sessions Court, which has power, under section 435 of the Code of Criminal Procedure, to direct a commitment to the Sessions Court for trial. Section 435 having been altered by Act VIII of 1869, it is no longer necessary to refer such cases to the High Court, as required by the Court's ruling in *Reg.* v. *Chanveraya bin Chanbasaya, 5 Bom., Cr., 65.* REG. *v.* KALA BIN HARI GAMA . . . . . **7 Bom., Cr., 72**

**62.** ——————— *Criminal Procedure Code (Act VIII of 1869), s. 435.—Case dismissed without sufficient inquiry.—Semble,*—When a charge is dismissed by a Subordinate Magistrate without inquiry, a Magistrate has no power, under section 435 of Act VIII of 1869, to order a trial before another Magistrate, but can only order a commitment to the Court of Session. QUEEN *v.* HIRALAL SING **[5 B. L. R., Ap., 48: 14 W. R., Cr., 8**

**63.** ——————— *Power to set aside finding where the Magistrate acted without jurisdiction.—Criminal Procedure Code, 1869, s. 435.*—Where a Subordinate Magistrate of the first class acting without jurisdiction held a trial and acquitted the accused person under section 255 of the Code of Criminal Procedure,—*Held* that the High Court alone could set aside the finding under section 404, and that the

MAGISTRATE, JURISDICTION OF—*continued.*

6. COMMITMENT TO SESSIONS COURT —*continued.*

**Power to direct committal**—*continued.*

Magistrate of the district had no power to do so under section 435 of the Code as amended by Act VIII of 1869. ANONYMOUS . **4 Mad., Ap., 61**

**64.** ——— *Magistrate and Joint Magistrate, Power of.—Preliminary inquiry.* —Legally, and for the purposes of a commitment, a Magistrate and Joint Magistrate have equal powers, and the Joint Magistrate is not bound to act upon the instructions of the Magistrate in a judicial proceeding, such as the commencement of a preliminary inquiry. QUEEN *v.* TILKOO GOALA **[8 W. R., Cr., 61**

**65.** ——— *Power to direct re-trial.—Criminal Procedure Code, 1861, s. 435.*— Where a Subordinate Magistrate discharges a person accused of an offence not being an offence specified in the seventh column of the schedule to the Criminal Procedure Code as triable by the Court of Session only or by the Court of Session or Magistrate of the district, the District Magistrate has no power to direct a re-trial under the provisions of section 435 of the Code of Criminal Procedure. REG. *v.* SUBHANA BIN GANU . . . . . **9 Bom., 169**

**66.** ——— *Courts of head Assistant Magistrate and Deputy Magistrate.— Trial of Munsif for extortion.—Mad. Reg. VI of 1816, s. 8.*—The Courts of the head Assistant Magistrate and of the Deputy Magistrate have jurisdiction to try a District Munsif on charges of extortion in the course of the exercise of his judicial functions. The Sessions Judge is a proper person to sanction the prosecution. *By* INNES, *J.*—The rule (laid down in section 8, Regulation VI of 1816) requiring the committal of such cases to the Court of Session has been impliedly, though not expressly, repealed. IN THE MATTER OF THE PETITION OF NARAYANASAMI AYYAR **[7 Mad., 182**

**67.** ——— **Duty of Magistrate to commit.**—*Magistrate making inquiry in Sessions case. —Discharge of accused.—Criminal Procedure Code, 1872, s. 195.*—A Magistrate inquiring into a case exclusively triable by the Court of Session is not bound to commit the accused person for trial, where the evidence for the prosecution, if believed, would end in a conviction; but is competent, if he discredits such evidence, to discharge the accused. LACHMAN *v.* JUALA . . . . . **I. L. R., 5 All., 161**

**68.** ——— *Inquiry into case triable by Court of Session.—Held,* where a Magistrate had tried a case exclusively triable by a Court of Session, and the conviction of the accused person and the sentence passed upon him at such trial were for that reason annulled by the Court of Session, but the proceedings held at such trial were not annulled, that such Magistrate might commit the accused person to the Court of Session on the evidence given before him at such trial EMPRESS *v.* ILAHI BAKHSH . . . **I. L. R., 2 All., 910**

MAGISTRATE, JURISDICTION OF—*continued.*

7. WITHDRAWAL OF CASES.

**69.** ——— **Withdrawal of case for trial.**—*Criminal Procedure Code, 1872, ss. 45, 47, 328, 329.*—The provisions of Act X of 1872, section 328, only apply when a Magistrate, after hearing part of the evidence in a case, ceases to exercise jurisdiction, and is succeeded by another, who has, and exercises, jurisdiction in such case. So section 329 only applies to "inquiries" under Chapter XV, and only when the Magistrate is "unable" to complete the inquiry himself. But when a case under trial is removed under section 47, the whole proceedings must commence *de novo* in the manner provided for in section 45. QUEEN *v.* KHAN MAHOMED **[24 W. R., Cr., 53**

**70.** ——— **Power to withdraw case.** —*Criminal Procedure Code, 1872, s. 47.*—Magistrates of districts should exercise the powers conferred on them by section 47 of Act X of 1872 only when it is absolutely necessary for the interests of justice that they should do so; and when one of the parties to a case applies to have it withdrawn from the Magistrate inquiring into or trying it and referred to another Magistrate, the Magistrate of the district should give the other party notice of such application, and an opportunity of showing cause why such application should not be granted. Where the accused in a criminal case applied to the Magistrate of the district, after the evidence of the complainant and his witnesses had been taken, to withdraw such case from the Subordinate Magistrate trying it and to try it himself, such application not containing any sufficient reason justifying the granting of the same, and the Magistrate of the district, without giving the complainant notice of such application or opportunity of showing cause against it, and without stating any reason, withdrew such case from the Subordinate Magistrate trying it and referred it to another for trial, the High Court set aside the order of the District Magistrate and of the Magistrate to whom such case was referred for trial, and directed the Magistrate from whom it had been withdrawn to proceed with it. IN THE MATTER OF THE PETITION OF UMBAO SINGH *v.* FAKIR CHAND **[I. L. R., 3 All., 749**

**71.** ——— *Criminal Procedure Code, 1872, ss. 47, 491.—Act XI of 1874, s. 6.* —The provisions of section 47 of the Code of Criminal Procedure, Act X of 1872, as amended by section 6 of Act XI of 1874, are wide enough to empower a District Magistrate to withdraw a case falling under section 491 of the same Code. IN THE MATTER OF THE PETITION OF DINENDRO NATH SHANIAL **[I. L. R., 8 Calc., 851**

8. RE-TRIAL OF CASES.

**72.** ——— **Fresh trial after discharge** —*Criminal Procedure Code, 1861, ss. 68 and 225.— Discharge of accused.—Institution of fresh proceedings.*—Where an accused person is discharged by a Deputy Magistrate under section 225 of the Code of

**MAGISTRATE, JURISDICTION OF—** *continued.*

8. RE-TRIAL OF CASES—*continued.*

**Fresh trial after discharge**—*continued.*

Criminal Procedure, after a preliminary inquiry, the Magistrate of the district may proceed against him afresh under section 68 of the Criminal Procedure Code. IN THE MATTER OF THE PETITION OF RAMJAI MAJUMDAR . . **6 B. L. R., Ap., 67 [14 W. R., Cr., 65**

**73.** ——— *Orders under s. 536, Criminal Procedure Code, 1872.—Hearing by District Magistrate after prior dismissal.*—When a duly empowered Magistrate has decided a matter under section 536, Code of Criminal Procedure, by dismissing the application after hearing the evidence offered, the District Magistrate is not competent to entertain the complaint *de novo.* IN THE MATTER OF JAMOTI *v.* GADALO KAMAR . **1 C. L. R., 89**

9. REVIEW OF ORDERS.

**74.** ——— **Committing order, Power to cancel.**—Where a Deputy Magistrate has once made an order transferring a case for trial to the Magistrate, he has no power to cancel the order and replace the case on his own file. QUEEN *v.* CHUNDER SEEKUR ROY . . . **12 W. R., Cr., 18**

**75.** ——— **Power to vary sentence.**—A Magistrate has not authority to vary any sentence he may have once passed on a prisoner and which has been finally recorded . REG. *v.* TOOKIA . **1 Bom., 3**

**76.** ——— **Power to revive order which has been quashed.**—On the 7th of June 1881, the Assistant Commissioner of Hylakandi, in Sylhet, passed an order under section 518 of the Criminal Procedure Code, 1872, that the manager of a certain tea garden should discontinue holding a market on Thursdays until further notice. On the 25th of August 1881, the Assistant Commissioner reviewed this order, and having come to the conclusion that he had no power to issue a permanent injunction, struck the case off the file, at the same time referring the matter to the Deputy Commissioner. The latter declined to interfere, informing the Assistant Commissioner that he saw no illegality in his order. Thereupon the Assistant Commissioner passed an order declaring that his order of the 7th of June 1881 remained in full force. On a reference to the High Court, made by the Officiating Sessions Judge of Sylhet, under section 297 of the Code of Criminal Procedure,—*Held* that the Magistrate having, on the 25th of August 1881, set aside his order of the 7th of June 1881, and struck the case off the file, he had no power to revive it without a fresh proceeding. BRADLEY *v.* JAMESON . **I. L. R., 8 Calc., 580 [11 C. L. R., 414**

10. SPECIAL ACTS.

**77.** ——— **Act XIX of 1838, s. 13 (Coasting Vessels, Bombay).**—Only a full-power Magistrate had jurisdiction to convict of an offence under section 13 of Act XIX of 1838. REG. *v.* KASAMJI . . . . **5 Bom., Cr., 6**

**MAGISTRATE, JURISDICTION OF—** *continued.*

10. SPECIAL ACTS—*continued.*

**78.** ——— **Act XXVI of 1850 (Towns Improvement, Bombay).**—*Infliction of penalty for breach of rule under.—Held* that a Subordinate Magistrate has no jurisdiction to impose a penalty for breach of a rule made by the Town Commissioners under Act XXVI of 1850, section 7, clause 5. REG. *v.* MALHARJI BIN NAULOJI **[3 Bom., Cr., 36**

**79.** ——— *Municipal Commissioners, Committee of, appointed under.*—The managing committee of Municipal Commissioners appointed under Act XXVI of 1850 have no power to try and convict persons for alleged breaches of rules made in pursuance of that Act. The power to inflict fines for such offences is, by section 10, vested in the Magistrate. REG. *v.* MAVJI DAYAL. REG. *v.* KALIDAS KEVAL . . . **5 Bom., Cr., 10**

**80.** ——— *Criminal Procedure Code, VIII of 1869.—Schedule.—Breach of Municipal rules under Act XXVI of 1850.*—By virtue of the last part of the schedule headed "offences against other laws" added to the Code of Criminal Procedure by Act VIII of 1869, a Subordinate Magistrate, second class, can take cognisance of the offence of a breach of the municipal rules promulgated under Act XXVI of 1850. REG. *v.* DHARMAYA VALAD SANGAPA . . . **8 Bom., Cr., 12**

**81.** ——— *Municipal Commissioners, Power of, to assume judicial powers.—Power to try offenders under rules made by Municipal Commissioners.*—Municipal Commissioners appointed under Act XXVI of 1850 have not, by that Act, conferred upon them, nor are they entitled to assume, judicial powers with reference to breaches of rules or bye-laws made by them under that Act; and such rules are *ultra vires* in giving them such powers. *Reg.* v. *Kalidas Keval, 5 Bom., Cr., 10,* approved and followed. The authority to try offenders against such rules or bye-laws is vested in the Magistrates of the country, and Subordinate as well as other Magistrates have jurisdiction to try such offenders. *Reg.* v. *Dharmaya valad Sangapa, 8 Bom., Cr., 12,* approved. REG. *v.* YENKU BAPUJI . . **8 Bom., Cr., 39**

**82.** ——— **Act XXXV of 1850 (Bombay Ferries), ss. 9 & 16.**—A conviction by a full-power Magistrate under section 9 of the Bombay Ferries Act annulled for want of jurisdiction, as the Magistrate of the zillah alone was empowered by section 16 summarily to hear and determine all offences against the Act. REG. *v.* PRABHAKAR N. SOMAN **[3 Bom., Cr., 11**

**83.** ——— **Act XXII of 1855 (Ports and Port Dues), ss. 46 & 62.**—*Magistrate.*—The word "Magistrate" in section 62 of Act XXII of 1855 includes a Subordinate Magistrate; such Magistrate has, therefore, power to try the master of a vessel for an offence committed against section 46 of that Act. REG. *v.* TUNGA TUKA . **5 Bom., Cr., 14**

**MAGISTRATE, JURISDICTION OF—** *continued.*

10. SPECIAL ACTS—*continued.*

**84. ——— Act I of 1858 (Compulsory Labour, Madras), ss. 1 & 6.**—*Acts and omissions.*—The only acts or omissions over which a Magistrate has jurisdiction under Act I of 1858 are those specified in the 1st section. Cases under section 6 of the Act are not cognisable by a Magistrate. ANONYMOUS . . . . . **4 Mad., Ap., 21**

**85. ——— Beng. Act III of 1863 (Transport of Native Labourers).**—*Penal Code, ss. 65 and 67.*—*Held* that a Subordinate Magistrate of the first class has power to deal with the case of an offence provided for by a special law (in this case Bengal Act III of 1863) when the punishment awardable is six months' fine, and fine only, section 67, and not section 65, of the Penal Code being applicable to such a case. QUEEN *v.* CHUNDER PROSAUD SINGH . . . **10 W. R., Cr., 30**

**86. ——— Bom. Act IX of 1863 (Cotton Frauds), s. 9.**—Conviction under section 9 of Bombay Act IX of 1863, and sentences of one month's rigorous imprisonment, as well as an order for confiscation of cotton, set aside for want of evidence to show that the Deputy Magistrate who tried the case had jurisdiction in the matter over the person convicted, and for want of evidence of fraud. REG. *v.* JIVAN USMAN . . . . **3 Bom., Cr., 12**

**87. ——— Bom. Act VIII of 1866 (Poisonous Drugs), s. 11.**—Convictions under section 11 of Bombay Act VIII of 1866 (Poisonous Drugs Act) can only be obtained outside the town and island of Bombay before Magistrates of the first class. EMPRESS *v.* IMAMBU . **I. L. R., 4 Bom., 167**

**88. ——— Bom. Act V of 1879 (Land Revenue).**—*Magistrate of first class and second class.*—*Rules made under s. 214, Bom. Act V of 1879, (Bom. Land Revenue Act).*—*Bom. Act X of 1866, s. 1, cl. 7.*—*Removal of earth from Government land.*—The offence committed in contravention of rule 3, clause 1, item (*d*) of the rules framed under section 214 of the Land Revenue Code (Bombay Act V of 1879) is exclusively triable by a Magistrate of the first class. Accordingly, a conviction and sentence by a Magistrate of the second class were set aside by the High Court. QUEEN-EMPRESS *v.* SHIVARAM **[I. L. R., 8 Bom., 591**

**89. ——— Bom. Reg. XXI of 1827.**—*Offence against opium laws.*—*Power of fine.*—The District Magistrate (whose Court is the proper tribunal for the trial of an offence relating to the smuggling of opium) has, under section 21 of the Code of Criminal Procedure, power to inflict any fine provided by Regulation XXI of 1827 for such offence, even though the fine may exceed R1,000. REG. *v.* NARAYAN GANGARAM . . . **9 Bom., 343**

**90. ——— ———** *Illegal possession of opium.*—The offence of possessing above a quarter of a Surat ser of opium not shown to have been legally obtained is exclusively cognisable by the District Magistrate. *Reg.* v. *Narayan Natha* (Criminal Reference No. 209 of 1869), overruled. REG. *v.* HIRA JIVA . . . . **7 Bom., Cr., 59**

**MAGISTRATE, JURISDICTION OF—** *continued.*

10. SPECIAL ACTS—*continued.*

**Bom. Reg. XXI of 1827**—*continued.*

**91. ——— ——— s. 7.**—*Offence against opium laws.*—The offence of unlawfully being in possession of smuggled opium is an offence exclusively cognisable by a Magistrate of a district or of a division of a district, as representing the Zillah Magistrate referred to in Regulation XXI of 1827, section 7. No other Magistrate or Court has now jurisdiction to hold a preliminary inquiry into, or to try a person accused of, such an offence. *Reg.* v. *Hira Jiva, 7 Bom., Cr., 59,* approved; and the Court's reply, No. 1231 of 19th August 1867, to the Khandesh Sessions Judge's reference No. 702 of 1867, dissented from. REG. *v.* LAKHU VALAD SAKBU . **8 Bom., Cr., 118**

But *see* REG. *v.* SADU DADABHAI . **9 Bom., 166**

**92. ——— ——— s. 10.**—*Breach of rules for sale of opium.*—A conviction and sentence by a full-power Magistrate for breach of the rules for the retail sale of opium under Regulation XXI of 1827 (Bombay), section 10, annulled for want of jurisdiction, as the Zillah Magistrate alone was empowered to enforce the penalty. REG. *v.* SADU VALAD PAVADI **[3 Bom., Cr., 39**

REG. *v.* GANIA BIN BAPU . **3 Bom., Cr., 50**

**93. ——— Cattle Trespass Act, III of 1857, s. 13.**—*Act XVII of 1862.*—The repealing section of Act XVII of 1862 did not affect the powers of a Subordinate Magistrate under section 13 of Act III of 1857. REG. *v.* KASSAMIA **[1 Bom., 100**

**94. ——— ———** *Act XVII of 1862.*—The latter portion of section 13 of Act III of 1857 having been repealed by Act XVII of 1862, —*Held* that the offences created by that section might be dealt with by the ordinary criminal tribunals, subject to the provisions of the Code of Criminal Procedure. REG. *v.* MATHUR PURSHOTAM **[4 Bom., Cr., 13**

**95. ——— ———** A Magistrate cannot, under section 13, Act III of 1857, punish, except for an act of forcible opposition to the seizure of cattle damage feasant. HILLS *v.* SEEBHUBEE ROY **[7 W. R., 155**

**96. ——— ——— s. 18.**—*Criminal Procedure Code, 1861, s. 21.*—By virtue of section 21 of the Criminal Procedure Code, a Subordinate Magistrate of the first class had jurisdiction to try an offence under section 18 of Act III of 1857 (Cattle Trespass Act), there being no provision in that Act as to the authorities by which offences committed under it were to be tried. REG. *v.* GANGA KOM MHASU . . . . . **5 Bom., Cr., 13**

**97. ——— Chowkidars.**—*Maintenance of chowkidar on chakeran land.*—A Magistrate can maintain a chowkidar in the possession of his

**MAGISTRATE, JURISDICTION OF—** *continued.*

10. SPECIAL ACTS—*continued.*

**Chowkidars**—*continued.*

chakeran land (*i.e.*, land set apart for his subsistence by his zemindar). Any such order of the Magistrate is appealable to the Superintendent of Police. QUEEN *v.* ZEMINDAR OF COLGONG . **1 W. R., Cr., 12**

**98.** ——— **Illegal confinement.**—*Deputy Magistrate, Power of.*—The offence of illegal confinement for more than ten days is triable only by the Court of Session or by the Magistrate of the district, but not by a Deputy Magistrate. QUEEN *v.* KOMUL MANJEE . . . . . **7 W. R., Cr., 13**

**99.** ——— **Mad. Act III of 1865 (offences against special and local laws).**—*Offences under Act XIII of 1859.*—Madras Act III of 1865 authorises every Magistrate to take cognisance of offences against Act XIII of 1859. ANONYMOUS . . . . . **4 Mad., Ap., 64**

**100.** ——— *Criminal Procedure Code, 1869.—Schedule.—Madras Act III of 1865.*—The jurisdiction conferred on Magistrates in the Madras Presidency by Madras Act III of 1865 is not ousted by the schedule to the Code of Criminal Procedure as amended by Act VIII of 1869. ANONYMOUS . . . . . **7 Mad., Ap., 6**

**101.** ——— *Native Deputy Magistrate.—Madras Police Act (Act XXIV of 1859), s. 50*—By Madras Act III of 1865 a Native Deputy Magistrate has power to try police officers above the rank of a private charged with offences under the Madras General Police Act (XXIV of 1859), notwithstanding the proviso in section 50 of the atter enactment. ANONYMOUS **[4 Mad., Ap., 54**

**102.** ——— *Repeal of Act XVI of 1874.—Repeal, Effect of.*—The repeal of Madras Act III of 1865 by Act XVI of 1874 has not deprived Magistrates in the Madras Presidency of jurisdiction over offences created by special and local laws thereby given to them. REG. *v.* KANDAKORA **[I. L. R., 1 Mad., 223**

**103.** ——— *Criminal Procedure Code, 1872, s. 8.—Act XVI of 1874.—Special and local laws.*—Madras Act III of 1865 declared every Magistrate in the Madras Presidency authorised to take cognisance of every offence committed against any special or local law then in force in the said Presidency, notwithstanding any provision to the contrary in any Act or Regulation then existing, and also of any offence against any special or local law which might thereafter be passed, unless such law should make the offences to which it might refer punishable by some other authorities therein specially mentioned. The effect of this Act was to remove the restrictions imposed by special or local laws theretofore passed, and to enable Magistrates within the limits of their ordinary powers to deal with offences punishable under any such special or local law, notwithstanding the special or local law indicated a particular tribunal as alone competent to try such offences, and to confer upon them jurisdiction also in the case of any special or local laws that might be passed after the enactment of Act III of 1865, unless jurisdiction was in any such later law specially conferred upon some other authority. Section 8 of the subsequent enactment, Act X of 1772 (the Criminal Procedure Code), limited the jurisdiction of Subordinate Magistrates over offences punishable under special and local laws, a third class Magistrate's jurisdiction being restricted to the trial of offences punishable under such laws with less than one year's imprisonment, while a second class Magistrate's jurisdiction was similarly restricted to the trial of offences punishable with less than three years' imprisonment. Act XVI of 1874, while repealing Act III of 1865, left unaffected the jurisdiction of the Subordinate Magistrate under that Act so far as it still remained in existence as limited by the provisions of section 8 of Act X of 1872 (Criminal Procedure Code). EMPRESS *v.* ACHI **[I. L. R., 2 Mad., 161**

**104.** ——— **Mad. Reg. XI of 1816, s. 10.**—*Village Magistrate.—Fine for abusive language.*—A Village Magistrate has no jurisdiction to impose a fine upon a person who uses abusive language to the Village Magistrate in the course of a trial under section 10, Regulation XI of 1816. ANONYMOUS **[5 Mad., Ap., 32**

**105.** ——— **Mad. Reg. IV of 1821.**—*Village Magistrate.—Sheep-stealing.—Mad. Reg. XI of 1816.*—Sheep-stealing, when the value of the sheep is less than a rupee, is cognisable by a Village Magistrate under Regulation IV of 1821 as a petty theft: but a sentence of fine by a Village Magistrate in such cases is illegal. QUEEN *v.* BOYA LINGA **[I. L. R., 5 Mad., 268**

**106.** ——— **Merchant Seamen's Act (I of 1859), s. 83.**—*European British subject.—Criminal Procedure Code, 1872, s. 72.*—A Magistrate is not empowered to try a European British subject under clause 5, section 83 of Act I of 1859 (The Merchant Shipping Act). *See* section 72 of the Criminal Procedure Code, 1872. ANONYMOUS **[4 Mad., Ap., 23**

ANONYMOUS . . . **7 Mad., Ap., 32**

**107.** ——— **Penal Code, s. 174.**—*Offence in contempt of Court.*—A Magistrate can take cognisance of an offence under section 174, Penal Code, committed against his own Court. QUEEN *v.* GUGUN MISSER . . . . . **8 W. R., Cr., 61**

**108.** ——— **s. 213.**—*Subordinate Magistrate.—Illegal gratification.*—A Subordinate Magistrate of the second class is not competent to initiate a charge, under section 213 of the Penal Code, of accepting an illegal gratification to screen an offender. OMBIT RAM *v.* NONAO RAM **[6 W. R., Cr., 90**

**MAGISTRATE, JURISDICTION OF—** *continued.*

10. SPECIAL ACTS—*continued.*

**Penal Code**—*continued.*

**109. ——— s. 392.**—*Robbery.—Deputy Magistrate, Power of.*—A charge of robbery, under section 392 of the Penal Code, is, under Act VIII of 1866, triable only by the Court of Session, or by the Magistrate of the district, but not by a Deputy Magistrate. MADHUB GHOSE *v.* BULLYE METEA . . . **7 W. R., Cr., 11**

**110. ——— s. 458.**—*Deputy Magistrate, Power of.*—A Deputy Magistrate has no jurisdiction in the case of an offence coming under section 458 of the Penal Code. QUEEN *v.* SHADRY **[1 W. R., Cr., 34**

**111. ——— ss. 380, 458, 459**—*Lurking house-trespass by night with aggravating circumstances.*—A Deputy Magistrate has no power to convict of theft (section 380, Penal Code), where the offence charged is lurking house-trespass by night with aggravating circumstances (sections 458 and 459, Penal Code), but must commit on the latter charge. PURAN TELEE *v.* BHUTTOO DOME **[9 W. R., Cr., 5**

**112. ——— s. 471.**—*Forged document.—Power to commit for forgery produced before the Collector.*—Where a forged document is put in evidence before the Collector, the power of commitment rests with the revenue authorities, and does not under any circumstances extend to the Magistrate. GOVERNMENT *v.* HUNGESSUR SEIN **[1 Ind. Jur., O. S., 11**

**113. ——— s. 509.**—*Making indecent gestures to annoy.*—Offences coming under section 509 of the Penal Code are triable by the Magistrate of the district only. KULREE *v.* JHOONOO . . . . . **7 W. R., Cr., 52**

**114. ——— Police Act V of 1861.**—*Criminal Procedure Code, 1861, s. 133.—Offence under local Act.*—A Magistrate is competent, under section 133 of the Code of Criminal Procedure, to direct an inquiry to be made by a police officer into an offence punishable under a local Act, such as the Police Act. QUEEN *v.* PRANKISTO PAL **[14 W. R., Cr., 41**

**115. ——— s. 29.**—*Deputy Magistrate.—Power of fine.*—A Deputy Magistrate exercising the full powers of a Magistrate has jurisdiction, under section 29, Act V of 1861, to fine police officers for violation of duty. ANONYMOUS **[4 W. R., Cr., 2**

**116. ——— *Magistrate.—Sessions Judge.***—A Magistrate only, and not a Sessions Judge, has power to try cases under section 29, Act V of 1861. INDROBEE THABA *v.* QUEEN. **[1 W. R., Cr., 5**

**117. ——— Post Office Act, XIV of 1866, s. 47.**—*Subordinate Magistrate.*—A Subordinate Magistrate has jurisdiction to try a prisoner for an offence under section 47 of the Indian Post Office Act (Act XIV of 1866). REG. *v.* VITHU BIN MALLU. **[5 Bom., Cr., 36**

**MAGISTRATE, JURISDICTION OF—** *continued.*

10. SPECIAL ACTS—*continued.*

**Post Office Act, XIV of 1866, s. 47**—*continued.*

**118. ——— Post Office Acts, XVII of 1854 and XIV of 1866, s. 48.**—*Magistrate, Obligation of, to commit.*—On a reference by a Sessions Judge in reviewing the monthly magisterial returns,—*Held* that a conviction and sentence recorded by a Magistrate under section 50 of Act XVII of 1854 (corresponding with section 48 of the Act of 1866) were illegal, as the Magistrate had no jurisdiction finally to dispose of the case, but was bound to commit it for trial before the Court of Sessions. REG. *v.* ATMARAM VAMAN BHANDARKAR **[3 Bom., Cr., 8**

**119. ——— Railway Act, XVIII of 1854., ss. 17, 35.**—*Bom. Reg. XII of 1827, ss. 5, 41.*—By section 35 of the Railway Act, district police officers in the Presidency of Bombay could punish to the extent of the power conferred upon them in petty offences, any offence made punishable under the Act by fine not exceeding R21. But section 5, Regulation XII of 1827 (authorising the appointment of district police officers), and section 41 of the same Regulation (defining the limits of their jurisdiction), being both repealed by Act XVII of 1862,—*Held* that a Subordinate Magistrate had no jurisdiction to impose a fine under section 17 of the Railway Act. REG. *v.* TRIBHUVAN ISHWAR **[3 Bom., Cr., 54**

**120. ——— s. 26.**—*Madras Act III of 1865.*—Magistrates of all grades are, under Madras Act III of 1865, competent to try persons charged with offences under section 26 of the Railway Act, XVIII of 1854. ANONYMOUS **[4 Mad., Ap., 9**

ANONYMOUS . . . **6 Mad., Ap., 41**

The schedule to the Criminal Procedure Code, 1869, made no alteration in this respect. ANONYMOUS . . . . . **7 Mad., Ap., 8**

**121. ———** *Conviction by full-power Magistrate.—Held* that a conviction by a Magistrate with full powers under section 26 of the Railway Act was illegal for want of jurisdiction. REG. *v.* LAKSHMAN BALAJI . **3 Bom., Cr., 10**

**122. ——— Registration Act, 1866, ss. 91 & 95.**—*Committal to Sessions Judge.—Held* that the committal of the accused to the Court of Session by a Magistrate for trial on a charge under section 91 of the Registration Act (XX of 1866) was legal as being within the powers of the Magistrate. The Sessions Court was accordingly directed to try the accused. REG. *v.* RAVLOJIBAV BIN HANMANTRAV . . . . . **5 Bom., Cr., 7**

**123. ——— Registration Act, 1877, s. 83.**—*Criminal Procedure Code, s. 29.—Jurisdiction*

**MAGISTRATE, JURISDICTION OF—** *continued.*

10. SPECIAL ACTS—*continued.*

**Registration Act, 1877, s. 83**—*continued.*

*of second class Magistrate.*—Section 29 of the Code of Criminal Procedure, 1882, does not affect the jurisdiction given to a second class Magistrate by section 83 of the Registration Act, 1877, as amended by Act XII of 1879. QUEEN-EMPRESS *v.* KRISHNA **[I. L. R., 7 Mad., 347**

**124. ——— Salt laws.**—*Criminal Procedure Code, 1861, s. 21.—Cases under local laws.*—A Magistrate is bound, with reference to section 21 of the Code of Criminal Procedure, to proceed in the investigation of cases arising under a special law (such as the Salt Law), according to all the provisions of the Code of Criminal Procedure. QUEEN *v.* ABDOOL AZEEZ KHAN . . **14 W. R., Cr., 36**

**125. ——— Stamp Act, 1869, s. 43.**—*Magistrate authorised by Collector to prosecute.*—A Magistrate, who has been authorised by the Collector of a district, under section 43 of the Stamp Act, to prosecute offenders against the stamp laws, is not competent also to try persons whom he prosecutes. The Collector should appoint some person other than a Magistrate to conduct the prosecutions. EMPRESS *v.* GANGADHUR BHUNJO . **I. L. R., 3 Calc., 622 [2 C. L. R., 179**

**126. ——— Whipping.**—*Second class Magistrate.—Sentence of whipping.—Code of Criminal Procedure (Act X of 1872), (Act X of 1882), ss. 2 and 32.*—A person appointed a Magistrate of the second class under Act X of 1872 is incompetent, since the coming into force of Act X of 1882, to pass a sentence of whipping, unless he is specially empowered so to do according to the provisions of section 32 of the latter Act. EMPRESS *v.* BHAGVANTA RAVJI . . . **I. L. R., 7 Bom., 303**

**127. ——— Witness.**—*Money deposited as expenses of witness, Order as to.—Order to credit money deposited under Criminal Procedure Code, 1861, s. 228, to Government.*—A Magistrate has no jurisdiction to order a sum of money, deposited under section 228 of the Code of Criminal Procedure, for the refund of which an application was made, to be credited to Government. ANONYMOUS **[6 Mad., Ap., 9**

**MAHOMEDAN ECCLESIASTICAL LAW.**

*See* RELIGION, OFFENCES RELATING TO— **[I. L. R., 7 All., 461**

**MAHOMEDAN FAMILY ADOPTING HINDU CUSTOMS.**

*See* HINDU LAW—CUSTOM—MAHOMEDANS . . **I. L. R., 3 Calc., 694**

**MAHOMEDAN LAW.**

**1. ——— Extent of.**—*Religion.*—Although the Mahomedan law, pure and simple, is part of the Mahomedan religion, it does not of necessity bind all who embrace the Mahomedan creed. MAHOMED SIDICK *v.* AHMED. ABDULA HAJI ABDSATAR *v.* AHMED . . . . **I. L. R., 10 Bom., 1**

**2. ——— Authorities on Mahomedan law, Value of.**—*Rule of interpretation.*—It is a general rule of interpretation of the Mahomedan law that in cases of difference of opinion amongst the jurisconsults Imam Abu Hanifa and his two disciples, Qazi Abu Yusuf and Imam Muhammad, the opinion of the majority must be followed; and in the application of legal principles to temporal matters, the opinion of Qazi Abu Yusuf is entitled to the greatest weight. ABDUL KADIR *v.* SALIMA **[I. L. R., 8 All., 149**

**3. ——— Doubtful point of law.**—*Rule of interpretation.—Practice of Court.*—Where by writers of the highest authority on the law of a particular sect a point of law is admitted to be doubtful, regard should be had to the practice of the Courts. DAIM *v.* ASOOHA BEBEE . **2 N. W., 360**

**MAHOMEDAN LAW—CUTCHI MEMONS.**

*See* CASES UNDER HINDU LAW—INHERITANCE—SPECIAL LAWS—CUTCHI MEMONS.

**1. ——— Hindus.**—*Hindu Wills Act, s. 2.—Probate of will.*—Cutchi Memons are not Hindus within the meaning of section 2 of the Hindu Wills Act (XXI of 1870), and, therefore, probate to take effect throughout India cannot be granted in the case of a will of a Cutchi Memon testator. Cutchi Memons are Mahomedans to whom Mahomedan law is to be applied, except when an ancient and invariable special custom to the contrary is established. IN RE ISMAIL . . . **I. L. R., 6 Bom., 452**

**2. ——— Law of inheritance applicable to.**—In the absence of proof of any special custom of inheritance, the Hindu law of inheritance applies to Cutchi Memons. ASHABAI *v.* TYEB HAJI RAHIMTULLA . . . **I. L. R., 9 Bom., 115**

ABDOOL CADUR HAJI MAHOMED *v.* TURNER **[I. L. R., 9 Bom., 158**

**MAHOMEDAN LAW—ACKNOWLEDGMENT.**

**1. ——— Acknowledgment by father.**—*Effect of acknowledgment of son or daughter.*—According to Mahomedan law, the acknowledgment of a father renders a son or daughter a legitimate child and heir, unless it is impossible for the son or daughter to be so. OOMDA BIBEE *v.* JONAB ALI **[5 W. R., 132 : 1 Jur., N. S., 143**

FUZEELUN BEEBEE *v.* OMDAH BEEBEE **[10 W. R., 469**

WUHEEDUN *v.* WUSEE HOSSEIN **[15 W. R., 403**

**MAHOMEDAN LAW—ACKNOWLEDGMENT.—Acknowledgment by father—** *continued.*

2. ——————— *Effect of acknowledgment of son.*—According to Mahomedan law, the acknowledgment of the father renders the son a legitimate son and heir, whether the mother was or was not lawfully married to the father. NUJMOODEEN AHMED *v.* ZUHOORUN . **10 W. R., 45**

3. ——————— *Proof of legitimacy.—Inference.*—The Mahomedan law allows legitimacy to be inferred from circumstances without direct proof. MAHOMED GOUHUR ALI KHAN *v.* HABRATOONISSA . . . **2 W. R., 52**

Upheld on the facts by the Privy Council. HABEEBOOLLAH *v.* GOUHUR ALLY KHAN **[18 W. R., 523**

4. ——————— *Proof of legitimacy.—Marriage.—Inference.*—According to the Mahomedan law, the legitimacy or legitimation of a child of Mahomedan parents may be presumed or inferred from circumstances, without proof, or at least without any direct proof, of a marriage between the parents, or of any formal act of legitimation. MAHOMED BAUKER HOSSEIN KHAN *v.* SHURFOONISSA BEGUM **[3 W. R., P. C., 37: 8 Moore's I. A., 136**

5. ——————— *Presumption as to cohabitation.—Legitimacy of issue.*—The Mahomedan law is very scrupulous in bastardising the issue of any connexion in which it can be shown by presumption that there has been cohabitation and acknowledgment of paternity. ROSHUN JEHAN *v.* ENAET HOSSEIN. ENAET HOSSEIN *v.* ROSHUN JEHAN . . . . . **5 W. R., 5**

Affirmed by Privy Council in KHAJOOROONISSA *v.* ROWSHAN JEHAN . . **I. L. R., 2 Calc., 184: 26 W. R., 36: L. R., 3 I. A., 291**

6. ——————— *Presumption of marriage.—Onus probandi.*—According to the Mahomedan law, a public acknowledgment of paternity will of itself raise a presumption of marriage between the person who makes it and the mother of the child, without the father specifically connecting his paternity with any particular woman. To rebut this presumption the onus of proving the impossibility of the marriage is on the other side. ROOK BEGUM *v.* WALAGOWHUR SHAH . . **3 W. R., 187**

7. ——————— *Legitimacy of son.*—An acknowledgment by a Mahomedan that a certain person is his son is not *primâ facie* evidence of the fact which may be rebutted, but establishes the fact acknowledged. Such acknowledgment is valid when the ages of the parties admit of the relationship between them, and where the descent of the party acknowledged has not been already established from another. IN THE MATTER OF THE PETITION OF NAJIBUNNISSA . . **4 B. L. R., A. C., 55**

JAIBUN *v.* NUJEEBOONISSA . **12 W. R., 497**

affirming, on appeal, NUJEEBOONISSA *v.* ZUMEERUN **[11 W. R., 426**

**MAHOMEDAN LAW—ACKNOWLEDGMENT.—Acknowledgment by father—** *continued.*

8. ——————— *Presumption of legitimacy.*—In the case of a Mahomedan child born in wedlock, there being no reliable evidence to show why the ordinary presumption should not prevail, it must be deemed the child of the husband. JESWUNT SINGJEE UBBY SINGJEE *v.* JET SINGJEE UBBY SINGJEE **[3 Moore's I. A., 245: 6 W. R., P. C., 46**

9. ——————— *Presumption as to legitimacy of son.—Custom of primogeniture.*—Observations on the law laid down by the Privy Council regarding the presumption of legitimacy which arises, under the Mahomedan law, in the absence of proof of marriage, when a son has been uniformly treated by his father and all the members of the family as legitimate. MUHAMMAD ISMAIL KHAN *v.* FIDAYATUNNISSA . **I. L. R., 3 All., 723**

10. ——————— *Legitimacy of son.—Presumption of marriage.*—Where a son has been uniformly treated by his father and all the members of the family as legitimate, a presumption arises under the Mahomedan law that the son's mother was his father's wife. KHAJOOROONISSA *v.* ROWSHAN JEHAN **[I. L. R., 2 Calc., 184: 26 W. R., 36 L. R., 3 I. A., 291**

Affirming decision of High Court in ROSHUN JEHAN *v.* ENAET HOSSEIN. ENAET HOSSEIN *v.* ROSHUN JEHAN . . . . **5 W. R., 5**

11. ——————— *Acknowledgment of children as sons.*—The acknowledgment and recognition of children by a Mahomedan as his sons, giving them the status of sons capable of inheriting as being of legitimate birth, may, without proof of his express acknowledgment of them, be inferred from his treatment of such children, provided that certain conditions negativing this relationship are absent. The question whether such acknowledgment should be presumed or not, depends on the circumstances of each particular case. *Ashrufood-dowlah Ahmed Hossein Khan* v. *Hyder Hossein Khan, 11 Moore's I. A., 94,* referred to and followed. MAHAMMAD AZMAT ALI KHAN *v.* LALLI BEGUM **[I. L. R., 8 Calc., 422 L. R., 9 I. A., 8**

12. ——————— *Presumption of marriage.*—According to Mahomedan law, mere continued cohabitation without proof of marriage or of acknowledgment is not sufficient to raise such a legal presumption of marriage as to legitimise the offspring. Marriage and acknowledgment may be presumed, but the presumption must be one of fact, and, as such, subject to the application of the ordinary rules of evidence. A subsequent marriage, so far from raising the presumption of a prior marriage, *primâ facie* at least excludes that presumption. ASHRUFFOODOWLAH AHMED HOSSEIN *v.* HYDER HOSSEIN KHAN **[7 W. R., P. C., 1: 11 Moore's I. A., 94**

MAHOMEDAN LAW—ACKNOWDEDGMENT.—Acknowledgment by father—*continued.*

13. ——————— *Validity of.—Acknowledgment of son.*—Where in a transaction with a third party *A.* describes *B.* as his son, and *B.* speaks of *A.* as his father, the acknowledgment of sonship is complete and formal, and, under the Mahomedan law, conclusive against all parties. NUBO KANT ROY CHOWDHRY *v.* MAHATAB BIBEE [20 W. R., 164

14. ——————— *Legitimation of offspring by acknowledgment.*—The acknowledgment and recognition of a natural son by a Mahomedan as his son gives him the status of a son capable of inheriting as a legitimate son, unless certain conditions exist. *Mahomed Azmat Ali Khan* v. *Lalli Begum, I. L. R., 8 Calc., 422,* referred to. Whether the offspring of an adulterous intercourse can be legitimated by any acknowledgment is an open question. SADAKAT HOSSEIN *v.* MAHOMED YUSUF [I. L. R., 10 Calc., 663 L. R., 11 I. A., 31

15. ——————— *Legitimacy.—Effect of acknowledgment of sonship.—Held* by PETHERAM, *C. J.*, that, according to the Mahomedan law, the effect of an acknowledgment by a Mahomedan that a particular person, born of the acknowledger's wife before marriage, is his son in fact, though the acknowledger may never have treated him as a legitimate son or intended to give him the status of legitimacy, is to confer upon such person the status of a son capable of inheriting as legitimate, unless conditions exist which make it impossible that such person can have been the acknowledger's son in fact. *Ashrufooddowlah Ahmed Hossein Khan* v. *Hyder Hossein Khan, 11 Moore's I. A., 94; Mahammad Azmat Ali Khan* v. *Lalli Begum, I. L. R., 8 Calc., 422;* and *Sadakat Hossein* v. *Mahomed Yusuf, I. L. R., 10 Calc., 663,* referred to. In a suit for possession, by right of inheritance, of a share of the property of a deceased Mahomedan by a person alleging himself to be a son of the deceased, the defendants pleaded that the plaintiff was not a son, but a stepson, having been born of the deceased's wife before her marriage. The plaintiff filed certain letters and other documents in which the deceased in express terms referred to him as his son; and he contended that these references amounted to acknowledgments of him as a son made by the deceased, which, under the Mahomedan law, entitled him to inherit as a legitimate son. *Held* by PETHERAM, *C. J.* (BRODHURST, *J.*, dissenting), that the acknowledgment by the deceased of the plaintiff as his son in fact conferred upon the latter the status of a legitimate son capable of inheriting the deceased's estate, although the evidence showed that the deceased never treated him as a legitimate son, or intended to give him the status of legitimacy. *Held* by BRODHURST, *J.*, *contra,* that the documents above referred to did not show more than that the deceased regarded the plaintiff as his stepson; that the plaintiff was never called his son except by courtesy and in the sense in which a European would ordinarily describe his stepson as his son; and that there was no sufficient evidence of the acknowledgment from which an inference was fairly to be deduced that the deceased ever intended to recognise the plaintiff and give him the status of a son capable of inheriting. *Sadakat Hossein* v. *Mahomed Yusuf, I. L. R., 10 Calc., 663,* referred to. MAHAMMAD ALLAHDAD KHAN *v.* MAHAMMAD ISMAIL KHAN . . I. L. R., 8 All., 234

16. ——————— *Mode of acknowledgment.*—In order to an acknowledgment of paternity legitimating children under the Mahomedan law, the declaration ought to be clear and distinct in respect to each child; and the children, or those of them who have reached years of discretion, ought to come forward and acknowledge their father. KEDARNATH CHUCKERBUTTY *v.* DONZELLE [20 W. R., 352

17. ——————— *Form of acknowledgment.—Evidence of marriage.*—The acknowledgment need not be of such a character as to be evidence of marriage. WUHEEDUN *v.* WUSKE HOSSEIN [15 W. R., 403

18. ——————— *Legitimacy of children.—Presumption as to marriage.*—Where a Mahomedan lady sued for a declaration of the validity of her marriage with the man with whom she had lived, and of the legitimacy of their children and relied upon the position which her reputed husband gave her during his lifetime in his family and on his treatment of their children,—*Held,* following Privy Council in *Ashrufooddowlah Ahmed Hossein Khan* v. *Hyder Hossein Khan, 11 Moore's I. A., 94,* that, though the presumption of legitimacy "follows from the bed," and legitimacy may be inferred from the treatment shown during lifetime to a woman and her children, yet a Court, in dealing with this subject, would not be justified in making any presumption of fact which a rational view of the principles of evidence would exclude; and that, as the force of presumptions of fact must vary with varying circumstances,—and in the present case the circumstances were all such as to throw the Court upon direct evidence rather than upon presumptions,—the Court could not, in the absence of substantive evidence, allow the claim. The appeal was accordingly dismissed. The circumstances above referred to, as throwing the Court upon direct testimony, were, that the lady herself was in the suit and might have given her evidence; that a valid Mahomedan marriage must always be made in the presence of witnesses, who might have been summoned as witnesses, together with the officiating mollah or kazi; and that the evidence of one such witness, who had been called, actually threw doubt upon itself. BUTOOLUN *v.* KOOLSOOM. BUTOOLUN *v.* LLOYD [25 W. R., 444

19. ——————— *Illegitimate son.—Informal acknowledgment.*—The son of a Mahomedan by a slave girl, if acknowledged by his father, is entitled to the same share as the son of a lawful wife. The acknowledgment of a son by a

**MAHOMEDAN LAW—ACKNOWLEDGMENT.—Acknowledgment by father—** *continued.*

Mahomedan need not be a formal acknowledgment: if it can be made out from his acts and conduct, it will be sufficient. WALIULLA *v.* MIRAN SAHEB [2 Bom., 285

20. ——————— *Legitimacy of child.*—Notwithstanding Mahomedan law, a Court of Justice cannot pronounce a child to be the legitimate offspring of a particular individual when such a conclusion would be contrary to the course of nature and impossible. ASHRUF ALI *v.* ASHAD ALI [16 W. R., 260

21. ——————— **Acknowledgment by brother.**—*Brotherhood.*—*Nasab.*—*Illegitimacy.*—A man cannot acknowledge a brother so as to establish the nasab. SHAHEBZADI BEGUM v. HIMMUT BAHADUR [4 B. L. R., A. C., 103: 12 W. R., 512

S. C. affirmed on review. HIMMUT BAHADOOR *v.* SHAHAZADA BEGUM . . 14 W. R., 125

22. ——————— *Validity of acknowledgment.*—*Insufficient acknowledgment, Effect of.*—The plaintiffs, *E.* and *M.*, were the illegitimate son and daughter of *B.*, a Mahomedan woman. *E* died, and after his death the plaintiff sued his widow and *M.* to recover his share of the property of *B.*, which he claimed as co-heir of *E.* He relied upon a recital in a petition in which *E.*, the plaintiff, and *M.*, describing themselves as the son and daughter of *B.*, had prayed for a certificate under Act XXVII of 1860. *Held* that this was not such an acknowledgment of the plaintiff by *E.* as to constitute between them the status of full brotherhood and heirship by Mahomedan law. *Semble,*—The acknowledgment by one man of another as his brother is not by Mahomedan law valid so as to be obligatory on the other heirs, but is binding against the acknowledger. HIMMUT BAHADUR *v.* SHAHEBZADI BEGUM [13 B. L. R., 182: 21 W. R., 113 L. R., 1 I. A., 23

Affirming decision of High Court in preceding case.

**MAHOMEDAN LAW—BILL OF EXCHANGE.**

——————— *Notice of dishonour.*—Notice of dishonour of a bill of exchange is not necessary by Mahomedan law. GAPINATH *v.* ABBAS HOSSEIN [7 B. L. R., 434, note

**MAHOMEDAN LAW—CONTRACT.**

1. ——————— *Consideration.*—*Relationship.*—By Mahomedan law an agreement to pay an annuity, though signed and registered, has not the effect of a deed in English law, but requires a consideration to support it. The relationship existing between cousins is not a sufficient consideration to support such an agreement. JAFAR ALI NIZAM ALI *v.* AHMAD ALI IMAM HAIDARBAKSH [5 Bom., A. C., 37

**MAHOMEDAN LAW—CONTRACT—** *continued.*

2. ——————— *Mortgage.*—*Redemption of separate mortgagee from debt.*—The rule that if the owner of different estates mortgage them to one person separately for distinct debts, or successively to secure the same debt, the mortgagee may insist that one security shall not be redeemed alone, applies to a Mahomedan mortgage. VITHAL MAHADEV *v.* DAUD VALAD MUHAMMAD HUSEN [6 Bom., A. C., 90

**MAHOMEDAN LAW—CUSTODY OF WIFE.**

*See* HABEAS CORPUS. [13 B. L. R., 160

——————— *Rights of mother and husband.*—By Mahomedan law the mother is entitled to the custody of a female child, although married, until she has attained puberty. Where a husband applied that his wife, stated in the return to a writ of *habeas corpus* to be "an infant under the age of sixteen years, to wit of the age of eleven years or thereabouts," might be delivered over into his custody, the Court, on the ground that she had not attained the age of puberty, and that her dower had not been paid, refused to order her to be taken from the custody of the mother, although the mother had taken her away secretly, in the absence of her father and husband from Bandari, where they were all living together, to Calcutta. IN THE MATTER OF KHATIJA BIBI . . . . . 5 B. L. R., 557

*See* IN THE MATTER OF MAHIM BIBI [13 B. L. R., 160

**MAHOMEDAN LAW—CUSTOM.**

1. ——————— **Kazi, Appointment of.**—*Hereditary office, Grant of.*—In the absence of an established local custom to that effect, the office of Kazi is not hereditary. *Quære,*—Whether such a custom would be valid. JAMAL WALAD AHMED *v.* JAMAL WALAD JALLAL . I. L. R., 1 Bom., 633

2. ——————— **Custom of right to eject on sale.**—*Lease.*—*Sale by lessor.*—A Mahomedan residing at Zanzibar let a house situated there to the defendant, to be held by the latter as long as he pleased, under a lease in which he (the lessor) stipulated never to remove the lessee. The plaintiff subsequently, with full knowledge of the lease, purchased the same house from the lessor, and as such purchaser sued to eject the defendant. The plaintiff tendered evidence to show that by the custom of Zanzibar the defendant's tenancy was determined upon the sale by the landlord. This evidence was refused. *Held* that the alleged custom, even if proved, was invalid. It was unreasonable, as enabling a man, after having granted a lease, to deprive the lessee of the entire benefit of his lease. DESOUZA *v.* PESTANJI DHANJIBHAI . . . . I. L. R., 8 Bom., 408

3. ——————— **Exclusion from inheritance of females by sons.**—*Labis.*—*Raouthans of Palgat.*—*Mahomedan religion.*—*Hindu law of inheritance.*—*Evidence necessary to support valid*

**MAHOMEDAN LAW—CUSTOM.—Exclusion from inheritance of females by sons —*continued.***

*custom.*—A claim by the widow of *S.*, Ravuthan, a Labi of Palgut, and her daughters, for their shares of his estate under Mahomedan law, was opposed by other members of the family, who pleaded that, according to a special custom obtaining among the Ravuthans of that part of the country adopted from Hindu law, females are excluded from inheritance if sons or sons' sons exist. In two instances it was proved that women of this class had obtained shares under Mahomedan law by suits without this plea having been put forward. The District Munsif described these cases as interruptions, and found on the evidence that the custom was proved. On appeal this decree was confirmed by the Subordinate Judge. *Held* that no valid custom was established by the evidence. A custom to be valid must be consciously accepted as having the force of law. MIRABIVI *v.* VELLAYANNA . . **I. L. R., 8 Mad., 464**

**4. ——— Division of estate in cases of intestacy.**—*Impartible estate.—Beng. Reg. XI of 1793.—Beng. Reg. X of 1800.*—The family usage that a zemindari has never been separated, but has devolved entire on every succession, though proved to have existed as the custom for many generations, will not exempt the zemindari from the operation of Regulation XI of 1793, which provides in case of intestacy for the division of landed estate among the heirs of the deceased according to the Mahomedan or Hindu law. Regulation X of 1800 does not apply to undivided zemindaris in which a custom prevails that the inheritance should be indivisible, but only to jungle mehals and other entire districts where local customs prevail; and therefore only partially, and to that extent, repeals Regulation XI of 1793. DEEDAR HOSSEIN *v.* ZUHOOROONNISSA **[2 Moore's I. A., 441**

**MAHOMEDAN LAW—DEBTS.**

*See* DEBTOR AND CREDITOR. **[I. L. R., 8 All., 178**

*See* CASES UNDER REPRESENTATIVE OF DECEASED PERSON.

*See* CASES UNDER SALE IN EXECUTION OF DECREE—DECREES AGAINST REPRESENTATIVES.

**1. ——— Decree against heir of debtor.** —*Effect of decree against one heir.*—Under Mahomedan law a decree against one heir of a deceased debtor cannot bind the other heirs. SITANATH DAS *v.* ROY LUCHMIPUT SINGH . **11 C. L. R., 268**

**2. ——— Consent decree against one heir, Effect of.**—*Heir of deceased debtor.—Intestacy.—Succession.—Parties.—Suit by creditor of intestate Mahomedan.—Representation of deceased debtor.—Per* GARTH, *C. J.*—A decree by consent against one heir of a deceased debtor cannot, under the Mahomedan law, legally bind the other heirs. *Per* MARKBY, *J.*—Under the Mahomedan law, the estate of an intestate descends entire, together with all the debts due from and owing to the deceased. The

**MAHOMEDAN LAW—DEBTS.—Consent decree against one heir, Effect of—*continued.***

creditor of an intestate Mahomedan must enforce his claim against the estate in a suit properly framed for the purpose. Such a suit is properly framed if all the persons in possession of that particular portion of the estate which it is intended to charge are made parties to it. The right of a Mahomedan heir claiming the property of his deceased ancestor, who died indebted, is a right of representation only, and except as representative he has no right to the property whatsoever. ASSAMATHEMNESSA BIBEE *v.* ROY LUTCHMEEPUT SINGH **[I. L. R., 4 Calc., 142 : 2 C. L. R., 223**

**3. ——— Creditors of deceased person.** —*Alienation by heir.—Purchaser from heir of Mahomedan.—Lis pendens.*—The creditor of a deceased Mahomedan cannot follow his estate into the hands of a *bonâ fide* purchaser for value, to whom it has been alienated by the heir-at-law, whether the alienation has been by absolute sale or by mortgage. But where the alienation is made during the pendency of a suit in which the creditor obtains a decree for the payment of his debt out of the assets of the estate which have come into the hands of the heir-at-law, the alienee will be held to take with notice, and be affected by the doctrine of *lis pendens.* BAZAYET HOSSEIN *v.* DOOLI CHUND. MAHOMED WAJID *v.* TAYYUBAN **[I. L. R., 4 Calc., 402 : L. R., 5 I. A., 211**

**4. ——— *Alienation by heirs.*** —*Rights of mortgagee.*—The debts of a deceased Mahomedan are not a charge upon the estate which gives the creditor a priority over all persons who after his death purchase or take a mortgage of his estate. See *Bazayet Hossein* v. *Dooli Chund, L. R., 5 I. A., 211 : I. L. R., 4 Calc., 402.* LAND MORTGAGE BANK *v.* BIDYADHARI DASI **[7 C. L. R., 460**

**5. ———** The creditor of a deceased Mahomedan cannot follow his estate into the hands of a *bonâ fide* purchaser from his heir. *Bazayet Hossein* v. *Dooli Chund, L. R., 5 I. A., 211,* followed. LAND MORTGAGE BANK *v.* ROY LUCHMIPUT SINGH . . . . **8 C. L. R., 447**

**6. ——— *Sale in execution of money-decree against the representatives of deceased Mahomedan.—Rights of purchaser at execution sale against mortgagee.—Notice.***—In execution of a money-decree against the heirs of a deceased Mahomedan for a debt incurred by him, *A.* purchased certain property which had been allotted to the widow of the deceased in lieu of dower and of her share of the inheritance Previously to the purchase, however, the widow had mortgaged the same property to *B.*, who, at the time of the mortgage, knew of the debt for which the decree was obtained. In a suit by *B.* against *A.* on the mortgage, it was not shown that there were not assets in the hands of the heirs-at-law to satisfy the debt due to *A.'s* vendor. *Held* that *B.* was entitled to recover. *Bazayet Hossein* v. *Dooli*

**MAHOMEDAN LAW—DEBTS.—Creditors of deceased person—*continued.***

*Chund, L. R., 5 I. A., 211,* followed. NARSINGH DASS *v.* NAJMOODDIN HOSSEIN
[I. L. R., 8 Calc., 20: 10 C. L. R., 225

7. ——————— *Administration, Suit for.—Suit by creditor of deceased Mahomedan against his heir.—Sale in execution of decree.*—After the death of a Mahomedan, several of his creditors sued his widow and daughter, and obtained decrees against the assets of the deceased, which assets had come into the possession of the mother and daughter. In execution of these decrees portions of the property were sold: thereupon two married sisters of the deceased, who lived with their husbands apart from the widow and daughter, sued as heirs of the deceased to recover their shares of the property sold. *Held* that the property of the deceased having been attached and sold in payment of his debts, the plaintiffs' suit must be dismissed. When a creditor of a deceased Mahomedan sues the heir in possession, and obtains a decree against the assets of the deceased, such a suit is to be looked upon as an administration suit; and those heirs of the deceased who have not been made parties cannot, in the absence of fraud, claim anything but what remains after the debts of the testator have been paid. *Nuzeerun* v. *Ameeroodeen, 24 W. R., 3; Assamathemnessa Bibee* v. *Roy Lutchmeeput Singh, I. L. R., 4 Calc., 142; Kishwur Khan* v. *Jewun Khan, 1 Sel. Rep., 25; Khajah Hidayutoollah* v. *Rai Jan Khanum, 3 Moore's I. A., 295;* and *Bazayet Hossein* v. *Dooli Chund, L. R., 5 I. A., 211,* referred to. MUTTYJAN *v.* AHMED ALLY
[I. L. R., 8 Calc., 370: 10 C. L. R., 346

8. ——————— *Suit by creditors against representatives.*—Two of the widows of a deceased Mahomedan sold a portion of his real estate to satisfy decrees obtained by creditors of the deceased against them as his representatives. The sale-deed was executed by them on behalf of the plaintiff, a daughter of the deceased, she being a minor, in the assumed character of her guardians. *Held,* if the plaintiff was in possession, and was not a party to, or properly represented in, the suits in which the creditors obtained decrees, she could not be bound by the decrees nor by the sale subsequently effected, and she was entitled to recover her share, but subject to the payment by her of her share of the debts for the satisfaction of which the sale was effected. HAMIR SINGH *v.* ZAKIA . . I. L. R., 1 All., 57

HENDEY *v.* MUTTYLALL DHUR
[I. L. R., 2 Calc., 395

9. ——————— *Succession.—Suit against one of the heirs of a deceased person for debt.*—The heirs to a deceased Mahomedan divided his estate among themselves according to their shares under the Mahomedan law of inheritance, a small debt being due from the estate at the time of division. Two of the heirs were subsequently sued for the whole of such debt. *Held* that, inasmuch as such heirs had not by sharing in the estate rendered themselves liable for the whole of such debt, Mahomedan law allowing the heirs of a deceased person to divide his estate, notwithstanding a small debt is due therefrom, and as a decree against such heirs would not bind the other heirs, a decree should not be passed against such heirs for the whole of such debt, but a decree should be passed against them for a share of such debt proportionate to the share of the estate they had taken. *Hamir Singh* v. *Zakir, I. L. R., 1 All., 57,* referred to. PIRTHIPAL SINGH *v.* HUSAINI JAN
[I. L. R., 4 All., 361

10. ——————— *Inheritance.—Devolution not suspended till payment of deceased ancestor's debts.—Decree in respect of deceased ancestor's debts passed against heir in possession of estate.—Decree not binding on other heirs not parties thereto and not in possession, so as to convey their shares to auction-purchaser in execution.—Recovery of possession by other heirs contingent on payment of proportionate shares of debt for which decree was passed.*—Upon the death of a Mahomadan intestate, who leaves unpaid debts, whether large or small with reference to the value of his estate, the ownership of such estate devolves immediately on his heirs, and such devolution is not contingent upon and suspended till payment of such debts. A decree relative to his debts, passed in a contentious or non-contentious suit against only such heirs of a deceased Mahomedan debtor as are in possession of the whole or part of his estate, does not bind the other heirs who, by reason of absence or other cause, are out of possession, so as to convey to the auction-purchaser, in execution of such a decree, the rights and interests of such heirs as were not parties to the decree. In execution of a decree for a debt due by a Mahomedan intestate, which was passed against such of the heirs of the deceased as were in possession of the debtor's estate, the decree-holder put up for sale and purchased certain property which formed part of the said estate. One of the heirs, who was out of possession, and who was not a party to these proceedings, brought a suit against the decree-holder for recovery of a share of the property sold in execution of the decree, by right of inheritance. *Held* by the Full Bench that the plaintiff was not entitled to recover from the auction-purchaser, in execution of the decree, possession of his share in the property sold, without such recovery of possession being rendered contingent upon payment by him of his proportionate share of the ancestor's debt for which the decree was passed, and in satisfaction whereof the sale took place *Wahidunnissa* v. *Sheobrattun, 6 B. L. R., 54; Assamathemnessa Bibee* v. *Roy Lutchmeeput Singh, I. L. R., 4 Calc., 142, Mazhar Ali* v. *Budh Singh, I. L. R., 7 All., 297; Bachman* v. *Bachman, I. L. R., 6 All., 583; Hamir Singh* v. *Zakia, I. L. R., 1 All., 57;* and *Muttyjan* v. *Ahmed Ally, I. L. R., 8 Calc., 370,* referred to by MAHMOOD, *J.* JAFRI BEGAM *v.* AMIR MUHAMMAD KHAN . . I. L. R., 7 All., 822

11. ——————— *Inheritance.—Devolution not suspended till payment of deceased ancestor's debts.*—A creditor of *A.*, a deceased Mahomedan, under a hypothecation bond, obtained a decree on the 20th December 1876, for recovery of the debt

**MAHOMEDAN LAW—DEBTS.—Creditors of deceased person—*continued.***

by enforcement of lien against *M.*, one of *A.'s* heirs, who alone was in possession of the estate; and, in execution of the decree, the whole estate was sold by auction on the 21st March 1878, and purchased by the decree-holder himself. *J.*, another of *A.'s* heirs, was not a party to these proceedings. On *J.'s* death, her son and heir, *A. H.*, conveyed to *M. A.* the rights and interests inherited by him from his mother,—namely, her share in *A.'s* estate. The purchaser of the share thereupon brought a suit against the decree-holder for its recovery. *Held* that, immediately upon the death of *A.*, the share of his estate claimed in the suit devolved upon *J.*; that she being no party to the decree of the 20th December 1876, her share in the property could not be affected by that decree, nor by the execution sale of the 21st March 1878; that upon her death that share devolved upon her son, who conveyed his rights to the plaintiff; that the plaintiff was therefore entitled to recover possession of the share which he had purchased, but that he could not do so without payment to the defendant of his proportionate share of the debts of *A.*, which were paid off from the proceeds of the auction sale of the 21st March 1878. *Jafri Begum* v. *Amir Muhammad Khan, I. L. R., 7 All., 822*, followed. MUHAMMAD AWAIS *v.* HAR SAHAI . **I. L. R., 7 All., 716**

12. ——— *Liability of one of several heirs to pay ancestors' debt, when but for his own action debt would be barred by limitation.—Justice, equity, and good conscience, Application of principle of.—Act VI of 1871, s. 24.*—*A.*, a Hindu and a creditor of *B.*, a deceased Mahomedan, sued *C.*, *D.*, *E.*, and *F.*, his heirs, to recover a sum of money alleged to be due on a roka, alleging that they were in possession of *B.'s* estate, and praying for a decree against the estate upon that footing. It was not disputed that the debt would have been barred by limitation but for a part-payment made by *C.*, and endorsed by him on the back of the roka. *D.*, *E.*, and *F.* were no parties to such payment, and it was found not to have been made with their consent. The first Court, considering that collusion existed between *A.* and *C.*, and having regard to the fact that *C.* did not dispute his liability, gave *A.* a decree for the full amount of the debt against *C.* without finding whether the roka was genuine or not, and held that the shares of *D.*, *E.*, and *F.* in *B.'s* estate were not liable for any portion of the debt. *A.* accepted this decision and did not appeal. *C.* appealed on the ground that he could only, under the Mahomedan law, be held liable for a part of the debt in proportion to the amount of *B.'s* estate which had come into his hands. The lower Appellate Court decided in *C.'s* favour and varied the decree by directing that *A.* was only entitled to recover two fifths of the debt from *C.*, that being the amount of *C.'s* share. *D.*, *E.*, and *F.* were not made parties to that appeal. *A.* then preferred a special appeal to the High Court, making *D.*, *E.*, and *F.* parties. *Held* that, under the circumstances of the case, and having regard to the rule of Mahomedan law, *A.* was not entitled to a decree against *C.* for more than two fifths of the debt. *Held*, further, that, applying the principle of justice, equity, and good conscience to the case, inasmuch as *A.* was a Hindu, it would not, under the circumstances of the case, be equitable to hold *C.* liable for the whole of the debt. BUSSUNTERAM MARWARY *v.* KAMALUDDIN AHMED . . **I. L. R., 11 Calc., 421**

**MAHOMEDAN LAW—DEBTS.—Creditors of deceased person—*continued.***

13. ——— **Power of alienation of heir.**—*Executor.—Purchaser from heir.*—*A.*, a Mahomedan, died, being indebted to *B.* in a sum of money. *B.* sued the heirs of *A.* for the amount and obtained a decree. Before *B.* obtained his decree the heirs of *A.* had mortgaged the estate of *A.* to *C.* The property was put up to sale in execution of *B.'s* decree, and *B.* became the purchaser, and now sued to obtain possession from *C.* *Held* that the mere fact of the property having once belonged to the estate of *A.* did not entitle *B.* to follow it in the hands of *C.*, so as to enable him to recover possession without redeeming. The heir of a Mahomedan may, as executor, sell a portion of the estate of the deceased, if necessary, for the payment of debts; and such sale will not be set aside if the purchaser acted *bonâ fide.* ENAYET HOSSEIN *v.* RAMZAN ALI **[1 B. L. R., A. C., 172: 10 W. R., 216**

*See* HASAN ALI *v.* MEHDI HUSAIN **[I. L. R., 2 All., 533**

14. ——— *Sale for debts of father.*—*M.*, a Mahomedan, inherited certain property from his father, which, while he was a minor, his mother sold to the defendant, in good faith, for the discharge of a debt adjudged to be due to the defendant by *M.'s* father. *M.*, when he became of age, sold the same property to the plaintiff, who sued to obtain possession thereof by avoidance of the sale to the defendant. *Held* that the plaintiff, having no better title or other right than *M.* could assert, was not competent to maintain the suit, without tendering payment of the debt. *Held* also that, even if Mahomedan law were applied, and *M.'s* mother was not legally competent to sell his property in the assumed character of his guardian, the plaintiff was bound to pay the debt due from *M.'s* father to the defendant before he could claim, by avoidance of the sale in question, the possession of the property in suit. SAHEB RAM *v.* MAHOMED ABDUL RAHAMAN . . . . . **6 N. W., 268**

15. ——— **Liability for assets.**—*Evidence of receipt of assets.*—Where it is sought to fix a person under the Mahomedan law with liability for the debt of a person deceased, by reason of the receipt of assets, it is incumbent on the creditor to give some evidence of assets having been received. FUZEELUTOONISSA *v.* HOORMUTOONISSA **[Marsh., 218: 1 Hay, 559**

**MAHOMEDAN LAW—DIVORCE.**

1. ——— **Validity of divorce.**—*Release of dower by wife.—Evidence of divorce.*—According to the Mahomedan law, the non-payment by the wife of the consideration for a divorce does not invalidate the divorce. The divorce is the sole act of the husband, though granted at the instance of the wife, and purchased by her. The kholanamah, or the deed securing to the husband the stipulated con-

**MAHOMEDAN LAW—DIVORCE.—Validity of divorce—*continued.***

sideration, does not constitute the divorce, but assumes and is founded upon it. The divorce is created by the husband's repudiation of the wife and the consequent separation. The husband having distinctly alleged a divorce by khola, and relied on two instruments,—one, an ibranamah (or deed of voluntary release by the wife of her denmohr or dowry) to which there was no satisfactory proof that she ever gave her assent with a knowledge of its contents, and a kholanamah (surrendering the wife's settlement) obtained from her mother by means of cruelty and ill-usage practised on her daughter, to confirm the ibranamah,—*Held* that instruments so obtained could have no legal effect when used as a defence against the wife's claim to her dowry. BUZL-UL-RUHEEM *v.* LUTEEFUTOONNISSA

**[1 W. R., P. C., 57: 8 Moore's I. A., 379 1 Ind. Jur., O. S., 1**

**2. ——— Evidence of divorce.**—*Husband's statement.*—The Mahomedan law does not provide for the nature of the evidence required to prove a divorce. *Quære,*—Whether the husband's statement that he has divorced his wife is sufficient proof of the fact. BUKSH ALI *v.* AMEERUN BEBEE **[2 W. R., 208**

**3. ——— *Necessity of written document.***—Although writing is not necessary to the validity of a divorce under Mahomedan law, yet where a divorce takes place between persons of rank and property, and where valuable rights depend upon the marriage and are affected by the divorce, the parties, for their own security, may be expected to have some document affording satisfactory evidence of what they have done. GOWHUR ALI KHAN *v.* AHMED KHAN . **20 W. R., 214**

**4. ——— *Deed of divorce signed in absence of wife, Validity of.***—An instrument of divorce signed by the husband in the presence of, and given to, the wife's father, was held to be valid, notwithstanding that it was not signed in the presence of the wife. WAJ BIBEE *v.* AZMUT ALI . . . . . **8 W. R., 23**

**5. ——— *Marriage.***—Where a Mahomedan was shown to have been duly married, her subsequent divorce should not be presumed only from the fact of her husband having taken another woman to live with him, in consequence of which his wife left his house and went to live with a relative, nor from the fact of his having stated in his will that he had no wife, lawful or nicca. NOOR BIBEE *v.* NAIVAS KHAN . **1 Ind. Jur., N. S., 221**

**6. ——— Right to leave husband.**—*Man taking another wife.*—A Mahomedan in the kubinnamah or deed of dower on his marriage with *S.* stipulated that he should not take a second wife without the permission of *S.* *Held* that *S.* was not entitled to leave him upon his taking a second wife without her permission. MOHABUTH ALLY *v.* MYMONISSA . . . . . **Marsh., 361**

S. C. MYMONISSA *v.* MOHABUTH ALLY. **[2 Hay, 404**

**MAHOMEDAN LAW—DIVORCE—*continued.***

**7. ——— Right to divorce.**—*Suit by wife for divorce.—Agreement for divorce.*—A husband entered into a private agreement with his wife, authorising her to divorce him upon his marrying a second wife during her life, and without her consent. *Held* that the Mahomedan law sanctioned such an agreement, and that the wife, on proof of her husband having married a second time without her consent, was entitled to a divorce. BADARANISSA BIBEE *v.* MAFIATTALA . **7 B. L. R., 442 : 15 W. R., 555**

**8. ——— Mode of divorce.**—*Charge of adultery.—Ill-usage.*—A charge of adultery by a Mahomedan against his wife does not operate as a divorce, though if false it might be an item of ill-usage towards making up a sufficient answer to his claim for restitution of conjugal rights. The husband cannot enforce his right to his wife till he pays the dower,—in the absence, that is, of any sufficient answer to his claim. Ill-treatment by him and his second wife would justify the first wife in leaving him. JAUN BEEBEE *v.* BEPAREE . **3 W. R., 93**

**9. ——— *Divorce in absence of wife.***—Suit by a Mahomedan female against her husband for maintenance. Defendant pleaded that he had divorced the plaintiff on the 8th January 1862. Both the lower Courts found that no divorce had taken place upon the following facts. Defendant went to Trichinopoly leaving his wife at Tinnevelly. While at Trichinopoly he received letters from Tinnevelly informing him that his wife was leading an immoral life. He therefore went before the Town Kazi of Trichinopoly, made a written declaration in the shape of a letter to plaintiff to the effect that he had divorced her, and repeated the divorce three times successively before the Town Kazi of Trichinopoly. Defendant directed also that the letter of divorce should be sent to the plaintiff, but there was no evidence of her having received it. *Held,* upon special appeal, that it was clear upon the authorities that there had been a valid divorce. The compressing the expression of the intention into one sentence seems, on the authorities, not to affect the legality of the repudiation, although some doctors consider the process immoral. SHERIF SAID *v.* USANABIBI AMMAL . . . **6 Mad., 452**

**10. ——— *Khoola divorce.***—Where a Mahomedan woman claimed a divorce from her husband on grounds which she failed to establish, but the husband, at the suggestion of the Court, agreed to a Khoola divorce on terms to be settled by a Kazi,—*Held* that the action of the Court in not dismissing the suit, but proceeding to suggest a compromise by means of a Khoola divorce, was not illegal. *Held* also that a Khoola divorce is valid though granted under compulsion. VADAKE VITIL ISMAL *v.* ODAKEL BEYAKUTTI UMAH **[I. L. R., 3 Mad., 347**

**11. ——— *Wife's right of option, Non-user of.***—Under Mahomedan law, where the husband gives the wife an option as to declaring herself repudiated and she avails herself of it, the repu-

**MAHOMEDAN LAW—DIVORCE.—Mode of divorce—*continued.***

diation or divorce is binding on him; and a discretion to repudiate when attached to a condition need not be limited to any particular period, but may be absolute as regards time. Such option is not lost by non-user where there is nothing in the contract between the parties obliging the wife to exercise the option directly a breach of the condition occurs. ASHRUF ALI *v.* ASHAD ALI . . . **16 W. R., 260**

**12.** ——————— *Divorce by wife.*—Under the Mahomedan law, a husband may give his wife the power to divorce herself from him according to the form prescribed by that law for divorce by the husband. HAMIDOOLLA *v.* FAIZUNNISSA **[I. L. R., 8 Calc., 327: 10 C. L. R., 291**

**13.** ——————— *Pronunciation of word "talak" by husband.*—The mere pronunciation of the word "talak" three times by the husband, without its being addressed to any person, is not sufficient to constitute a valid divorce by Mahomedan law. *Semble,*—That a divorce pronounced in due form by a man against a woman who is in fact his wife, dissolves the marriage, though he pronounces it under a belief that she is not his wife. FURZUND HOSSEIN *v.* JANU BIBEE . **I. L. R., 4 Calc., 588**

**14.** ——————— *Divorce by one acting on compulsion from threats.*—According to Mahomedan law, the divorce of one acting upon compulsion from threats is effective. IBRAHIM MULLA *v.* ENAYETUR RUHMAN **[4 B. L. R., A. C., 13: 12 W. R., 460**

**15.** ——————— *Repudiation by ambiguous expression.—Custody of minor children.*—Where a Mahomedan said to his wife, when she insisted against his wish on leaving his house and going to that of her father, that if she went she was his paternal uncle's daughter, meaning thereby that he would not regard her in any other relationship and would not receive her back as his wife—*Held* that the expression used by the husband to the wife, being used with intention, constituted, under Mahomedan law, a divorce which became absolute if not revoked within the time allowed by that law. *Held,* also, the divorce having become absolute, the parties being Sunnis, that the husband was not entitled to the custody of his infant daughter until she had attained the age of puberty. HAMID ALI *v.* IMTIAZAN . . . . **I. L. R., 2 All., 71**

**16.** ——————— *Zihar.—Mutta form of marriage.—Quære,*—Whether the form of divorce called Zihar may be exercised in the mutta form of marriage. IN THE MATTER OF THE PETITION OF LUDDUN SAHIBA. LUDDUN SAHIBA *v.* KAMAR KUDAR **[I. L. R., 8 Calc., 736: 11 C. L. R., 237**

**17.** ——————— *Khoja Mahomedans.—Custom.*—Custom as to divorce among Khoja Mahomedans of the Sunni sect considered. IN RE KASAM PIRBHAI . . . **8 Bom., Cr., 95**

**MAHOMEDAN LAW—DIVORCE—*continued.***

**18.** ——————— **Effect of divorce.**—*Irreversible divorce.*—According to Mahomedan law a divorce is irreversible if the husband does not take back the wife before the expiration of her "iddat," or term of probation. MOZUFFUR ALI *v.* KUMEERUNISSA BIBEE . . . **W. R., 1864, 32**

**19.** ——————— *Talak biddat.—Husband and wife.—Order for maintenance upon husband.—Effect upon order.—Presidency Magistrate's Act, IV of 1877, s. 234.—Borah Mahomedans.*—An order made under section 234 of Act IV of 1877 by the Presidency Magistrate directing a Borah Mahomedan husband of the Imami sect to pay a sum monthly for the maintenance of his wife, belonging to the Hanafi sect, does not deprive the husband of his right to divorce his wife, and after such divorce the Magistrate's order can no longer be enforced. The talak biddat, or irregular divorce, which is effected by three repudiations at the same time, appears from the authorities to be sinful, but valid. IN RE ABDUL ALI ISHMAILJI **[I L. R., 7 Bom., 180**

So with an order made under Act XLVIII of 1860 (Police Amendment Act), section 10. IN RE KASAM PIRBHAI . . . . **8 Bom., Cr., 95**

**20.** ——————— *Maintenance of wife, Order for.—Criminal Procedure Code, 1872, s. 536.—"Iddat."*—An order for the maintenance of a wife, passed under Chapter XLI of Act X of 1872, becomes inoperative, in the case of a Mahomedan, by reason of his lawfully divorcing his wife, and thus putting an end to the conjugal relation, but it does not become so before the expiration of the divorced wife's "iddat." *Abdur Rohoman* v. *Sakhina, I. L. R., 5 Calc., 558; In re Kasam Pirbhai, 8 Bom., Cr., 95;* and *Luddun Sahiba* v. *Kamar Kadar, I. L. R., 8 Calc., 736;* Madras High Court Proceedings, 2nd December 1879, referred to and followed. The Mahomedan law of divorce relating to the maintenance of a divorced wife during her "iddat" referred to. IN THE MATTER OF THE PETITION OF DIN MAHOMED **[I. L. R., 5 All., 226**

**MAHOMEDAN LAW—DOWER.**

*See* DEBTOR AND CREDITOR. **[I. L. R., 8 All., 178**

**1.** ——————— **Dower, Proof of claim to.**—*Deed of dower, Necessity of.—Verbal statement.*—A deed of dower is not in all cases indispensable to the truth and validity of a claim for dower. *Semble,*—There appears to be no reason why a mukzernamah or statement made (not on oath before the Court) by parties in a position to know the facts, should not have a certain weight. JUMULLA *v.* MULKA **[1 Ind. Jur., N. S., 26**

S. C. MULLEEKA *v.* JUMEELA . **5 W. R., 23**

S. C on appeal to Privy Council, MULLEEKA *v.* JUMEELA **[11 B. L. R., 375: L. R., I. A., Sup. Vol., 135**

TAJOO BEEBEE *v.* NOORUN BEEBEE **[1 W. R., 31**

**MAHOMEDAN LAW—DOWER.—Dower, Proof of claim to—*continued.***

2. ——— *Verbal contract for dower.—Customary dower, Evidence of amount of.*—A verbal contract of dower for a large sum is admissible only if proved by most clear and satisfactory evidence. A customary dower must be proved by showing a custom of the women of the wife's family to receive, rather than of the men of the husband's family to pay, a certain dower; the Mahomedan dower being the consideration paid by the bridegroom for the marriage, and therefore regulated by the position and conduct of the bride, especially as Mahomedan men often contract most unequal marriages, though the means and position of the bridegroom must not altogether be excluded from consideration. NUJEEMOODDEEN AHMED *v.* HOSSEINEE . . . . . **4 W. R., 110**

3. ——— *Oral evidence in proof of claim.*—The very best description of oral evidence is absolutely necessary to support a claim for dower where no kabinamah is produced. HUSEENA *v.* HUSMUTOONISSA . . **7 W. R., 495**

ABDOOL JUBBAR CHOWDHRY *v.* COLLECTOR OF MYMENSINGH . . . **11 W. R., 65**

4. ——— **Deed in lieu of dower.**—*Possession.—Validity of deed.*—According to the Mahomedan law, possession under a deed of bye-mokassa, executed in lieu of dower, is not necessary to its validity. NUSEEBOONISSA *v.* DANUSH ALI **[3 W. R., 133**

5. ——— **Payment by husband to wife.**—*Presumption of nature of payment.—Gift.*—Where a husband granted a dower of five lakhs of Lucknow rupees, and subsequently directed Sicca rupees 4,50,000 Company's paper to be set aside for her,—*Held,* under the circumstances, that this was to be presumed to be a payment on account of dower, and not a gift. IFTIKARUNISSA BEGUM *v.* AMJAD ALI KHAN . . **7 B. L. R., P. C., 643**

6. ——— **Right to dower.**—Where a Mahomedan (Shiah), on his marriage, being in poor circumstances, fixed a "deferred" dower of R51,000 upon his wife, and died without leaving sufficient assets to pay such dower, and his wife sued to recover the amount of such dower from his estate,—*Held* by STUART, *C. J.* (PEARSON, *J.*, dissenting) that, it being nowhere laid down absolutely and expressly by any authority on the Mahomedan law that, however large the dower fixed may be, the wife is entitled to recover the whole of it from her husband's estate, without reference to his circumstances at the time of marriage or the value of his estate at his death, the plaintiff was only entitled, under the circumstances, to a reasonable amount of dower. *Held* by the Full Bench, on appeal from the decision of STUART, *C. J.*, that a Mahomedan widow was entitled to the whole of the dower which her deceased husband had on marriage agreed to give her, whatever it might amount to, and whether or not her husband was comparatively poor when he married, or had not left assets sufficient to pay the dower-debt. SUGRA BIBI *v.* MASUMA BIBI **[I. L. R., 2 All., 573**

**MAHOMEDAN LAW—DOWER.—Right to dower—*continued.***

7. ——— *Omission to claim dower in legacy.*—According to Mahomedan law, if the widow assents to any person's taking a legacy without putting forward her claim to dower, she cannot afterwards retract her assent. REZZA HOSSEIN *v.* IFATOONNISSA . . **24 W. R., 564**

8. ——— **Nature of dower.**—*Dower not specified.*—According to Mahomedan law, dower is presumed to be prompt in the absence of express contract, and may be enforced at any time. TADIYA *v.* HASANEBIYARI . . . . **6 Mad., 9**

9. ——— *Exigible dower, no amount specified as.—Held* where no specific amount of dower has been declared exigible, and as there was no clear evidence of what was customary, that the Assistant Judge in appeal committed no error in law in holding that one third of the whole might be considered exigible during the life of the husband, the remaining two thirds being claimable on his death. FATMA BIBI *v.* SADRUDDIN **[2 Bom., 307: 2nd Ed., 291**

10. ——— *Mode of payment if divorced.—Inheritance.*—Among Mahomedans deferred dower becomes payable on the dissolution of the marriage, whether by divorce or by the death of either of the parties. According to Mahomedan law, where the heirs of a woman claimed dower from her husband, which was mowajal, or deferred, and not due or payable till her death, their claim was a simple money claim founded solely on the contract made by the husband. The husband is not a trustee for the wife in respect of her dower, nor has the wife a lien on her husband's property. *Quære,*—As to the nature of the wife's claim for dower against the heirs of her husband. MAHAR ALI *v.* AMANI **[2 B. L. R., A. C., 306**

S. C. KHYRATUN *v.* AMANI . **11 W. R., 212**

MEHRAN *v.* KUBIRAM **[6 B. L. R., 60, note: 13 W. R., 49**

11. ——— *Prompt and deferred dower.—Custom.*—Under Mahomedan law, when on marriage it is not specified whether a wife's dower is prompt or deferred, the nature of the dower is not to be determined with reference to custom, but a portion of it must be considered prompt. The amount to be considered prompt must be determined with reference to the position of the wife and the amount of the dower, what is customary being at the same time taken into consideration. TAUFIK-UN-NISSA *v.* GHULAM KAMBAR . **I. L. R., 1 All., 506**

12. ——— **Non-payment of prompt dower, Effect of.**—*Husband and wife.—Shiah.—Sunni.—Suit for recovery of wife.*—A woman of the Sunni sect of Mahomedans marrying a man of the Shiah sect is entitled to the privileges secured to her married position by the law of her sect, and does not thereby become governed by the Shiah law. *Held,* therefore, where a husband sued to recover his wife, the one being a Shiah and the other a Sunni, that the

**MAHOMEDAN LAW—DOWER.—Non-payment of prompt dower, Effect of—** *continued.*

wife's dower being "exigible" dower, and not having been paid, the suit was not maintainable under Sunni law. NASRAT HUSAIN *v* HAMIDAN [I. L. R., 4 All., 205

13. ——————— *Suit for restitution of conjugal rights.—Custom.—Prompt and deferred dower.*—When a Mahomedan sues his wife for restitution of conjugal rights, such suit is to be determined with reference to Mahomedan law, and not with reference to the general law of contract. Under Mahomedan law, if a wife's dower is "prompt" she is entitled, when her husband sues her to enforce his conjugal rights, to refuse to cohabit with him, until he has paid her her dower, and that notwithstanding that she may have left his house without demanding her dower and only demands it when he sues, and notwithstanding also that she and her husband may have already cohabited with consent since their marriage. When at the time of marriage the payment of dower has not been stipulated to be "deferred," payment of a portion of the dower must be considered "prompt." The amount of such portion is to be determined with reference to custom. Where there is no custom, it must be determined by the Court with reference to the status of the wife and the amount of the dower. Where a Court, following this rule, determined that one fifth only of a dower of R5,000 not stipulated to be "deferred" must be considered "prompt," inasmuch as the wife had been a prostitute and came of a family of prostitutes, it exercised its discretion soundly. EIDAN *v.* MAZHAR HUSAIN . I. L. R., 1 All., 483

14. ——————— *Restitution of conjugal rights.*—A Mahomedan cannot, according to Mahomedan law, maintain a suit against his wife for restitution of conjugal rights, even after such consummation with consent as is proved by cohabitation for five years, where the wife's dower is "prompt" and has not been paid. *Abdool Shukkoar* v. *Raheem-oon-nissa, 6 N. W., 94,* followed. WILAYAT HUSAIN *v.* ALLAH RAKHI . I. L. R., 2 All., 831

15. ——————— *Marriage.—Suit for restitution of conjugal rights.—Plea of non-payment.—Form of decree.*—According to the Mahomedan law, marriage is a civil contract, upon the completion of which, by proposal and acceptance, all the rights and obligations which it creates arise immediately and simultaneously. There is no authority for the proposition that all or any of these rights and obligations are dependent upon any condition precedent as to the payment of dower by the husband to the wife. Dower can only be regarded as the consideration for connubial intercourse by way of analogy to price under the contract of sale. Although prompt dower may be demanded at any time after marriage, the wife is under no obligation to make such demand at any specified time during coverture, and it is only upon such demand being made that it becomes payable. This claim may be used by her as a means of obtaining payment of the dower, and as a defence to a claim for cohabitation on the part of the husband without her consent; but, although she may plead non-payment, the husband's right to claim cohabitation is antecedent to the plea, and it cannot be said that until he has paid prompt dower his right to cohabitation does not accrue. The sole object of the rule allowing the plea of non-payment of dower is to enable the wife to secure payment. Her right to resist her husband so long as the dower remains unpaid is analogous to the lien of a vendor upon the sold goods while they remain in his possession, and so long as the price or any part of it is unpaid; and her surrender to her husband resembles the delivery of the goods to the vendee. Her lien for unpaid dower ceases to exist after consummation, unless at such time she is a minor, or insane, or has been forced, in which case her father may refuse to surrender her until payment. It cannot in any case be pleaded so as to defeat altogether the suit for restitution of conjugal rights, which is maintainable upon the refusal of either party to cohabit with the other; and it can only operate in modification of the decree for restitution by rendering its enforcement conditional upon payment of so much of the dower as may be regarded as prompt, in accordance with the principle recognised by Courts of equity under the general category of compensation or lien, when pleaded by a defendant in resistance or modification of the plaintiff's claim. *Buzloor Ruheem* v. *Shumsoon-nissa Begum, 11 Moore's I. A, 551; Mulleeka* v. *Jumeela, 11 B. L. R., 375; Khajooroonissa* v. *Ryeesoonissa, L. R., 2 I. A., 235; Nawab Bahadoor Jung Khan* v. *Uzeez Begum, N. W., S. D. A., 1843, 46, p. 180; Jaun Bebee* v. *Beparee, 3 W. R., 93; Gatha Ram Mistree* v. *Moohita Kochin Atteah Doomoonee, 14 B. L. R, 298;* and *Eidan* v. *Mazhar Husain, I. L. R., 1 All., 483,* referred to. *Abdool Shukkoar* v. *Raheem-oon-nissa, 6 N. W., 94; Wilayat Husain* v. *Allah Rakhi, I. L. R., 2 All., 831; Nasrat Husain* v. *Hamidan, I. L. R., 4 All., 205;* and *Nasir Khan* v. *Umrao, Weekly Notes, All., 1882, p. 96,* dissented from. In a suit brought by a husband for restitution of conjugal rights, the parties being Sunni Mahomedans governed by the Hanafi law, the defendant pleaded that the suit was not maintainable, as the plaintiff had not paid her dower-debt. The plaintiff thereupon deposited the whole of the dower-debt in Court. It appeared that the defendant's dower had been fixed without any specification as to whether it was to be wholly or partly prompt. It also appeared that she had attained majority before the marriage, and that she had cohabited with the plaintiff for three months after marriage, and there was no evidence that she had ever demanded payment of her dower before the suit was filed, or that she had refused cohabitation on the ground of non-payment. Besides the plea already mentioned, she also relied upon allegations of divorce and cruelty, but these allegations were found to be untrue. The lower appellate Court dismissed the suit, holding that inasmuch as the plaintiff had not paid the dower-debt at the time when he brought his suit, he had no cause of action under the provisions of the Mahomedan law. *Held* by the Full Bench that the lower Appellate Court's

**MAHOMEDAN LAW—DOWER.—Non-payment of prompt dower, Effect of—*continued.***

view of the Mahomedan law relating to conjugal rights and the husband's obligation to pay dower was erroneous; and that the plaintiff, under the circumstances of the case, had a right to maintain the suit. ABDUL KADIR *v.* SALIMA

**[I. L. R., 8 All., 149**

**16. ——— Suit for dower.**—*Cause of action.*—In a suit by a Mahomedan widow to recover from the heirs of her husband the amount of dower which became due to her after her husband's death, the cause of action must be deemed to have arisen at the time when she was ejected by order of Court from the property left by her husband, and which she held as security for the satisfaction of her dues. SOORMA KHATOON *v.* ATTAFFOONNISSA KHATOON . . . . . **2 Hay, 210**

**17. ——— *Exigible dower.***—*Cause of action.—Deferred dower.*—According to Mahomedan law, mojal or exigible dower is payable on demand at any time from the consummation of the marriage up to the death of the wife, and a suit preferred by heirs for their mother's mojal dower will be in time if brought within twelve years of the mother's death. Mowajal or non-exigible or deferred dower is claimable on the dissolution of the marriage either by death or divorce. Shares of dower when received by the legal inheritors thereof cease to be dower, and become part of the recipient's estate. HOSSEINOODDEEN CHOWDHRY *v.* TAJUNNISSA KHATOON . . . **W. R., 1864, 199**

**18. ——— *Prompt and deferred dower.***—A Mussalman, on his marriage, entered into a written agreement (unregistered) with his wife to pay her a lakh of rupees, one fourth as prompt (mojal) dower, the remainder as deferred (mowajal) dower. A separation occurred between the husband and wife, but there was no divorce. During the separation, on 3rd May 1861, the wife petitioned for leave to sue as a pauper to recover the balance of her prompt dower. The husband, on the 1st July 1861, filed a petition denying her claim against him. The wife's application to sue as a pauper was rejected on 27th January 1862. The husband died on 30th August 1867. On the 13th May 1869 the widow brought her suit to recover the balance of prompt dower and the whole of the deferred dower. *Held* that she could recover the latter. The cause of action in respect of deferred dower could not arise until the husband's death. But the cause of action in respect of prompt dower arises upon demand by the wife and refusal by the husband. KHAJARANNISSA *v.* RISANNISSA BEGUM

**[5 B. L. R., 84: 13 W. R., 371**

**19. ——— *Limitation.—Divorce.***—Where dower is "prompt," limitation does not begin to run until the dower is demanded or the marriage is dissolved by death or otherwise. The amount claimed,—*viz.*, R16,25,000,—not having been disputed in the Court of original jurisdiction, was allowed. *Quære,*—Whether, in the case of a divorce,

**MAHOMEDAN LAW—DOWER.—Suit for dower—*continued.***

a cause of action accrues in respect of deferred dower before the repudiation has become irrevocable, or the dower has been demanded. MULLEEKA *v.* JUMEELA . . . . . **11 B. L. R., 375**

**[L. R., I. A., Sup. Vol., 135**

S. C. in lower Court, JUMEELA *v.* MULLEEKA

**[W. R., 1864, 252: 5 W. R., 23: 1 Ind. Jur., N. S., 26**

**20. ——— *Exigible dower.***—*Demand.—Application to sue in formâ pauperis.—Cause of action.*—The prompt or exigible dower of the Mahomedan law may be regarded as a debt always due and demandable during the subsistence of the marriage, and certainly payable on demand. On a clear and unambiguous demand by the wife for payment, and refusal by the husband to pay such dower, a cause of action accrues, against which limitation begins to run. An application under section 299, Act VIII of 1859, by a Mahomedan woman for leave to sue her husband for exigible dower *in formâ pauperis*, may be taken to express her intention of bringing an action for dower only if she obtains leave to do so as a pauper. Until she has the Court's permission to sue, her application does not amount to a demand by way of action. A counter-petition by the husband objecting to the pauper suit being allowed, and denying his liability to pay the dower, does not alter the character of the proceedings, since no opposition on his part can constitute a cause of action unless there has been a previous demand by the wife; the option being with her to demand the dower or not, and to elect her time for demanding it. KHAJARANNISSA *v.* SAIFOOLLA KHAN

**[15 B. L. R., 306: 24 W. R., 163: L. R., 2 I. A., 235**

Reversing the decision that the suit, as regarded the prompt dower, was barred by limitation in KHAJARANNISSA *v.* RISANNISSA BEGUM

**[5 B. L. R., 84: 13 W. R., 371**

**21. ——— *Demand.—Limitation.***—A Mahomedan of the Shia sect by a deed of dower charged his whole estate with a certain sum when demanded by his wedded wife, but did not impignorate his estate to secure the sum put in settlement. The dower was not demanded during the lifetime of the husband, and his widow at his death took possession of his estate in satisfaction of her claim. *Held* by the Sudder Dewanny Court, and such decision on appeal confirmed by the Privy Council, that the widow had a lien upon her deceased husband's estate as being hypothecated for her dower, and could either retain property to the amount of her dower or alienate part of the estate in satisfaction of her claim. *Held*, also, that a demand in the lifetime of the husband was not necessary, and that though more than twelve years had elapsed from the date of the deed and the time the widow set up her claim for dower, the claim was not barred by limitation. AMEER-OON-NISSA *v.* MORAD-OON-NISSA

**[6 Moore's I. A., 211**

**22. ——— *Genuineness of kabinamah.—Right to sue without certificate under***

**MAHOMEDAN LAW—DOWER.—Suit for dower—*continued.***

*Act XXVII of 1860, s. 3.—Prompt and deferred dower.*—The appellant, one of the royal family of Oudh, sued his father, the respondent, for R50,000 as his share of the dower alleged to have been settled on his mother, the late Oomrao Begum, who left as her heirs her husband (the appellant), her only son, and three daughters, who were made joint defendants. The plaintiff's case was that the dower being unpaid, he, as co-heir, became entitled to three tenths; but, having regard to the circumstances of the husband, he had limited her claim. The respondent disputed the genuineness of the kabinamah and the amount of the alleged dower, pleading that whatever was its amount it had been satisfied during the lifetime of Oomrao Begum. The first Court decreed the suit, but the lower Appellate Court, holding that the defendant had established his plea of satisfaction, reversed the decision. *Held* that the mehrnamah was a genuine document, and that the dower was of the amount alleged by the plaintiff, subject to modification according to the law and practice in Oudh; but that, as plaintiff had taken out no certificate under Act XXVII of 1860, section 3, the case should be remitted to the Judicial Commissioner to have it ascertained what amount of dower was payable by the respondent to the estate of his deceased wife, and what, after payment of debts, was the share of dower due to each co-sharer. Where it is not expressed whether the payment of the dower is to be prompt or deferred, the rule is to regard the whole as due on demand. *Quære,*—Where no time for the payment of deferred dower is expressly limited by contract, must it be presumed to be payable on the death of either husband or wife, or only on the death of the husband? BEDAR BUKHT MOHUMMUD ALI *v.* KHUBRUM BUKHT YAHYA ALI KHAN . **19 W. R., P. C., 315**

**23. ——— Lien for dower.**—*Fixing of amount of dower.*—On an issue whether an oral gift of an estate, consisting of certain talookas and mouzahs, had been made by a Mahomedan proprietor in favour of his wife, the gift having been stated to have been made in consideration of a dower of a certain amount, which remained unpaid, it was not necessary to affirm in the decision that that amount of dower had been agreed upon prior to the marriage. It is not necessary to constitute dower by Mahomedan law that the dower should be agreed upon before marriage; it may be fixed afterwards. KAMARUNNISSA BIBI *v.* HUSSAINI BIBI **[I. L. R., 3 All., 266**

**24. ——— *Lien of widow against heir.—Amount of dower unascertained.***—In a suit against the two widows of a deceased Mahomedan, who had obtained a certificate of administration to his estate under Act XXVII of 1860, the plaintiff claimed a 12-anna share of the estate, and prayed for the possession with mesne profits from the death of the deceased. The widows claimed to have their dower first satisfied. The amount of the dower had not been ascertained. *Held* that the widows had a lien for their dower on the estate, and the plaintiff was not entitled to recover possession so long as any portion of the dower remained unsatisfied.

**MAHOMEDAN LAW—DOWER.—Lien for dower—*continued.***

This was so though the amount of the dower was unascertained. AHMED HOSSEIN *v.* KHADIJA **[3 B. L. R., A. C., 28, note: 10 W. R., 369**

TAJIM *v.* WAHED ALI . . **22 W. R., 118**

NOUSHA BEGUM *v.* UMRAO BEGUM **[7 N. W., 60**

ATAHUR ALI *v.* ALTAF FATIMA **[10 W. R., 370, note**

**25. ——— *Mahomedan widow.—Widow's heir.—Determination of amount of dower.***—A Mahomedan widow lawfully in possession of her husband's estate occupies a position analogous to that of a mortgagee, and her possession cannot be disturbed until her dower-debt has been satisfied, and after her death her heirs are entitled to succeed her in such possession, and if wrongfully deprived thereof, to maintain a suit for its recovery. *Held* that the ruling of the Court in *Balund Khan v. Janee, 2 N. W., 319,*—that where a defendant is found to be in possession of landed property in lieu of dower, and it is held that the plaintiff is not entitled to sue for possession of the property until such claim for dower has been satisfied, it is not necessary to determine the question of the amount of such dower, the matter being one which could be settled properly in a suit for an account of what was due as dower,—was not applicable to a case where the plaintiffs seeking to recover possession did not claim as heirs of the widow's husband, but as heirs of the widow herself, and where the decree for possession passed in their favour would remain undisturbed even if an amount less than that fixed by the lower Appellate Court were found to be what was due as dower. AZIZULLAH KHAN *v.* AHMAD ALI KHAN **[I. L. R., 7 All., 353**

**26. ——— *Law in Oudh.—Punjab Code.***—The widow of a Mahomedan, in possession of her husband's estate under a claim of dower, has a lien upon it as against those entitled as heirs, and is entitled to possession as against them, till her claim of dower is satisfied. According to the Punjab Code (held to be in force in Oudh in the years 1859 and 1860), the dower mentioned in a marriage contract (instead of being enforced as an absolute deed, as claimed by the appellant) was subject to a modification at the discretion of the Court, both in the case of a divorce and on the death of the husband. MULKAH DO ALUM NAWAB TAJDAR BOHOO *v.* JEHAN KUDR **[2 W. R., P. C., 55: 10 Moore's I. A., 252**

**27. ———** The heir of a deceased Mahomedan having dispossessed the widow of deceased, who was in possession in lieu of dower, takes the estate subject to her lien for the amount of her dower. UMED ALI *v.* SAFFIHAN **[3 B. L. R., A. C., 175**

So does a purchaser from her son, and the purchaser cannot dispossess the widow in possession in lieu of dower. BUNDAY ALI KHAN *v.* CHOTEE BIBEE **[1 Agra, 273**

**MAHOMEDAN LAW — DOWER. — Lien for dower—*continued.***

28. ——————— *Widow in possession in lieu of dower.—Charge on estate for dower.*—Where a Court holds that a defendant is in possession of certain landed property in lieu of dower, and that the plaintiff is not entitled to sue for possession of the property until such claim for dower has been satisfied, it is unnecessary to determine the question of the amount of such dower, plaintiff having pleaded that the dower had been surrendered. A Mahomedan widow is entitled to a lien for whatever dower remains due to her, although there may be a dispute as to what is the amount actually due, having reference to the amount originally filed as dower, or to the amount satisfied by payments. An heir to a share of the estate is not entitled to recover possession from the widow so long as any portion of the dower remains unsatisfied, nor can he be entitled to mesne profits, but his proper course is to bring a suit for an account of what is due as dower, and to pray that in satisfaction of that amount he may be put into possession of his share of the estate. Payment of the widows, like every other debt, must be made before the estate can be distributed amongst the heirs. BALUND KHAN *v.* JANEE [2 N. W., 319

*See* UFZOOL BEGUM *v.* LADLEE BEGUM [2 N. W., 325

And IMDAD HOSSEIN *v.* HOSSEINEE BUKSH [2 N. W., 327

29. ——————— *Lien on estate of husband.*—Where the widow of a Mahomedan obtained actual and lawful possession of the estates of her husband under a claim to hold them as one of the heirs and for her dower, it was held that she was entitled to retain possession until her dower was satisfied, with the liability to account to those entitled to the property subject to the claim for the profits received. BACHUN *v.* HAMID HOSSEIN [10 B. L. R., 45: 14 Moore's I. A., 377: 17 W. R., 113

30. ——————— *Right of widow to possession against heirs.*—A widow, who is not entitled to more than her legal share in her husband's estate, has no right to the exclusive possession of the entire estate, unless it be found that she was put in possession of the entire estate either by her husband or by the consent of the other heir or heirs in lieu of dower. AMEERUN *v.* RUHEEMUN [2 Agra, Pt. II, 162

Where it is so found, she has such right. KUREEM BUKSH KHAN *v.* DOOLHIN KHOORD [15 W. R., 82

31. ——————— *Hypothecation.—Beng. Reg. VII of 1832.*—The widow's claim for dower under the Mahomedan law is only a debt against the husband's estate. It may be recovered from the heirs to the extent of assets come to their hands. It does not give the widow a lien on any specific property of the deceased husband so as to enable her to follow that property, as in the case of a mortgage, into the hands of a *bonâ fide* purchaser for value.

**MAHOMEDAN LAW — DOWER. — Lien for dower—*continued.***

*Semble,*—Under the Mahomedan law, there is not hypothecation without seisin; but a creditor, whether widow or any other creditor, if in possession of the husband's property with the consent of the debtor or his heirs, might hold over until the debt is paid; and the cases cited to show that the widow had a right to hold until her dower was paid off proceeded on this principle. *Per* HOBHOUSE, *J.*—It is very questionable whether the Court is bound to apply the Mahomedan law to this case under the provisions of Regulation VII of 1832, the case not being one of succession, inheritance, marriage, caste, or religious usage; but simply one of contract. WAHIDUNNISSA *v.* SHUBRATTUN . . 6 B. L. R., 54: 14 W. R., 239

32. ——————— *Assignment to wife in lieu of dower.—Subsequent decree affecting share.—Priority of assignee over decree-holders.*—Where a person had by deed assigned his share to his wife in lieu of dower, and the assignee had been put in possession of the share so assigned to her under the decree of the Court,—*Held* that the reduction of shares by any subsequent decree would not affect the assignment, and if at all affected, she (assignee) would be entitled to have the same extent of land made up to her out of whatever other interest her husband or his heirs may have had in the estate; that her right would be prior in time and preferable to any that could be set up by a creditor under a decree subsequent to assignment, and that the plaintiffs who purchased from the assignee were consequently entitled to decree. DHUN SINGH *v.* RAM SUHAI . . . . . 2 Agra, 39

33. ——————— *Right of widow to possession for dower as against heirs.*—A Mahomedan widow, even though she have a valid claim for dower against her husband's estate, cannot take possession of the estate as against the heirs, but must sue them regularly for the amount due to her. SELAMUT *v.* MOWLA BUKSH . 5 W. R., 194

34. ——————— *Dispossession of widow.—Wasilat.*—The widow of a Mussulman, in possession of her husband's estate under a claim of dower, has a lien upon it, and is entitled to possession as against those entitled as heirs, till her claim is satisfied. Should the widow in such a case be deprived of possession by a decree in favour of heirs who take with notice of her claim to dower, and more particularly where her right to sue has been expressly reserved, the heirs take subject to a lien of which the property is not divested by the decree. *Held,* by the Appellate Bench that in a case in which a Mahomedan widow had, after many years of possession as above, been compelled to make over one sixth of her estate to her mother-in-law, and then sued her mother-in-law for one sixth of her dower without interest, she was entitled to recover her claim without reduction on account of wasilat. WOOMATOOL FATIMA BEGUM *v.* MEERUNMUNNISSA KHANUM [9 W. R., 318

35. ——————— *Relinquishment by son in favour of mother for her unpaid dower.*—The Privy Council reversed so much of the decision

**MAHOMEDAN LAW—DOWER.—Lien for dower—*continued.***

of the High Court as ruled that the effect of an arrangement between the plaintiff and her son, by which the son relinquished his share in his late father's property, was not that the mother took an absolute interest in the property in satisfaction of her claim for unpaid dower, but that she should have only a life-interest, the son retaining the legal reversion in himself; the Privy Council being of opinion that the creation of such a life-estate did not seem to be consistent with Mahomedan usage, and that there ought to be very clear proof (which had not been shown in this case) of a transaction so unusual and so improbable amongst Mahomedans. A widow's claim for unpaid dower, when it does not, by virtue of a bye-mokusa executed by her husband, become a preferential charge on the estate, constitutes a debt payable *pari passu* with the demands of other creditors. HAMEEDA *v.* BUDLUN . **17 W. R., P. C., 525**

**36.** ——— *Widow out of, or in wrongful, possession.*—Where she is not in possession or her possession is unlawful, her right is to demand the amount of her dower from the heirs: such amount being realisable from their shares of the estates, like other debts, in the usual course of law. MEERUN *v.* NAJEEBUN . . . **2 Agra, 335**

**37.** ——— *Right of widow deprived of estate by heir.*—Where a Mahomedan widow was improperly deprived of a portion of such estate under a decree in a suit by an heir of her husband, the question as to her right of dower having been before the Court, but not disposed of by the Judge in that suit,—*Held* that the heir must be treated as having taken the property subject to a right of lien which was not divested by the decree in the former suit. JANEE KHANUM *v.* AMATOOL FATIMA KHANUM . . . . **8 W. R., 51**

**38.** ——— *Inheritance.—Transfer by widow in possession in lieu of dower.—Right of purchaser.—Heirs.—Held* that a purchaser of a deceased husband's estate from a Mahomedan widow, in possession thereof, pending payment of her dower, is not entitled to plead non-satisfaction of her dower-debt to a claim by her husband's heirs for their share of his inheritance, as the widow's right to dower is personal to herself and does not pass to a purchaser of the estate. *Bachan* v. *Hamid Hossein, 10 B. L. R., 45;* and *Bazayet Hossein* v. *Dooli Chand, L. R., 5 I. A., 211,* referred to. ALI MUHAMMAD KHAN *v.* AZIZULLAH KHAN **[I. L. R., 6 All., 50**

**39.** ——— *Right of mortgagee prior to suit for dower.*—A Mahomedan dying, his son *N.*, who was in possession of the whole of the deceased's property, mortgaged it to secure repayment of money advanced to him by the mortgagee. In the following year the three widows of the deceased, brought a suit against *N.* to assert their right of dower, obtained a decree, and in execution attached and sold the property, and, buying it themselves, got into possession. The mortgagee then brought a suit to obtain from the widows the property which he had purchased. *Held* that until the widows brought their suit the property in *N.'s* hands was not subject to a lien or charge in favour of them, and that it passed free from incumbrances to the mortgagee as a *bonâ fide* purchaser for valuable consideration. *Held,* also that the plaintiff was entitled to so much of the property as was *N.'s* share. BEGUM *v.* DOOLEE CHUND **[20 W. R., 93**

**40.** ——— **Power of widow to alienate share of which she is in possession in lieu of dower.**—*Suit to avoid alienation.—Held* that a widow in possession of the share of her deceased husband's heirs in lieu of dower, is not competent to alienate it, and the heirs can sue for the avoidance of such transfer made by the widow. MAHOMED USSUDOOLLAH KHAN *v.* GHASHEEA BEEBEE . **1 Agra, 150**

They cannot, however, claim possession before the dower is paid. AZEEMUN *v.* ASGUR ALI **[2 Agra, Pt. II, 167**

**41.** ——— *Share by right of inheritance.—Held* that a widow who is in possession of her husband's estate in lieu of her dower is not competent to alienate the whole estate permanently, but can only sell what belonged to her by right of inheritance. KUMMUR-OOL-NISSA BEGUM v. MAHOMED HUSSUN . . . . **1 Agra, 287**

**42.** ——— **Power of mother in possession of daughter's shares in husband's estate in lieu of dower.**—*Daughters without immediate right.—Held* that the mother who is in possession of her daughter's shares in her husband's estate in lieu of dower is not at liberty to sell them, and the sale can be invalidated, although the daughters may not be entitled to immediate entry upon their shares. GHUFOORUN BEBEE *v.* MUSTUKEDEH **[2 Agra, 300**

**43.** ——— **Purchase of property by wife out of money given in account of dower.**—*Husband and wife.*—Under the Mahomedan law, a wife may (except with fraudulent intent) purchase property as her own during her husband's lifetime with money given to her by him on account of dower. NASOO *v.* MAHATAL BEEBEE . **4 W. R., 7**

**MAHOMEDAN LAW—ENDOWMENT.**

*See* CUSTOM . . . **1 Bom., 36**

**1.** ——— **Creation of endowment.**—*Verbal endowment.*—According to Mahomedan law, a valid endowment may be verbally constituted without any formal deed. SHURBO NARAIN SINGH *v.* ALLY BUKSH SHAH . . . **2 Hay, 415**

**2.** ——— *Charges on profits for definite period.*—The primary objects for which lands are endowed under the Mahomedan law are to support a mosque and to defray the expenses of worship therein. The mere charge upon the profits of an endowed estate of certain items which must in time cease, and the lapse of which will leave the whole profits available for the purposes of the endowment, does not render an endowment invalid under the Maho-

**MAHOMEDAN LAW—ENDOWMENT.**
**—Creation of endowment—*continued.***

medan law. MUZHUROOL HUQ *v.* PUHRAJ DITAREY MOHAPATTUR . . . . **13 W. R., 235**

3. ——————— *Words declaratory of appropriation.—Motive.*—The chief elements of wukf are special words declaratory of the appropriation and a proper motive cause; and where the declaration is made in a solemnly, published document, the wukf is completed. DOYAL CHUND MULLICK *v.* KEERAMUT ALI . . . . **16 W. R., 116**

4. ——————— *Lands set apart for support of mosque.*—The payment of expenses of a mosque out of the rents of certain property is not proof of itself that the property is endowed. SHUREEOONNISSA *v.* KOOLSOOM . . **25 W. R., 447**

5. ——————— *Grants for subsistence.*—Grants to an individual in his own right, and for the purpose of furnishing him with the means of subsistence, do not constitute a work for endowment. KUNEEZ FATIMA *v.* SAHEBA JAN . **8 W. R., 313**

6. ——————— *Wukf.— Construction of deed of endowment.—Settlement on person and his descendants to three generations, and afterwards to charity.—Appropriations of property by settlement.*—A Mahomedan settled a portion of his immoveable property as follows: "I have made wukf the remaining four annas in favour of my daughter *B.* and her descendants, as also her descendants' descendants' descendants, how low soever, and when they no longer exist, then in favour of the poor and needy." *Held*, this settlement did not create a valid wukf. To constitute a valid wukf, there must be a dedication of the property solely to the worship of God or to religious or charitable purposes. *Semble,*—Appropriations in the nature of a settlement of property on a man and his descendants can only be treated as legitimate appropriations under the designation of wukf where the term "sadukah" is used. Even supposing they could be so treated, it would be necessary, in order to validate a wukf by making a settlement of property on himself or his descendants, for a man to reduce himself to a state of absolute poverty. MAHOMED HAMIDULLA KHAN *v.* LOTFUL HUQ **[I. L. R., 6 Calc., 744 : 8 C. L. R., 164**

7. ——————— *Wukf.—Settlement on man and his descendants.—Semble,*—To constitute a valid wukf according to Mahomedan law, it is not sufficient that the word "wukf" be used in the instrument of endowment. There must be a dedication of the property solely to the worship of God or to religious and charitable purposes. A Mahomedan cannot, therefore, by using the term "wukf," effect a settlement of property upon himself and his descendants, which will keep such property inalienable by himself and his descendants for ever. *Held* that the plaintiffs, who were sons of a daughter of one of the original settlors, did not come within the meaning of the term "aulad dar aulad" or the term "warrasan", used in the instrument of settlement. ABDUL GANNE KASAM *v.* HUSSEN MIYA RAHIMTULA **[10 Bom., 7**

**MAHOMEDAN LAW—ENDOWMENT.**
**—Creation of endowment—*continued.***

8. ——————— *Wukf.—Possession, Delivery of.—Grant of endowed property.*—To constitute a valid "wukf," or grant made for charitable and religious purposes, it must, according to the doctrine of the Shias, be absolute and unconditional, and possession must be given of the "mowkoof," or thing granted. Where a Mahomedan lady executed a deed conveying her property on trust for religious purposes, reserving to herself for life two thirds of the income derivable from the property, and only making an absolute and unconditional grant of the rest for the purposes of the trust,—*Held* that, under the Mahomedan law, the deed must be considered invalid with respect to that portion of the income reserved by the grantor to herself for life; but as to the rest, that the deed operated as a good and valid grant. KALUB HOSSEIN *v.* MEHRUM BEEBEE . **4 N. W., 155**

9. ——————— *Wukf.—Mutwalli.—Right to sue.*—A Mahomedan of the Shafi sect, by a deed of settlement executed in 1838, called a wukfnamah, settled moieties of his estate on his two wives, their daughters, and the descendants of the donees in each line so long as it should subsist, with cross remainders, on the extinction of either line, to the representatives of the other, with final remainders, on the extinction of both, to the heirs of the settlor. The settlor constituted himself the nazir or mutwalli (superintendent or trustee) of the estate during his life, and nominated *A.* and *B.* to act as such after his death with the consent of his wives. In 1840 the settlor died; *A.* died in 1865; *B.* survived. The wives and daughters of the settlor also died. The representatives of one of the settlor's daughters sued the defendant to recover a part of the estate, which had been sold to him by the Civil Court, as the property of another of the daughters, on the ground that the estate on the death of that daughter passed as wukf to her surviving sister. *Held* that, supposing the wukf to have been validly created, the right to bring the suit belonged (according to Mahomedan law), not to the heirs or descendants of the settlor, but to the mutwallis (superintendents) jointly. On the death of one of the mutwallis, a successor to him should have been appointed in the first place by the settlor, and, failing him, by his executor, if he had appointed any, otherwise by the Court on the application of the parties beneficially interested in the estate. *Quære,*—Whether a wukf could be created for the purpose merely of conferring a perpetual and inalienable estate on a particular family without any ultimate express limitation to the use of the poor or some other inextinguishable class of beneficiaries. PHATE SAHEB BIBI *v.* DAMODAR PREMJI . . . . **I. L. R., 3 Bom., 84**

10. ——————— *Charitable object.—Subject of wukf.—Shares in company.*—According to Mahomedan law a wukf cannot be created of shares in a limited liability company. A wukf, the purpose of which is to create a mere family settlement without a charitable object, is invalid. *Abdul Gunne Kasam* v. *Hussen Miya Rahimtula, 10 Bom., 7;* and *Mahomed Hamidulla Khan* v. *Budrunissa*

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*Khatoon, 8 C. L. R., 164,* followed. FATIMA BIBEE *v.* ARIF ISMAILJEE BHAM . . **9 C. L. R., 66**

**11.** ——————— *Wukf.—Provisions for payment of debts and maintenance.—Minor plaintiff.—Guardian.*—A Mahomedan created a wukf of all his property, and appointed his minor grandson mutwalli, providing that during the minority the property should be managed by the minor's father. The deed contained a provision that, in the first place, certain debts should be paid, and then provided that the property should be applied towards the religious uses created and the maintenance of of the settlor's grandsons and their male issue. In execution of a decree against the minor's father, the endowed property was attached and sold. In a suit by the minor through his sister, as guardian, to recover possession of the property, in which suit the sister was not made guardian *ad litem* by an order of Court, but was allowed to sue by the District Judge, —*Held* that the suit was maintainable as framed. *Held,* also, that notwithstanding the provisions for payment of debts and maintenance, the wukf was valid. LUCHMIPUT SINGH *v.* AMIR ALUM **[I. L. R., 9 Calc., 176: 12 C. L. R., 22**

**12.** ——————— *Grant to grantees and their aulad va ahfad.—Meaning of the word "ahfad."—Wukf.—Tavlyat and sajjadanashin, Right of females to hold the offices of.*—A certain village was granted by the Mogul Government in inam to two persons and their "aulad va ahfad" for the maintenance of a durga (mausoleum) of a pír (saint). The plaintiff and the defendant were the descendants of the original grantees. In 1878 the plaintiff sued the defendant for the recovery of the profits of a one-fourth share in the inam, claiming to be entitled thereto through his mother and grandmother, who was a daughter of the son of the great-grandson of one of the two original grantees. It was contended (*inter alia*) for the defendant that the expression "aulad va ahfad" used in the grant would include only the lineal male descendants, and not the plaintiff, who claimed through females, who were incapable of performing the spiritual offices connected with the mausoleum. The Court of first instance dismissed the plaintiff's claim. He appealed, and the lower Appellate Court allowed his claim to the extent of one-eighth share. On appeal by the defendant to the High Court,—*Held,* confirming the decision of the lower Appellate Court, that the plaintiff was entitled to share both in the offices of the durga and the endowment. The term "ahfad," being a term of the largest and most general signification, includes the descendants of females as well as of males. The primary object of the grant was to provide for the tavlyat and the office of sajjadanashin of the mausoleum of the saint, and with that view to supply the means for the maintenance of the persons who should perform the offices, as well as for the ordinary expenses of keeping up the mausoleum. A female could not be the sajjadanashin, whose duties were of a strictly spiritual nature requiring peculiar personal qualifications so as to exclude female descendants from participating in the endowment; but it would

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**—Creation of endowment—*continued.***

not follow that males, who established their descent from the *propositus* through females, should be excluded. Had the intention of the grant in the present case been to limit the class of descendants exclusively to persons claiming through males, the expression "aulad dar aulad" would have been used, instead of the general expression "aulad va ahfad." *Hussain Beebee* v. *Hussain Sherif, 4 Mad., 23;* and *Mujavar Ibrambibi* v. *Mujavar Hussain Sherif, I. L. R., 3 Mad., 95,* distinguished. KARIMODIN *v.* ALAM-KHAN . . . . **I. L. R., 10 Bom., 119**

**13.** ——————— *Wukf, Essentials of.—Increase in value of wukf properties how appropriated.*—Where by a sanad a gift was made of the then income of certain villages with a specification that one third of it was for the defrayal of the expenses of the servants of a mosque, and fursh and light, &c., one third for the expenses of a madrassa, and the remaining one third for the maintenance allowance of the mutwalli,—*Held* that the gift complied with the four essential conditions necessary to create a valid wukf according to Mahomedan law. *Held* also that, in the absence of any express direction as to what was to be done with any surplus profits of the dedicated property, the reasonable presumption is that the improved value of the dedicated property, or any excess of profit over and above the amount stated in the sanad, was intended by the grantor to be devoted to the same purpose for which the amount, which was the actual value of the property at the time of the gift, was expressly assigned. JUGATMONI CHOWDRANI *v.* ROMJANI BIBEE **[I. L. R., 10 Calc., 533**

**14.** ——————— *Wukf.—Descent per stirpes.—Grant in inam to grantee and children without restriction as to names.—Direction to pray for perpetuity of Government.*—A sanad of the Emperor Shah Jehan, dated A.D. 1651-52, granted in inam to one Sayad Hasan the village of Dharoda and certain lands of another village in these terms: "Let the whole village above mentioned, as well as the above-mentioned land, be hereby settled and conferred as above, manifestly and knowingly as a help for the means of subsistence for the children of the above-mentioned Sayad Hasan without restriction as to names, in order that, using the income thereof from season to season and from year to year for their own maintenance, they may engage themselves in praying for the perpetuity of this ever-enduring Government." *Held* that this grant did not constitute wukf, or a religious endowment, making the village descendible to the issue of the donee *per stirpes* (that is, allowing representation) rather than according to the ordinary Mahomedan law; and the direction that the donee and his issue were to pray for the perpetuity of the then existing Government meant no more than an inculcation of gratitude for the gift; and that neither neglect to fulfil the direction nor the downfall of the Government would work a forfeiture or avoidance of the grant. Although a wazifa grant may be a religious endowment, such is neither necessarily nor even generally its nature. Hence the use of the term "mauzif" (*alias* "wazif"

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or "wazifa"), with regard to the grant of a village, does not stamp the grant as a wukf or religious endowment. MAHOMED ALI *v.* GOBAR ALI
[I. L. R., 6 Bom., 88

15. ——————— *Wukf.—Power of revocation.—Reservation of rents and profits to donor for life.—Ultimate dedication of property to charity with intervening private interests.—Rule against perpetuities how far applicable in a colony subject to English law.—Charities, What are.—Trust for maintenance of idol, for benefit of poor, for building tanks.—Dedication by minor.—Subsequent ratification.—Estoppel.*—A wukf must be certain as to the property appropriated, unconditional, and not subject to an option. It must have a final object which cannot fail, and this object must be expressly set forth. When a wukf is created, the reservation in the deed of settlement of the annual profits of the property to the donor for life does not invalidate the deed. If, however, there is a provision for the sale of the *corpus* of the property and an appropriation of the proceeds to the donor, the settlement is invalid. If the condition of an ultimate dedication to a pious and unfailing purpose be satisfied, a wukf is not rendered invalid by an intermediate settlement on the founder's children and their descendants. The benefits these successively take may constitute a perpetuity in the sense of the English law; but according to the Mahomedan law, that does not vitiate the settlement, provided the ultimate charitable object be clearly designated. The rule against perpetuities extends to a colony in which English law is enforced only so far as it is adapted to the circumstances of the community. The case of "charities useful and beneficial" to the community is an exception to this rule. It is for the Courts to pronounce whether any particular object of bounty falls within this class. In order to decide this question, they must, in general, apply the standard of customary law and common opinion amongst the community to which the parties interested belong. Objects which the English law would possibly regard as superstitious uses are allowable and commendable according to Mahomedan law. A trust for the benefit of the poor, for aiding pilgrimages and marriages, and for the support of wells and temples, is a charity amongst Mahomedans. The law and opinion of Mahomedans regard such a trust as a charity; and granting there is a charity, the objection to a perpetuity fails according to the principles of the English law. Where the proposed object of the endowment is one which is directly contrary to the public law of the State, the above rule does not apply. By an indenture of voluntary settlement, dated 16th March 1866, *F.*, a Mahomedan girl of the age of fourteen, conveyed certain immoveable property in the Island of Bombay to trustees upon trust—(1) During her lifetime to pay the rents and profits to her for her sole and separate use without power of anticipation. (2) After her death to pay the rents and profits to her children and descendants as she might by deed or will appoint. In default of appointment the trustees were to pay life-allowances to such descendants at their discretion. The rents and profits only were to be thus distributed among such descendants for ever, the *corpus* of the property being kept intact. (3) In case there should be no such descendants, or in the event of failure of such descendants, the rents and profits were to be expended on charitable purposes, such as expenses of poor pilgrims going to Mecca, building mosques, funeral and marriage expenses of poor people, sinking wells or tanks, or in such other manner as the trustees should think fit. Shortly after the execution of the settlement, the trustees took possession of the property, and for fifteen years continued to pay the rents and profits to the settlor. The settlor was married in 1866 to *H.*, and there was issue of the marriage only one son, who died in 1872, an infant under the age of five years. *H.* died in 1872, and the settlor remained a widow. In 1881 she became desirous of revoking the above settlement, and under section 527 of the Civil Procedure Code (Act X of 1877) she stated a case for the opinion of the Court, contending that she could lawfully revoke the trusts declared by the said indenture; that, if she could not revoke, then that the trust therein declared in favour of charity was void for remoteness; and generally that she was, under the circumstances, entitled to have the property reconveyed to her by the surviving trustee. *Held* that the settlement was irrevocable. The dedication having been once made could not be recalled. The interposed private interests, which might or might not endure, did not avoid the ultimate charitable trust. According to Mahomedan law the latter gave effect to the former. Should the intermediate purposes of the dedication fail, the final trust for charity did not fail with them. It was but accelerated, being itself regarded as the principal object in virtue of which effect was given to the intervening disposition. Charitable grants being thus tenderly regarded, it would be inconsistent that a power of revocation should be recognised in the grantor. *Held*, also, that although the dedication by a girl of fourteen was not to be upheld without inquiry, yet the transaction never having being questioned by her husband during his life, and she having for fifteen years confirmed her own act by a continued acceptance of the profits of the estate from the trustees, could not with reason contend that the dedication was invalid on account either of its ceremonial defects or of a want of an accompanying volition. FATMABIBI *v.* ADVOCATE GENERAL OF BOMBAY . . . I. L. R., 6 Bom., 42

16. ——— **Revocation of endowment.—** *Effect of revocation or improper conduct of trustees.* —A valid wukf cannot be affected by revocation or by the bad conduct of those responsible for the carrying out of the appropriator's behests, nor can it be alienated. DOYAL CHUND MULLICK *v.* KERAMUT ALI . . . . . 16 W. R., 116

17. ——————— *Removal for misconduct.*—According to Shiah law, a man who devotes property to charitable or other uses, and transfers the proprietary right therein to a trustee, cannot at his pleasure take it back from the trustee whom he has constituted the owner, and give it to another

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person, unless on the creation of the trust he has reserved to himself the right to do so in express terms. HIDAITOONNISSA *v.* AFZUL HOSSEIN [2 N. W., 420

18. ——————— *Grant reverting to donor on misconduct of mutwallis.*—If mutwallis fail to act up to the directions of an endowment, the grant does not necessarily revert to the heirs of the grantee. REASUT ALI *v.* ABBOTT . 12 W. R., 132

19. ——— Management of endowment.—*Position of manager.—Limitation.—Act XX of 1863.*—Since the passing of Act XX of 1863 a mutwalla, or manager of a Mahomedan endowment, cannot be considered to hold the position he was taken to have in the judgment of the Privy Council in *Jewun Doss Sahoo* v. *Kubeerooddeen, 6 W. R., P. C*, 3,—*viz.*, as an officer appointed by the Government; and therefore the ordinary rules of limitation are applicable to such cases. LALL MAHOMED *v.* LALLA BRIJ KISHORE . . 17 W. R., 430

20. ——————— *Land granted for purposes of.—Right of succession to, and income of.*—Land granted for the endowment of a khalibi, or other religious office, cannot be claimed by right of inheritance. Where such a grant has been made, the members of the grantee's family have no right at his death to a division amongst them of the income derivable from the land. The right to the income of such land is inseparable from the office for the support of which the land was granted. JAAFAR MOHIUDIN SAHIB *v.* AJI MOHIUDIN SAHIB [2 Mad., 19

21. ——— Succession to management of endowment.—*Succession to endowed property.—Rules of founder.—Usage.—Primogeniture.*—Where property has been devoted exclusively to religious and charitable purposes, the determination of the question of succession depends upon the rules which the founder of the endowment may have established, whether such rules are defined by writing or are to be inferred from evidence of usage. Where so far as the will of the founder can be ascertained from the usage of former days, it seemed to authorise a mode of succession originating in an appointment by the incumbent of a successor, the Court would not be authorised to find in favour of any rule of succession by primogeniture solely from the circumstance that the persons appointed were usually the eldest sons. GULAM RAHUMTULLA SAHIB *v.* MOHOMMED AKBAR SAHIB . . 8 Mad., 63

22. ——————— *Wukf property.—Founder's right to appoint manager.—Right of executors to nominate manager.—Akriba.*—Although, according to Mahomedan law, the founder of a wukf has a right to reserve the management of it to himself or to appoint some one else thereto, yet when he has specified the class from amongst which the manager is to be selected (*e.g.*, from amongst his relations), he cannot afterwards name a person as manager not answering the proper description. After the death of the founder the right to nominate a

**MAHOMEDAN LAW—ENDOWMENT.—Succession to management of endowment—*continued.***

manager of the wukf vests in the founder's vakeels or executors, or the survivor of them for the time being. The term "akriba" (relations), though more properly confined to relations by blood, will, when the context shows that it was intended to be used in a wider sense, be extended so as to include relations by affinity. The wife or widow of the founder is not included amongst his "akriba." ADVOCATE GENERAL *v.* FATIMA SULTANI BEGAM . 9 Bom., 19

23. ——————— *Misappropriation of funds, Effect of, on nature of trust.—Construction of endowment or grant.*—Where the mutwalli of an endowment sought to recover his surburakari right in two villages, of which he had been dispossessed by a person who had obtained a decree against him personally, and taken out execution against the endowment; and the said judgment-creditor contended—first, that the proceeds of the endowment had been appropriated to other purposes than those specified in the firman creating it; second, that as the firman contained no rule of succession by inheritance or otherwise, plaintiff could not claim to be mutwalli simply in virtue of his being a descendant of the original mutwalli; and third, that the use of the term "inam" in the firman showed that the grant was in the nature of a personal endowment: it was found that the nature of the firman removed all doubt of the wukf character of the endowment: and held, *firstly*, that the misappropriation of wukf funds might form the subject of a suit to compel the mutwalli to do his duty, but could not alter the essential nature of his trust: *secondly*, that the question of the right of the plaintiff to succession could not, for the first time, be raised in this stage of the case; and, *thirdly*, that a grant should be construed according to the intention of the founder, and not according to the strict interpretation of any particular word: the word "inam" being indiscriminately applied to personal grants and religious endowments. ASHEEROODDEEN *alias* KALLA MIAH *v.* DROBO MOYEE . . . . . 25 W. R., 557

24. ——————— *Alienation of endowed lands.—Appointment of wife as mutwalli in husband's lifetime.—Power to appoint mutwalli.*—Where a plaintiff sued to recover certain lands which had been appropriated to religious and charitable purposes by the father of her deceased husband, and urged that she had been ousted by defendant, who was the son of a half-brother of her husband; but the defendant contended that he had been put in possession as manager by plaintiff herself and other widows of the plaintiff's deceased father-in-law, all which widows had some interests in the land under various deeds by which additions had been made to the orignal endowment; and defendant further pleaded that, under the original deed of appointment, plaintiff's husband could not alienate the property, and that plaintiff's possession would be a virtual alienation; and also that plaintiff's claim was barred by limitation, and that she could not hold the land without the sanction of the Government under Act XX of 1863;—*Held* that, although plaintiff's original

**MAHOMEDAN LAW—ENDOWMENT. —Succession to management of endowment—*continued.***

appointment by her late husband during his lifetime was unauthorised, yet, as alienation in such a case would mean alienation of the subject of the endowment rather than its transfer to plaintiff, whose possession was not an adverse possession, plaintiff's possession did not defeat the purposes of the original appropriator, and could not be regarded as an alienation; and that in these circumstances, even though the property were wukf, there could be no defect in plaintiff's title. An appropriator of land to special purposes can, under Mahomedan law, confer the office of superintendent on another at any time. It was found in this case that defendant, as a descendant of the original appropriator, had succeeded to other properties which were quite distinct from the land in suit. ABDOOL KHALEK *v.* PORAN BIBEE

**[25 W. R., 542**

25. ——— **Appointment as manager.**—*How far effectual.*—An appointment as manager, by the trustee for the time being of a Mahomedan religious endowment, was held not effectual beyond the incumbency of the nominator. MOHEEOODDEEN AHMED *v.* ELAHEE BUKSH . . **6 W. R., 277**

26. ——— *Shiah.—Disqualification.*—The fact of a person being a Shiah does not disqualify him for the supervision of a wukf made by a Sunni. DOYAL CHUND MULLICK *v.* KERAMUT ALI . . . . . **16 W. R., 116**

27. ——— *Hereditary succession.*—In a Mahomedan religious endowment, when it is essential that the superior or manager should have certain qualifications which succession by descent would not always ensure, the theory of hereditary succession is most unlikely and out of place. SYEDUN *v.* ALLAH AHMED

**[W. R., 1864, 327**

28. ——— *Suffada-nasheen, Descent of office of.—Female's right of.*—Under the Mahomedan law, offices like that of suffada-nasheen should descend to persons in the male line, and those who are descended from females are regarded as not belonging to the family of the founder, but strangers. Where such an office has been once diverted for sufficient cause (*e.g.*, default of male issue) from a particular line of descent, it is liable to be brought back into the line of a previous holder when the person claiming under that holder is a descendant in the female line. AHMUD HOSSEIN *v.* MOHIOODEEN AHMUD . . . . . **16 W. R., 193**

29. ——— *Temporal and spiritual affairs.—Performance of duties by female.*—According to Mahomedan law, a woman may manage the temporal affairs of a mosque, but not the spiritual affairs connected with it, the management of the latter requiring peculiar personal qualifications. HUSSAIN BIBEE *v.* HUSSAIN SHERIF . **4 Mad., 23**

30. ——— *Wukf or endowed property.—Office of mutwalli, Nature of.—Transfer of, or performance of duties of, by agent.*—The office of mutwalli is a trust which a woman, equally with a man, is capable of undertaking, but it is a personal trust, and the office may not be transferred, nor the endowed property conveyed, to any person whom the acting mutwalla may select. The word "deputy," in book 9, chapter V, page 591 of Baillie's Mahomedan Law, signifies some one who, as an agent, may be employed to perform the duties of the office, as to collect rents and to assist the mutwalli in expending the proceeds of the endowed property for charitable purposes. WAHID ALI *v.* ASHRUFF HOSSAIN

**[I. L. R., 8 Calc., 732: 10 C. L. R., 529**

31. ——— *Woman performing duties of manager of endowment.*—A woman is not competent to perform the duties of mujavar of a durga which are not of a secular nature. MUJAVAR IBRAMBIBI *v.* MUJAVAR HUSSAIN SHERIFF

**[I. L. R., 3 Mad., 95**

32. ——— **Alienation of endowed property.**—*Wukf.—Limitation.*—According to Mahomedan law, wukf or endowed property is alienable. Wukf property is not the less wukf property because of the use of the words "inam" and "altamgha" in the grant, provided the grant clearly appears to have been intended for charitable purposes. A mutwalli, or superintendent of an endowment, is not barred by limitation if he sues to recover possession of endowed property within twelve years from the date of his appointment. JEWUN DOSS SAHOO *v.* KUBEEROODDEEN . **6 W. R., P. C., 3: 2 Moore's I. A., 390**

33. ——— *Alienation by mutwalli.*—In dealing with the mutwalli of an endowment, it is not necessary for the purchaser to look further than to the power of the mutwalli under his deed of trust. If the deed gives the mutwalli the power and discretion to make a sale, it is not a matter of concern to the purchaser whether that power or discretion is judiciously exercised or not. GOLAM ALI *v.* SOWLUTOOSNISSA BIBEE

**[W. R., 1864, 242**

34. ——— *Grant of mirasi lease.*—According to Mahomedan law, the trustees of an endowment cannot create a valid mirasi tenure at a fixed rent by granting a lease of any portion of the wukf property. SOOJAT ALI *v.* ZUMEEROODDEEN

**[5 W. R., 158**

35. ——— *Alienation of land devoted in part to religious purposes.*—Where the whole of the profits of land are not devoted to religious purposes, but the land is a heritable property burdened with a trust,—*e.g.*, the keeping up of a saint's tomb,—it may be alienated subject to the trust. FULTOO BIBEE *v.* BHURRUT LALL CHUKUT

**[10 W R., 299**

36. ——— *Liability of wukf property in hands of widow to decree against husband.*—Where property is endowed (made wukf) by the proprietor, and as such devolves to his widow as trustee (mutwalli), it cannot be sold in satisfaction of a claim against him. FEGREDO *v.* MAHOMED MUDESSUR . . . . . **15 W. R., 75**

**MAHOMEDAN LAW—ENDOWMENT.—Alienation of endowed property—*continued.***

**37.** ——————— *Mortgage.*—The fact that a mortgage is in existence over property at the time when it is set apart as an endowment, does not invalidate the endowment under Mahomedan law. It is an endowment subject to a mortgage. If after a mortgage the mortgagor endows the land and dies leaving sufficient assets, his heirs are bound to apply those assets to the redemption of the mortgage, so that the endowment may take effect freed from the mortgage by the application of other assets of the endower. But, if necessary, the mortgagee may enforce the mortgage by sale of the land, and the endowment will be rendered void as against the purchaser under the mortgage, but not as against the heirs of the endower; as against the latter, the surplus sale-proceeds will be subject to the endowment. HAJRA BEGUM *v.* KHAJA HOSSEIN ALI KHAN **[4 B. L. R., A. C., 86 : 12 W. R., 498**

Upholding on review, KHAJAH HOSSEIN ALI *v.* HAZARA BEGUM . . . **12 W. R., 344**

**38.** ——————— *Waste committed by mutwalli.—Liability to account.*—Where a mutwalli was proved to have been guilty of waste, the High Court ordered him to file in Court every six months a true and complete account of his income, expenditure, and dealings with the property belonging to the endowment. IMDAD HOSSEIN *v.* MAHOMED ALI KHAN . . . **23 W. R., 150**

**39.** ——— **Removal of manager.**—*Misconduct.*—If a superintendent of an endowment misconducts himself, the Mahomedan law admits of his removal, and this is sufficient to protect the objects for which the trust was created. HIDAITOON-NISSA *v.* AFZUL HOSSEIN . **2 N. W., 420**

**40.** ——————— *Mismanagement.—Power of donor.*—The rule of Mahomedan law that a mutawalli, or superintendent of an endowment, is removable for mismanagement, does not apply to the case of a trustee who has a hereditary proprietary right vested in him. It is essential, for the exercise by the donor of the power of removing a superintendent, that such power be specially reserved at the time of the endowment. GULAM HUSSAIN SAIB *v.* AJI AJAM TADALLAH SAIB. AJI AJAM TADALLAH SAIB *v.* GULAM HUSSAIN SAIB . . **4 Mad., 44**

**41.** ——————— *Misconduct.*—Where the plaintiff sued to recover certain property as wukf, on the ground that the mutwalli and his ancestor (a former mutwalli) had misconducted themselves by selling to some of the defendants the property which was the subject of the endowment,—*Held* that as plaintiff had shown no title, either as heir or otherwise, to partake of the benefit of the endowment, he had no right to recover possession, and that the utmost he could ask for was to have the mutwalli who had misconducted himself removed, and a new mutwalli appointed, provided he showed circumstances which, according to law, would justify the Court in selecting a mutwalli. BHUBRUCK CHUNDRA SAHOO *v.* GOLAM SHURRUF **[10 W. R., 458**

**MAHOMEDAN LAW—ENDOWMENT.—Removal of manager—*continued.***

**42.** ——————— *Removal of officer for disobedience.—Cause of action.—Trust.*—In a suit by the superintendent of a Mahomedan religious establishment to eject defendant (*M.*) from the office of takheadar and from certain lands thereto appertaining, on the ground that he had by the authority vested in him already discharged *M.* from employment in consequence of disobedience, the alleged cause of action being an order passed by the Civil Court decreeing to the defendant a quantity of land belonging to the establishment, notwithstanding the superintendent's objection that *M.* was no longer takheadar,—*Held* that the plaintiff's cause of action was correctly stated, for it was by the order in question that his nominee was put aside, and the defendant declared to have a right to the land as takheadar; and that the defendant's claiming to hold independently of the superintendent was an act of the gravest disobedience warranting the plaintiff's interference and the exercise of his authority. *Held*, too, that the suit was not barred by limitation, as the defendant held his office subject to the general contral and authority of the superintendent, both parties executing the same trust. MEHER ALI *v.* GOLAM NUZUFF **[11 W. R., 333**

**MAHOMEDAN LAW—GIFT.**


| | Col. |
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| 1. LAW APPLICABLE TO— . . . | 3672 |
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*See* COMPROMISE — CONSTRUCTION, ENFORCING, EFFECT OF AND SETTING ASIDE DEEDS OF COMPROMISE. **[6 Bom., A. C., 77**

1. LAW APPLICABLE TO—

**1.** ——— **Law of equity and good conscience.**—*Cases of inheritance, marriage, and caste.*—The application to Mahomedans of their own laws in cases other than those coming under the denomination of inheritance, marriage, and caste (*e.g.*, in case of gifts), is the administering of justice according to equity and good conscience. ZOHOOROODEEN SIRDAR *v.* BAHAROOLLA SIRCAR **[W. R., 1864, 185**

**2.** ——— **Questions as to gift arising in suits.**—*Bengal Civil Courts Act, VI of 1871, s. 24.*—Under section 24 of Act VI of 1871, Mahomedan law is not strictly applicable to questions relating to gift arising in suits, but it is equitable as between Mahomedans to apply that law to such questions. SHUMSHOOLNISSA *v.* ZOHRA BEEBEE . **6 N. W., 2 [Agra, F. B., Ed. 1874, 286**

2. CONSTRUCTION.

**3.** ——— *Donee from Mahomedan widow.—Title.—Held* that a donee holding from a Mahomedan widow does not acquire a better title to the property than the donor herself had. MAHOMED NOOR KHAN *v.* HUR DYAL . . . . **1 Agra, 67**

**MAHOMEDAN LAW—GIFT**—*continued.*

2. CONSTRUCTION—*continued.*

**4. ——— Gift for consideration.**—*Revocable grant.—Construction of instrument of gift.*—One of two brothers, co-sharers in ancestral lands, died leaving a widow, who thereupon became entitled to one fourth of her husband's share of the family inheritance. Without relinquishing her right to claim her share, in lieu thereof she received an allowance of cash and grain. The surviving brother made an arrangement with her which was carried into effect by documents. By one instrument he granted two villages to her. By another she accepted the gift, giving up her claim to any part of the ancestral estate of her husband. The first instrument, *inter alia*, stated as follows: "I declare and record that the aforesaid sister-in-law may manage the said villages for herself and apply their income to meet her necessary expenses and to pay the Government revenue." *Held* that these words did not cut down previous words of gift to what in the Mahomedan law is called an *ariat*; and that the transaction was neither a mere grant of a license to the widow to take the profits of the land revocable by the donor, nor a grant of an estate only for the life of the widow. It was a *hibbah-bil-iwaz*, or gift for consideration, granting the villages absolutely. MAHOMED FAIZ AHMED KHAN *v.* GHULAM AHMED KHAN

**[I. L. R., 3 All., 490**
**L. R., 8 I. A., 25**

**5. ——— Transfer of absolute estate.**—*Condition.—Sunni law.—Shiah law.*—The owner of a house made a gift thereof to certain persons "for their residence, and that of their heirs, generation after generation," declaring that if the donees sold or mortgaged the house, he and his heirs should have a claim to the house, but not otherwise. *Held* that under Mahomedan law, whether that by which the Shiahs or that by which the Sunnis were governed, the house passed by the gift to the donees absolutely, the declaration by the donor as to the effect of an alienation by the donees being in the nature of a recommendation, and not having the effect of limiting the estate in the house itself. NASIR HUSAIN *v.* SUGHRA BEGUM . . **I. L. R., 5 All., 505**

**6. ——— Deed of gift.**—*Will.—Validity of declaration of title.*—*Held* that a document to the following effect was a deed of gift and not a will: "I have no children. Therefore my own brother, Mir Hemdoola *alias* Chotay Saheb, in his lifetime placed in my lap his infant son, Mir Ruhulla, of his own free will and accord. From that day, having taken the said Mir Saheb into my family, I adopted him as my son. Consequently he is being brought up entirely by me, and he alone is also my heir. And I have appointed him the owner of all by goods and property. . . . I have made over the same to the possession of the said Mir Saheb. . . . I have a share in the goods and property of my husband, Mir Afzaloodin Khan Saheb, the Nawab of Surat. The owner thereof also is the same Mir Saheb. Therefore in my lifetime should this property come into my hands, I will also deliver the the same into the possession of the said Mir Saheb.

**MAHOMEDAN LAW—GIFT**—*continued.*

2. CONSTRUCTION—*continued.*

**Deed of gift**—*continued.*

Because the said Mir Saheb being the heir of all my goods and property, I have constituted him the possessor thereof by virtue of ownership. He is therefore the owner. And after me, should this property be divided, then the said Mir Saheb is the owner and absolutely entitled to receive my portion by the aforesaid right, by the right of ownership of my share, from the Court of His Honour the Agent. No one shall oppose him." *Held*, further, that even if the direction in the above document as to making the grantee of the document the owner of the grantor's share in her husband's property be regarded as a declaration of title, such declaration had, according to Mahomedan law, no validity to create a proprietary right in the said share after the grantor's death. KAVARBAI *v.* ALAM KHAN

**[I. L. R., 7 Bom., 170**

3. VALIDITY.

**7. ——— Deed of sale.**—*Joint gift.—Without discrimination of shares.*—Where a conveyance between Mahomedans, though in form a deed of sale, is in reality a gift, its validity should be tested by the rules of law applicable to gifts, and not by those applicable to deeds of sale. In determining whether a transaction is one of sale or gift, the intention of the parties, rather than the form of the instrument used, should be considered. A deed of gift, in English form, of a house to three persons as joint tenants (without discrimination of shares) is good according to Mahomedan law, as it shows an intention on the part of the donor to give the property in the whole house to each of the donees. A gift by a Mahomedan in Bombay which contravenes the principles of English Courts of Equity with regard to gifts to persons standing in a fiduciary relation to the donors will not be upheld. RAJABAI *v.* ISMAIL AHMED . . . . **7 Bom., O. C., 27**

**8. ——— Deed of gift altering succession of property by law.**—*Intention of parties.*—Where a Mahomedan transferred certain property (Company's paper) to his son, reserving the interest to himself for life, the object of the disposition being to give the son a larger share of the father's property than would come to him by succession *ab intestato*,—*Held* that the transaction could not be impeached on moral grounds, as a design to alter the disposition of property so as to defeat a succession by an alienation, which the law allows, is simply a design to conform to the law while working out an unforbidden object. *Held*, also, that the intention of the parties did not violate any provision of the Hedaya, and the transfer was complete and the gift valid. UMJAD ALLY KHAN *v.* MOHUMDEE BEGUM

**[10 W. R., P. C., 25 : 11 Moore's I. A., 517**

**9. ——— Hiba-bil-iwaz.**—*Effect of, upon heirs.*—A hiba-bil-iwaz differs from an out-and-out sale as well as from a gift, while it partakes of the character of both, and, if supported by sufficient consideration, is binding under the Mahomedan law upon

**MAHOMEDAN LAW—GIFT—*continued.***

3. VALIDITY—*continued.*

**Hiba-bil-iwaz—*continued.***

the heirs of the party executing such deed. SOLAH BIBEE *v.* KEERUN BIBEE . **16 W. R., 175**

10. ——— *Condition of good behaviour.*—A gift is not necessarily hiba-bil-iwaz by an allusion in the deed to the good behaviour of the donee, and his supplying a certain amount to the donor to enable the latter to do some act in respet of the property. USSUD ALI KHAN *v.* OLFUT BEEBEE **[3 Agra, 237**

11. ——— **Alienation by Mahomedan lady.**—*Consent of children.*—A Mahomedan lady can sell or give away her property as she pleases. When a mother makes a gift to her children, and one of them seeks to set it aside as fraudulent, so far as it affects the plaintiff's right of inheritance, so long as the mother is alive and admits the execution of the deed of gift, the plaintiff is not in a position to disturb it; and it is quite immaterial in such a case whether the plaintiff's consent was or was not given. MAHOMED ZUHEERUL HUQ *v.* BUTOOLUN **[1 W. R., 79**

12. ——— *Gift on death-bed.*—*Will.*—A Mahomedan widow, or any other woman, holding property in her own right, may give it away to whomsoever she pleases, unless she delays the gift till upon her death-bed, when such a gift would be looked upon as a will, and be inoperative beyond a certain limit. LUTEEFOONISSA BIBEE *v.* RAJAOOR RUHMAN . . . **8 W. R., 84**

13. ——— **Delivery of possession.**—*Possession with mortgagee.*—*Sale.*—*Minors.*—A Mahomedan lady executed a deed of gift in favour of the plaintiff, who was at the date of its execution a minor, of certain lands (including the land in dispute) of which she professed to have obtained possession under a decree against her coparceners. The plaintiff, on the strength of the deed of gift, sued for a declaration of his right to the land, alleging that the donor had actually recovered possession in execution of her decree. The original and appellate Courts found that the defendant was, at the date of the deed of gift, in actual possession under a mortgage executed by the donor's coparceners, and that she had failed, in executing her decree, to eject the defendant. *Held* (KEMBALL, *J.*, *dissentiente*) that at the date of the deed of gift the donor was simply the owner of property which was in possession of a mortgagee, and could not, under Mahomedan law, make a gift of it, although she could sell the same. See *Adam Khan* v. *Alarakhi, I. L. R., 6 Bom., 645.* When the donee is a minor, possession may be had by a trustee on his behalf. MOHINUDIN *v.* MANCHERSHAH . . . **I. L. R., 6 Bom., 650**

14. ——— **Gift of share before partition.**—*Co-sharers.*—According to the Mahomedan law, one of two sharers can give over his share to the other even before partition. AMEENA BIBEE *v.* ZEIFA BIBEE . . . . **3 W. R., 37**

**MAHOMEDAN LAW—GIFT—*continued.***

3. VALIDITY—*continued.*

15. ——— **Gift of undivided property.**—*Musha, or confusion.*—*Change of possession.*—Where there is, on the part of a father or other guardian of a minor, a real and *bonâ fide* intention to make a gift to the minor, the Mahomedan law will be satisfied without actual change of possession, and will presume the subsequent holding of the property by the father or guardian to be on behalf of the minor. Where the subjects of a gift are definite shares in certain zemindaris, the nature of the right in which is defined and regulated by the public Acts of the British Government, so that they form for revenue purposes distinct estates, each having a separate number in the Collector's books, and each liable to the Government only for its own assessed revenue, the proprietor collecting a definite share of the rents from the ryots, and having a right to this definite share and no more, the rule of the Mahomedan law as to *musha*, which makes the gift of undivided property invalid, does not apply. *Quære,*—Whether the law relating to *musha* applies to those cases in which the owner gives all his own interest in undivided property. AMEEROONISSA KHATOON *v.* ABADOONISSA KHATOON . **15 B. L. R., 67: 23 W. R., 208 [L. R., 2 I. A., 87**

16. ——— **Gift of property not in possession.**—*Gift of zemindaris let out on lease, and malikana rights.*—*Musha as applied to gifts of unpartitioned and undivided lands.*—The rule of Mahomedan law that no gift can be valid unless the subject of it is in the possession of the donor at the time when the gift is made, has relation, so far as it relates to land, to cases where the donor professes to give away the *possessory interest* in the land itself, and not merely a reversionary right in it. What is usually called possession in this country is not only *actual or khas possession*, but includes the receipt of the rents and profits. There is nothing in Mahomedan law to make the gift of a zemindari, a part or the whole of which is let out on lease to tenants, invalid. Nor is there any principle by which to distinguish malikana rights from the right to receive rents or dividends upon Government securities, and gifts of such a nature may be legally conferred under the Mahomedan law. The doctrines of Mahomedan law which lay down that a gift of an undivided share in property is invalid because of *musha* or confusion on the part of the donor, and that a gift of property to two donees without first separating or dividing their shares is bad because of *musha* on the part of the donees, apply only to those subjects of gift which are capable of partition. MULLICK ABDOOL GUFFOOR *v.* MULEKA. . . **I. L. R., 10 Calc., 1112**

17. ——— **Interest of donees undefined by gift.**—*Receipt by donees of rent of land given.*—*Possession.*—A gift of land made by a Mahomedan is invalid if the interest of each of the donees is not defined by the gift. *Semble,*—That the continued receipt by the donees of the rents of land, which had been let by them as the managers of the donor, is not a sufficient taking possession to satisfy

MAHOMEDAN LAW—GIFT—*continued.*

3. VALIDITY—*continued.*

**Interest of donees undefined by gift**—*continued.*

the requirements of the Mahomedan law. VALIMIA ALIMIA *v.* GULAM KADAR MOHIDIN [6 Bom., A. C., 25

18. ——— **Gift in lieu of dower.**—*Indefiniteness.*—In a suit upon a hibbanama alleged to have been executed by the husband of the plaintiff, giving her twenty-two shares in a village as a gift in lieu of dower, the Civil Judge dismissed the suit upon the ground that the omission of the amount of the dower rendered the instrument of no validity according to Mahomedan law. *Held* (reversing the decree of the Civil Judge) that the suit was maintainable, the instrument expressing plainly the specific shares of the property, and the gift was made in lieu of the whole dower, and there being no room for doubt as to the meaning and intention of the contracting parties in regard to the particular subjects either of the gift or of the consideration. SAHIBA BEGUM *v.* ATCHAMMA . . . . . 4 Mad., 115

19. ——— **Gift without defining respective shares of donees.**—*Act VI of 1871, s. 24.—Law of justice, equity, and good conscience.*—A deed of gift of his estate, executed by a person of somewhat weak mind, in favour of two of his sons, one an adult and the other a minor, without division or detail of their respective shares, whereby a younger son and several daughters were excluded from inheritance, was set aside by the Court under the general rule of Mahomedan law, that anything which is capable of division, when given to two persons, should be divided by the donor at the time of the gift, or immediately subsequent thereto and prior to the delivery to the donees, and the special rule that a gift of undivided property is absolutely invalid where one of the donees is a minor son; justice, equity, and good conscience not requiring, under the circumstances of the case, that the deed should be maintained. *K.* devised a certain estate to his son *Z.*, but directed that the devise should only take effect on his death in respect of a portion of the property which was rent-free land, and that, with regard to the remainder, his son *A.* should hold possession for the purpose of collecting and paying the Government revenue due on both portions without rendition of accounts, until such time as *Z.* should have a son competent to manage land paying revenue. *Z.* executed a deed of gift of his estate. He never came into possession of the second portion of the property. *Held*, with reference to the question whether the donor had fulfilled the requirements of Mahomedan law by putting the donees into immediate possession, that the deed, having operated in respect of the first portion of the property which *Z.* had become possessed of under the will, operated in respect of the second. NIZAM-UD-DIN *v.* ZABEDA BIBI [6 N. W., 338

20. ——— **Undefined gift.**—*Gift by father to minor son.*—The rule that an undefined gift of joint undivided property, mixed with property capable of division, is invalid by Mahomedan law, does not apply to a gift by a father to a minor son. WAJEED ALI *v.* ABDOOL ALI . W. R., 1864, 121

MAHOMEDAN LAW—GIFT—*continued.*

3. VALIDITY—*continued.*

**Undefined gift**—*continued.*

21. ——— **Gift of defined share in land.**—*Separate property.*—A defined share in a landed estate is a separate property, to the gift of which the objection which attaches under Mahomedan law to the gift of joint and undivided property is inapplicable. JIWAN BAKHSH *v.* IMTIAZ BEGAM . . . . . I. L. R., 2 All., 93

22. ——— **Gift of defined share of property.**—*Possession.—Hanifia Code—Imamia Code.*—A Mahomedan bequeathed his property to his two nephews, Gulam Rasul and Gulam Ali, as joint tenants. Gulam Ali died, leaving a widow and a daughter, who continued to be joint tenants with Gulam Rasul; but the latter continued in exclusive possession of the property, subject to any claim which they might establish to a share in, or a charge upon, it. Gulam Rasul, by a written instrument, made a gift of that property to his younger son, the father of the defendants, disinheriting his elder son, the plaintiff. *Held* that the gift was valid, and that the doctrine of the Hanifia, though not of the Imamia, Code, that the gift of a share in undivided property, which admits of partition, is certainly invalid, or, at least, forbidden, has no application to the gift of property so circumstanced. GULAM JAFAR *v.* MASLUDIN . . . I. L. R., 5 Bom., 238

23. ———. *Reservation of income.—Condition against alienation.—Undivided property.—Indivisible property.*—*B.* owned a one-twelfth share of a muafi estate and a dwelling-house. As owner of the dwelling-house, she owned a share in a staircase, privy, and door, which were held by her jointly with the owners of adjoining dwelling-houses. She made a gift of her property, transferring the dominion over it to the donees, but reserving the income of the share of the muafi estate for life, and stipulating against its alienation. *Held* that the gift of the one-twelfth share of the muafi estate, being a gift of a specific share, was not open to objection under Mahomedan law, and such gift was not vitiated by the mere reservation of the income of the share, or by the condition against alienation. *Held*, also, that the gift was not invalid under Mahomedan law, so far as it related to the staircase, privy, and door, as those things, though undivided property, were incapable of division, and a gift of part of an indivisible thing was valid under that law. KASIM HUSSEIN *v.* SHARIF-UN-NISSA [I. L. R., 5 All., 285

24. ——— **Gift with restriction as to alienation.**—*Absolute gift.*—Plaintiff, during his son's minority, gave certain property to him, and on the delivery of possession got from him a document stipulating (1) that he would not alienate; (2) that at his death the property should return to the father. This document was deposited with the father, and

MAHOMEDAN LAW—GIFT—*continued.*

3. VALIDITY—*continued.*

**Gift with restriction as to alienation—** *continued.*

not heard of until the property was taken in execution for the son's debts, many years after the gift. *Held* that, by Mahomedan law, as well as by the general principles of law, such a restriction on alienation, especially after the gift had become complete long before, is absolutely invalid. AMIRUDDAULA MUHAMAD KAKYA HUSSAIN KHAN *v.* NATERI SRINIVASA CHARLU. JAGHIRDAR OF VIRUTHALABATHI *v.* NATERI SRINIVASA CHARLU . . **6 Mad., 356**

25. ——— **Gift coupled with condition.**—*Absolute gift.*—A testatrix was entitled to Government notes under a gift coupled with the condition that she was to receive only the interest during her life, and that after her death the notes were to be held in trust for all her heirs. *Quære,*—Whether, under the Mahomedan law, the gift made to the testatrix was not a gift to her absolutely, the condition being void. SULEMAN KADR *v.* DORAB ALI KHAN . . . **I. L. R., 8 Calc., 1 [L. R., 8 I. A., 117**

26. ——— **Possession, Necessity of.**—*Donor out of possession.*—To make a deed of gift valid under the provisions of the Mahomedan law, seisin is necessary; if the donor is not in possession at the time, the gift is void. ABEDOONISSA KHATOON *v.* AMEEROONISSA KHATOON . . **9 W. R., 257**

27. ——— *Possession given and accepted.*—Under the law of the Sherra, gifts are not valid until possession is given by the donor and taken by the donee. OBEDUR REZA *v.* MAHOMED MUNEER . . . . . **16 W. R., 88**

28. ——— *Hibba.*—Possession is under the Mahomedan law absolutely necessary to establish the validity of a hibba. SHAHJAN BIBEE *v.* SHIB CHUNDER SHAHA . . **22 W. R., 314**

29. ——— *Contingent or postponed gift.—Possession not immediate.*—Under the Mahomedan law a gift cannot depend upon a contingency or be postponed, but possession must be immediate. ROSHUN JAHAN *v.* ENAET HOSSEIN **[5 W. R., 4**

30. ——— *Donor remaining in possession.*—According to Mahomedan law, a gift is invalid when the donor is to remain in possession during his lifetime. ZOHOOROODEEN SIRDAR *v.* BAHAROOLLAH SIRCAR . . **W. R., 1864, 185**

31. ——— *Donor remaining in possession.—Deed of gift.—Consideration.*—The policy of the Mahomedan law is to prevent a testator interfering by will with the course of the devolution of property according to law among his heirs. But a holder of property may defeat the policy of the law by giving in his lifetime the whole, or any part, of his property to one of his heirs, provided he complies with certain forms. This may be done by a deed of gift without consideration, or by deed of gift

MAHOMEDAN LAW—GIFT—*continued.*

3. VALIDITY—*continued.*

**Possession, Necessity of—***continued.*

for consideration A conveyance by deed of gift without consideration is invalid, unless accompanied by delivery of the thing given, so far as it admits of delivery. In the case of a gift for consideration, the delivery of possession is not necessary for its validity, and no question arises as to the adequacy of the consideration; but there must be an actual payment of the consideration by the donee, and a *bonâ fide* intention on the part of the donor to divest himself *in præsenti* of the property, and to confer it on the donee. It is incumbent on those who set up transactions of this nature to show very clearly that the forms of the Mahomedan law, whereby its policy is defeated, have been strictly complied with. KHAJOOROONISSA *v* ROUSHAN JEHAN **[I. L. R., 2 Calc., 184 : 26 W. R., 36 L. R., 3 I. A., 291**

Affirming the decision of the High Court in ROSHUN JAHAN *v.* ENAET HOSSEIN . **5 W. R., 4**

32. ——— *Gift in futuro.*—Under the Mahomedan law a gift is not valid unless it is accompanied by possession, nor can it be made to take effect at any future definite period. A document containing the words, "I have executed an ikrar to this effect, that, so long as I live, I shall enjoy and possess the properties, and that I shall not sell or make gift to any one; but, after my death, you will be the owner, and also have a right to sell or to make a gift after my death,"—*Held* to be an ordinary gift of property "*in futuro,*" and as such invalid under Mahomedan law. YUSUF ALI *v.* COLLECTOR OF TIPPERAH . . . . **I. L. R., 9 Calc., 138**

33. ——— *Delivery.—Donee in physical possession prior to gift.—Formal delivery, entry, or departure.—Manifest intention of donor to transfer.*—For the purposes of completing a gift of immoveable property by delivery and possession, no formal entry or actual physical departure is necessary; it is sufficient if the donor and donee are present on the premises, and an intention on the part of the donor to transfer has been unequivocally manifested. IBHRAM *v.* SULEMAN . **I. L. R., 9 Bom., 146**

34. ——— *Gift made on death-bed.—Delivery of possession.*—Where property, the subject-matter of a gift made by a Mahomedan during his death illness (*murg-ul-maut*), was in the hands of the donee as manager or agent of the donor, it was held that the possession of the donee as such manager or agent was not such possession as would render it necessary to the validity of the gift that there should have been an actual or formal delivery to him of possession of the property. VALAYET HOSSEIN *v.* MANIRAN . **5 C. L. R., 91**

35. ——— *Change of possession.—Consideration.*—On an issue whether an oral gift of an estate consisting of certain talookas and mouzahs had been made by a Mahomedan proprietor in favour of his wife,—*Held* that the possession of the estate, which was the subject of gift, having been

MAHOMEDAN LAW—GIFT—*continued.*

3. VALIDITY—*continued.*

**Possession, Necessity of—*continued.***

changed in conformity with the gift, that change of possession would have been sufficient to support it, even without consideration. *Held*, on the evidence, that the gift was effectively made. KAMAR-UN-NISSA BIBI *v.* HUSAINI BIBI [I. L. R., 3 All., 266

36. ——————— *Seisin.—Surrender and delivery to donee.*—The plaintiff's deceased sister in her lifetime was the owner of three and a half undivided shares in a village, which she mortgaged in 1846, upon the terms that the mortgagee should be put into possession, and that he should credit the produce of two shares on account of the mortgage-debt, and should pay the mortgagor one share and a half for her maintenance. Subsequently, in 1853, she made an absolute gift in writing of three of the shares to the fourth defendant and his mother. The produce of the shares was applied during the lifetime of the donor after the gift just as it had been before the gift. *Held* that there was no such surrender and delivery of the property to the donee as is requisite to make a valid gift according to Mahomedan law. KHADER HUSSAIN *v.* HUSSAIN BEGUM . . . . . 5 Mad., 114

37. ——————— *Absence of relinquishment by donor or seisin by donee.*—A deed by a Mahomedan, in which he declared, "I have adopted *A. B.* to succeed to my property," was held to be neither a deed of gift nor a testamentary gift to take effect after the death of the donor, there being a complete absence of any relinquishment by the donor or of seisin by the donee. JESWUNT SINGHJEE UBBY SINGJEE *v.* JET SINGHEE UBBY SINGJEE [6 W. R., P. C., 46 3 Moore's I. A., 245

38. ——————— *"Tamlik," or assignment of ownership.*—"Tamlik," or assignment of ownership, is a term of general import applying to the various modes of acquisition of property recognised by Mahomedan law, but forms no separate and distinct mode of acquiring property. When applied to gift it does not avoid the legal requirements of acceptance and seisin. An instrument called a "tamliknama" purported to give *S.*, in consideration of her devotion and affection to the executant, the executant's property; and provided that the executant should during her life enjoy the income from the property; that at her death *S.* should have the proprietary possession and enjoyment of the property, just like the executant; that the executant should effect mutation of names in respect of the property in *S.'s* favour; that the property should not belong to any other person but *S.*; and that any transfer by the executant to any other person should be void. After giving *S.* the power to transfer the property by sale, mortgage, gift, "tamlik," &c., it proceeded in manner following: "But *S.*, or her transferee, shall get possession of the said share only after my death. On my death *S.* and her heirs shall become the owners of this share." The deed could only have validity as a



MAHOMEDAN LAW—GIFT—*continued.*

3. VALIDITY—*continued.*

**Possession, Necessity of—*continued.***

will; as a deed of gift it was wholly invalid. KASUM *v.* SHAISTA BIBI . . . 7 N. W., 313

39. ——————— *Seisin and acceptance of possession.—Residence and receipt of rent by donor.*—A Mahomedan husband executed a "hibba," or deed of gift, without consideration, in favour of his wife, comprising a house in which they were residing at the time, with its furniture, and two other houses. He at the same time delivered the hibba and the keys of the houses to his wife, and quitted the house of residence, leaving her in possession of the same. *Held* that the requirements of the Mahomedan law, with regard to gifts without consideration,—*viz.*, acceptance and seisin on the part of the donee, and relinquishment on the part of the donor,—had been complied with, though the husband shortly afterwards returned to the house, resided there with his wife till his death, and received the rents of other parts of the property comprised in the hibba. The continued occupation or residence and receipt of rents were in such circumstances to be referred to the character which the donor bears of husband, and to the rights and duties connected with that character. AMINA BIBI *v.* KHATIJA BIBI [1 Bom., 2nd Ed., 157

40. ——————— *Gift by husband to wife.—Delivery of possession.—Gift, Validity of, as against creditor, or subsequent bonâ fide purchasers.*—Plaintiff, the nicka wife of the late Nawab of the Carnatic, sued for a declaration of her absolute title to certain premises (Nos. 1, 2, 3, and 4), for possession of certain other premises (Nos. 5 and 6), for delivery to her by defendant of the title-deeds of all the premises except No. 1, and for cancellation and delivery up of a sheriff's bill of sale of No. 1 in favour of *T. A.*, of a mortgage of Nos. 2, 5, and 6 to *R. & Co.*, of a mortgage of No. 4 to *A. A.*, and of all assignments by *T. A. R. & Co.*, or *A. A.*, to defendant. She claimed this relief under an alleged gift to her by the late Nawab on or about the 6th January 1851. Defendant said (and it was so found) as to 2, 5, and 6, that he had never had anything to do with the said premises or with the title deeds thereof. As to the other premises, that the several assignments in his possession were made to him as receiver of the Carnatic property, under Act XXX of 1858, but that he had not obtained possession of the said premises nor of any of the title-deeds thereof, except the sheriff's bill of sale of the 29th November 1855. Issues were settled raising the following questions: Whether the gift was made as alleged? Whether, if so, it was valid against creditors of, or subsequent purchasers for valuable consideration from, the donor? Whether the gift was revocable, and revoked? Whether defendant has, or ever had, possession of all or any of the title-deeds of Nos. 2, 5, and 6? *Held* that a complete gift had been made and not revoked: that it was valid against the creditors of the donor, and also (as the donor and donee were both Mahomedans) against subsequent purchasers for valuable consideration from the donor: but that defendant had never had possession of the title-deeds of Nos. 2,

MAHOMEDAN LAW—GIFT—*continued.*

3. VALIDITY—*continued.*

**Possession, Necessity of**—*continued.*

5, and 6, so that the suit could not be maintained as regards them. Under Mahomedan law, "in the instance of a wife who may give a house to her husband the gift will be good, although she continue to occupy it along with her husband and keep all her property therein, because the wife and her property are both in the legal possession of the husband. So also it has been held by some that if a father transfer his house to his minor son, himself continuing to occupy it and to keep his property therein, the gift is valid, on the principle that the father in retaining possession is acting as agent for his son, according to which doctrine his possession is equivalent to that of his son." Reason requires that the same principle should be applied to the case of a gift by husband to wife. The wife may, according to Mahomedan law, hold property independent of her husband, and as a husband may make a valid gift to his wife, it can only be necessary that the gift should be accompanied with such a change of possession as the subject is capable of, and as is consistent with the continuance of the relation of husband and wife. AZIMUNNISSA BEGUM *v.* DALE [6 Mad., 455

41. ——— *Gift by father to infant child.*—*Held* that it is not necessary by the Mahomedan law that possession should follow to complete a gift by a father to his infant child. GYASOODDEEN HYDER *v.* FATIMA BEGUM . 1 Agra, 238

42. ——— *Gift by father to minor son.*—According to Mahomedan law, no formal delivery and seisin are necessary to the validity of a gift of property by a father to a minor son. Where a son has divested himself in favour of his father of all interest in property which had been given to him by his parents, before any legal effect can be given to such a transfer, the clearest proof is necessary of good faith and joint dealing between the parties, and also that the father's influence was not unduly exercised for his own advantage. WAJEED ALI *v.* ABDOOL ALI . . . W. R., 1864, 127

43. ——— *Absence of change of possession.*—*Gift by father to son.*—Gift by father to son held not valid as being followed by no real change in the nature of the enjoyment of the property, and merely nominal. MUNNOO BIBEE *v.* JEHANDAR KHAN . . . 1 Agra, 250

44. ——— **Death-bed gift.**—*Donatio mortis causâ.*—*Deed of gift.*—According to the Mahomedan law, in order to make a gift operate as a *donatio mortis causâ*, the delivery must be upon the condition that it should become effectual as a gift on the death of the donor. Where, therefore, it was found that a deed of gift was executed in the last illness of the donor, and was in the possession of the donee after her death,—*Held* that this was not enough to make it operate as a *donatio mortis causâ*, but that it was necessary to find the further fact whether the deed was delivered by the donor before her death, and whether such delivery was in contemplation of death, and with the intention that it should become effectual on the death of the donor. NUSSEBUN BIBEE *v.* ASHRUFF ALLY . Marsh., 315 : 2 Hay, 163

45. ——— *Legacy*—According to Mahomedan law a gift on a death-bed is viewed in the light of a legacy. ASHADOOLLAH *v.* SHAEBA JHASORS . . . . 2 Hay, 345

46. ——— **Gift in contemplation of death.**— *Will.*—According to the Mahomedan law, a gift made in contemplation of death, though not operative as a gift, operates as a legacy. Ordinarily it conveys to the legatee property not exceeding one third of the deceased's whole property, the remaining two thirds going to the heirs. In the absence of heirs, a will carries the whole property. EKIN BEBEE *v.* ASHRUF ALI . . . . 1 W. R., 152

47. ——— *Will.*—*Person labouring under sickness of which he dies.*—According to Mahomedan law, if a person executes a gift while labouring under a sickness from which he never recovers, and which ultimately proves fatal to him, effect can be given to the instrument only to the extent of one third. KUREEMUN *v.* MULLICK ENAET HOSSEIN . . . . . W. R., 1864, 221

48. ——— *Will.*—*Consent of heirs.*—A deed of gift, such as a tuluknamah, executed at a time when the grantor was labouring under a sickness from which she never recovered, cannot operate save as a will. If such a death-bed gift or will is made in favour of one who is an heir, the will or gift, so far as it relates to that heir, will be inoperative without the consent of the other heirs. ASHRUFFUNNISSA *v.* AZEEMUN. BARODA KOOERY *v.* ASHRUFFUNNISSA . . . 1 W. R., 17

49. ——— *Lease granted during illness.*—A mokurrari lease extended where the grantor was dangerously ill and in contemplation of death, was held to be a death-bed gift, and his natural heirs declared incapable of taking anything under it except their shares of the defendant's property according to Mahomedan law. ENAET HOSSEIN *v.* KUREEMOONISSA . . . 3 W. R., 40

50. ——— *Gift by person labouring under disease.*—Under the Mahomedan law the term "murg-ul-maut" is applicable not only to diseases which actually cause death, but to diseases from which it is probable that death will ensue, so as to engender in the person afflicted with the disease an apprehension of death. Under the same law a person labouring under such a disease cannot make a valid gift of the whole of his property until a year has elapsed from the time he was first attacked by it. When a gift is made by a person labouring under such a disease, it is good to the extent of one third of the subject of the gift, if the donee has been put into possession by the donor. LABBI BEEBEE *v.* BIBBUN BEEBEE . . 6 N. W., 159

MAHOMEDAN LAW—GIFT—*continued.*

3. VALIDITY—*continued.*

Gift in contemplation of death—*continued.*

51. ——————— *Absence of immediate apprehension of death.—"Murg-ul-maut."*—According to Mahomedan law a gift by a sick person is not invalid if at the time of such gift his sickness is of long continuance, *i.e.*, has lasted for a year, and he is in full possession of his senses, and there is no immediate apprehension of his death. *Labbi Bibi* v. *Bibbun Bibi, 6 N. W., 159,* followed. *Held,* therefore, where at the time of a gift the donor had suffered from a certain sickness for more than a year and was in full possession of his senses, and there was no immediate apprehension of his death, and he died shortly after making the gift, but whether from such sickness or from some other cause it was not possible to say, that under these circumstances the gift was not invalid according to Mahomedan law. MAHOMED GULSHEER KHAN *v.* MARIAM BEGUM [I. L. R., 3 All., 731

52. ——————— *Absence of immediate apprehension of death.—Semble,*—A gift by a sick person is not invalid if at the time he made it he was in full possession of his senses, and there was no immediate apprehension of death. IBHRAM *v.* SULEMAN . I. L. R., 9 Bom., 146

53. ——————— *Gift in lieu of debt for dower.—Sale.—Dower.—Held* that the provisions of the Mahomedan law applicable to gifts made by persons labouring under a fatal disease do not apply to a so-called gift made in lieu of a dower-debt, which is really of the nature of a sale. GHULAM MUSTAFA *v.* HURMAT . I. L. R., 2 All., 854

4. REVOCATION.

54. ——— Power of revocation.—*Irrevocable gift.—Delivery of possession.*—In a suit for arrears of rent due on defendant's putnee talook, though the rate was admitted, it was pleaded that, in consequence of a dacoity having taken place in the defendant's house, she had been allowed by the plaintiff (her brother-in-law) a remission of rent annually for a certain number of years, and defendant professed her readiness to pay if the remission were allowed. Plaintiff's agreement set forth that, in consequence of defendant's house having been plundered, she was entitled to assistance to enable her to replace what she had lost, and that the rajah (zemindar) not being able to make good the amount at once took this method of assisting his connexion. *Held* that the gift (or remission of rent for the years in suit) was complete at the termination of each year; in other words, delivery had been made to the donee, and it could not be recalled under the Mahomedan law, which is precise as to the impossibility of revoking a gift after delivery without the decree of a Judge or the consent of the donee. ENAET HOSSEIN *v.* KHOOBUNNISSA . . 11 W. R., 320

55. ——— Power of revoking gift.—*Revocable gifts.*—Certain lands, choultries, and moveable property had been, by instrument in writing, given to the brother of the donor and his heirs for the purpose, in perpetuity, of keeping in repair the choultries and affording strangers the charities of shelter, and, if circumstances permitted, food also, as well as for supplying the wants of the donees, with clauses restraining alienation by them. *Held* that the instrument effected a transfer of the property to the donees subject to the trust of applying the profits of the lands, &c., in perpetuity to certain charitable purposes, and was not revocable, whether the transaction be viewed as a pure trust or as a gift. The power of revoking gifts is given under the Mahomedan law only in the case of private gifts for the donee's own use, no relationship existing between the donor and the donee. GULAM HUSSAIN SAIB *v.* AGI AJAM TADALLAH SAIB. AGI AJAM TADALLAH SAIB *v.* GULAM HUSSAIN SAIB . . 4 Mad., 44

56. ——— Power of revocation.—*Alienation by donee.—Gift by father to son.*—By Mahomedan law there can be no revocation of a gift by a father to a son when the donee has alienated the thing given. WAJEED ALI *v.* ABDOOL ALI [W. R., 1864, 121

57. ——————— *Deed of gift made in contemplation of marriage.*—A hiba-bil-iwaz, or deed of gift made in contemplation of marriage, is not a revocable instrument. KULSOON *v.* AMEERUNNESSA . . . . 1 Hyde, 150

MAHOMEDAN LAW—GUARDIAN.

*See* MAHOMEDAN LAW—MARRIAGE. [1 Bom., 236

1. ——— Right of guardianship.—*Mother.—Father.—Infant under seven years.*—According to Mahomedan law, the mother is entitled, in preference to the father, to the custody of an infant under seven years of age. FUTTEH ALI SHAH *v.* MAHOMED MUKEEM OODEEN. FUTTEH ALI SHAH *v.* FUZEELUTTUNNISSA BEBEE . W. R., 1864, 131

RAJ BEGUM *v.* REZA HOSSEIN . 2 W. R., 76

2. ——————— *Mother.—Custody of child.—Male child.—Female child.*—According to Mahomedan law, a mother is entitled to the custody of her child, if such child be a male, till it shall have attained the age of seven years; if such child be a female, till it shall have reached the age of puberty. IN THE MATTER OF TAYHEB ALLY . 2 Hyde, 63

3. ——————— *Hizanut.—The custody of female minors before puberty.—Mother's right.*—By the Mahomedan law the mother is entitled to the custody of a female minor who has not attained her puberty, in preference to the husband. NUR KADIR *v.* ZULEIKHA BIBI [I. L. R., 11 Calc., 649

4. ——————— *Minors, Custody of.—Mother.*—According to the Shiah school of the Mahomedan law, a mother is entitled to the custody

**MAHOMEDAN LAW—GUARDIAN.—Right of guardianship—*continued.***

of her female children unless she has been guilty of unchastity. IN THE MATTER OF HOSSEINI BEGUM [I. L. R., 7 Calc., 434

5. ——— *Mother.—Paternal uncle.—Minors, Custody of.*—According to Mahomedan law, a mother has a preferential right over the paternal uncle to the guardianship of minors and to the custody of their persons. ALIMODEED MOALLEM *v.* SYFOORA BIBEE . . 6 W. R., Mis., 125

6. ——— *Mother, Re-marriage of.*—Under the Mahomedan law the mother is of all persons best entitled to the custody of infant children up to the age of puberty; but her right is made void by marriage with a stranger. BEEDHUN BIBEE *v.* FUZULOOLLAH . . 20 W. R., 411

7. ——— *Custody of minor son.—Mother, Right of.*—According to the Mahomedan law, a mother has the right of custody of the person of her minor son up to seven years of age. *Quære,*—Where she does not maintain him, has she, as against a relation on the father's side, the right of custody and control after that age? IN THE MATTER OF AMEEROONISSA . . 11 W. R., 297

8. ——— *Girl not having attained puberty.—Grandmother.—Maternal grandmother as guardian.—Act IX of 1861, s. 3*—Under the Mahomedan law the grandmother is entitled to the guardianship of a minor female child in preference to the child's paternal uncle, where such child, although married to a minor, has not attained puberty. BHOOCHA *v.* ELAHI BUX [I. L. R., 11 Calc., 574

9. ——— *Custody of children.—Act IX of 1861, s. 5.—Appeal.*—The Mahomedan law takes a more liberal view of the mother's rights with regard to the custody of her children than does the English law, under which the father's title to the custody of his children subsists from the moment of their birth, while under the Mahomedan law a mother's title to such custody remains till the children attain the age of seven years. An application was made by a Mahomedan father under section 1 of Act IX of 1861 that his two minor children, aged respectively twelve and nine years, should be taken out of the custody of their mother and handed over to his own custody. The application having been rejected by the District Judge, an appeal was preferred to the High Court as an appeal from an order. It was objected to the hearing of the appeal that, in view of section 5 of Act IX of 1881, the appeal should have been as from a decree, and should have been made under the rules applicable to a regular appeal. *Held* that, looking to the peculiar nature of the proceedings, the objection was a highly technical one, and as all the evidence in the case was upon the record and was all taken down in English, it would only be delaying the hearing of the appeal upon very inadequate grounds if the objection were allowed. *Held* also that, according to the principles of the Mahomedan law, the appellant was by law entitled to have the children in his

**MAHOMEDAN LAW—GUARDIAN.—Right of guardianship—*continued.***

custody, subject always to the principle, which must govern a case of this kind, that there was no reason to apprehend that by being in such custody they would run the risk of bodily injury, and that (without saying that this exhausted the considerations that might arise, warranting the Court in refusing an application for the custody of minors) there was nothing in the record in this case which disclosed any proper ground to justify the refusal of the application. IDU *v.* AMIRAN . I. L. R., 8 All., 322

10. ——— *Minor.—Guardian of property.—Certificate of guardianship.*—Under the Mahomedan law the brother of the mother of a female minor, whose parents are dead, is entitled, in preference to a mere stranger, to the guardianship of the property of the minor, unless it be shown that he is in some way unfit to take charge of such property. IN THE MATTER OF THE PETITION OF IMAM BUKSH. IMAM BUKSH *v.* THACKO BIBEE [I. L. R., 9 Calc., 599

11. ——— *Sister.—Minor, Custody of.—Prostitute.—Held,* where the plaintiff sued for the custody of her minor sister, as her legal guardian under Mahomedan law, that the fact of the plaintiff being a prostitute was, although she was legally entitled to the custody of such minor, a sufficient reason for dismissing the suit in the interests of such minor. ABASI *v.* DUNNE [I. L. R., 1 All., 598

12. ——— *Uncle.—Nephew.—Next friend.*—The rule of Mahomedan law that an uncle can not be the guardian of a minor nephew's property does not prevent an uncle representing his infant nephew under the Code of Civil Procedure as next friend in a suit. ABDUL BARI *v.* RASH BEHARI PAL . . . . . 6 C. L. R., 413

13. ——— *Suit for restitution of minor wife in custody of her mother.*—The plaintiff sued to recover *M.,* who was ten years of age, alleging that he had been married to her, that she had remained at his house, and that her mother and other persons had taken her away, and would not allow her to return. The lower Appellate Court dismissed the suit on the ground that *M.* was a minor, and also on the ground that she was only ten years of age. *Held* that the plaintiff's suit was properly dismissed. WAZEER ALI *v.* KAIM ALI [5 N. W., 196

14. ——— *Sale by guardian of property of minor.—Purchase, Right of.*—Under the Mahomedan law a sale by a guardian of property belonging to a minor is not permitted otherwise than in case of urgent necessity or clear advantage to the infant. A purchaser from such guardian cannot defend his title on the ground of the *bona fides* of the transaction. An elder brother is not in the position of a guardian having any power as such over the property of his minor sisters. BUKSHAN *v.* MALDAI KOOERI . . 3 B. L. R., A. C., 423

S. C. BUKSHUN *v* DOOLBUN . 12 W. R., 337

MAHOMEDAN LAW—GUARDIAN.—Right of guardianship—*continued.*

15. ——————— *Brothers.*—Under the Mahomedan law remote guardians, among whom are brothers, can under no circumstances aliene the property of a minor; their guardianship only extends to matters connected with the education of their wards, and the near guardians alone have limited power over the immoveable property. RUTTON *v.* DOOMEE KHAN . . . . . 3 Agra, 21

16. ——————— *Legal necessity.—Sale.*—The question of legal necessity does not necessarily arise in cases of sale under the Mahomedan law, though it may properly be an element for consideration when the conduct of a guardian is called in question. The Mahomedan law looks to the benefit of the minor, and permits the guardian to dispose of moveable property if it be for the benefit of the minor. In this case a sale made to carry on important litigation was held *bonâ fide* and for the benefit of the minor, the decision in *Grose's case, 4 B. L. R., O. C., 1 (12 W. R., O. C., 13)*, not being applicable. SYEDUN *v.* VELAYET ALI KHAN . 17 W. R., 239

17. ——————— *Sale of minor's property.—Validity of such sale.—Sanction of sale by ruling authority.*—The plaintiff sued to recover her husband's share in certain property at S., to which he and other persons became entitled as heirs of *M.* That property had been sold to the defendants by the heirs of *M.* during the minority of the plaintiff's husband, his elder brother acting for him in the transaction. It was proved that the sale of the property to the defendants had been approved of by *H.*, who was the agent of the Governor of Bombay at S., and the representative of the ruling authority in the management of *M.'s* estate. The plaintiff contended that, according to Mahomedan law, it was not competent for the elder brother of a minor, as guardian, to alienate a minor's property. *Held* that the sanction of the ruling power constituted a sufficient authority for the act of the guardian, provided that the transaction was one which, according to Mahomedan law, a duly constituted guardian might have entered into on behalf of his ward. That law permits a guardian to sell the immoveable property of his ward, when the late incumbent died in debt, or when the sale of such property is necessary for the maintenance of the minor. The evidence in the present case showed that the indebtedness of *M.* and the distressed condition of his heirs existed in a sufficient degree to justify the sale of the whole property of the heirs. HUSAIN BEGAM *v.* ZIA-UL-NISA BEGAM. . . . . I. L. R., 6 Bom., 467

18. ——————— *Minor.—Infant.—Guardian of property.—Mortgage.—Co-heirs.—Infants' liability.*—In May 1881, certain co-heirs of a deceased Mahomedan mortgaged a portion of the property which had descended to them in common with others, then infants, as heirs of the deceased. The mortgage was raised for the purpose of paying off arrears of rent of a putni talook which was a part of the property inherited from the deceased. There was no evidence to show that there were any other necessary expenses connected with the deceased's estate which had to be met, nor what that estate consisted of, nor whether the arrears of rent could or could not have been paid without having recourse to the mortgage. According to the Mahomedan law the mortgagors were not the guardians of the property of the infants. *Held* that the shares taken by the infants as heirs of the deceased were not bound by the mortgage. BHUTNATH DEY *v.* AHMED HOSAIN . . I. L. R., 11 Calc., 417

19. ——————— *Alienation by guardian to pay ancestral debts.—Minor, Sale binding on.—H.*, being in possession of certain real property on her account, and on account of her nephew and niece, minors, of whose persons and property she had assumed charge in the capacity of guardian, sold the property, in good faith and for valuable consideration, in order to liquidate ancestral debts and for other necessary purposes and wants of herself and the minors. *Held* that under Mahomedan law, and according to justice, equity, and good conscience, the sale was binding on the minors. HASAN ALI *v.* MEHDI HUSAIN . . I. L. R., 1 All., 533

20. ——————— *Alienation by widow.—Rights of other heirs.—Minor.—Mother.—Mortgage.—First and second mortgagees.—Suit by first mortgagee for sale of mortgaged property.—Second mortgagee not made a party.—Transfer of property.—Act IV of 1882, ss. 78, 85.—Res judicata.*—Upon the death of *G.*, a Mahomedan, his estate was divisible into eight shares, two of which devolved upon his son, *A.*, one upon each of his five daughters, and one upon his widow, *B.* The name of *B.* only was recorded in the revenue registers in respect of the zamindari property left by *G.* In 1876 *A.* and *B.* gave to *X.* a deed of simple mortgage of 2½ biswas out of a 5 biswas share of a village included in the said property. In 1878 *A.* and *B.* gave to *S.* a deed of simple mortgage of the 5 biswas, which were described in the deed as the widow's "own" property. In 1882 *X.* obtained a decree upon his mortgage for the sale of the mortgaged property, and it was put up for sale and purchased by *X.* himself in January 1884. In February and November 1884 the daughters of *G.* obtained *ex parte* decrees against *A.* and *B.* in suits brought by them to recover their shares by inheritance in the 5 biswas. In 1885 *S.* brought a suit upon his mortgage of 1878, claiming the amount due thereon and the sale of the whole 5 biswas. To this suit he made defendants *A.* and *B.*, *G.'s* daughters, and *X.*, alleging that the decrees of February and November 1884 were fraudulently and collusively obtained; and as to the auction sale of January 1884, that the 2½ biswas were sold subject to his mortgage, he not having been made a party to the suit brought by *X.* upon the deed of 1876, and therefore not being bound by any of the proceedings taken therein or consequent thereto. It was contended that *B.'s* position as head of the family entitled her to deal with the property so as to bind all the members of the family, though using her name only; and it was suggested that, at the time of the mortgage of 1878, some of the daughters

**MAHOMEDAN LAW—GUARDIAN.—Right of guardianship—*continued.***

were minors. On behalf of the daughters it was contended (*inter alia*) that the decrees obtained by them against *A* and *B*. in February 1884 were conclusive, by way of *res judicata*, against the plaintiff, who, as mortgagee from *A*. and *B*., claimed under a title derived from them. *Held, per* MAHMOOD, *J*.—According to the Mahomedan law, the surviving widow, though held in respect by the members of the family, would not be entitled to deal with the property so as to bind them, and the entry of her name in the revenue registers in the place of her deceased husband would probably be a mere mark of respect and sympathy. Her position in respect of her husband's estate is ordinarily nothing more or less than that of any other heir, and even where her children are minors, she cannot exercise any power of disposition with reference to their property, because although she may, under certain limitations, act as guardian of their persons till they reach the age of discretion, she cannot exercise control or act as their guardian in respect of their property without special appointment by the ruling authority, in default of other relations who are entitled to such guardianship. Even, therefore, if some of the daughters in the present case were minors at the time of the plaintiff's mortgage, their shares could not be affected thereby. They could only be so affected if circumstances existed which would furnish grounds for applying against them the rule of estoppel contained in section 115 of the Evidence Act, or the doctrine of equity formulated in section 41 of the Transfer of Property Act, but here no such circumstances existed. SITARAM *v.* AMIR BEGUM [I. L. R., 8 All., 324

**MAHOMEDAN LAW—INHERITANCE.**

*See* MAHOMEDAN LAW—PRESUMPTION OF DEATH . . I. L. R., 2 All., 625

*See* SLAVERY . I. L. R., 3 Bom., 422 [12 Bom., 156

**1. ——— Enumeration of heirs by Mahomedan law.**—*Return.*—Three different kinds of heirs are recognised by Mahomedan law,—(1) sharers, (2) residuaries, and (3) distant kindred. Where there are no residuaries the principle of return provides that the surplus of the shares of the sharers shall revert to them in proportion to their shares, except in the cases of husband and wife. Next are the "distant kindred." GUJADHUR PERSHAD *v.* ABDOOLLAH [11 W. R., 220

**2. ——— Kindred related in equal degrees.**—*Males.*—Where surviving kindred are related in like degree to a deceased party, the males are entitled under Mahomedan law to a double share of the inheritance. RAM BEHAREE SINGH *v.* SITARA KHATOON . . . . . 10 W. R., 315

**3. ——— Heirs of missing person.**—*Division of estate to be held by heirs on trust.*—The plaintiff sued to be put in possession of a share of the estate of a missing person, alleging that by Mahomedan law and custom they were entitled to hold in

**MAHOMEDAN LAW—INHERITANCE.—Heirs of missing person—*continued.***

trust for him a share equal to that which would devolve on them after his death by right of inheritance. *Held* that under the Mahomedan law the heirs of a missing person are not, as such, entitled to divide his estate among themselves, either as a trust or otherwise, before his death, natural or legal. KALEE KHAN *v.* JADEE . . . . . 5 N. W., 62

**4. ——— Heirs of husband on death of wife, whose heir he was.**—Whatever may be the position and rights of a husband, being the only surviving heir of his wife, according to the Mahomedan law, there is no representation in matters of succession, and therefore those rights do not descend to the heirs of a husband who has predeceased the wife, and who are themselves no relation of the wife. In fact, under the Mahomedan system, after the dissolution of a marriage contract by death or otherwise, the parties or their heirs bear no more relation to one another than the heirs of *quondam* partners in the same mercantile house. EKIN BEBEE *v.* ASHRUF ALI [1 W. R., 152

**5. ——— Heirs of girl not validly married.**—*Paternal grandmother.—Mother.—Half brothers or sisters.*—A marriage performed between minors in the fazolee (nominal) form, the girl's father being dead and the marriage being contracted by her paternal grandmother, was held to be invalid on the death of the girl without afterwards meeting or communicating with her husband, because after arriving at puberty she had never expressed in any way assent to or dissent from the marriage. *Held* that under such circumstances the paternal grandmother of the girl was not entitled to inherit her estate; that the mother as her surviving parent was entitled to a third share thereof; and that her half brothers and sisters were entitled (without prejudice to any claims by third parties) to the residue. MULKA JEHAN SAHIBA *v.* MAHOMED USHKURREE KHAN [ L. R., I. A., Sup. Vol., 192 : 26 W. R., 26

**6. ——— Estate limited to take effect in favour of a person after another's death.**—It is not consistent with Mahomedan law to limit an estate to take effect after the determination, on the death of the owner, of a prior estate by way of what is known to English law as a vested remainder, so as to create an interest which can pass to a third person before the determination of the prior estate. ABDUL WAHID KHAN *v.* NURAN BIBEE [I. L. R., 11 Calc., 597 : L. R., 12 I. A., 91

**7. ——— Primogeniture, Custom of.**—*Exclusion of females from inheritance.*—Observations on the law laid down by the Privy Council regarding the custom of primogeniture and the exclusion of females and other heirs from inheritance. MUHAMMAD ISMAIL KHAN *v.* FIDAYAT-UN-NISSA [I. L. R., 3 All., 723

**8. ——— *Proof of custom.***—Where a suit was brought by two younger brothers, in accordance with Mahomedan law, for their shares in a property which was held by an elder brother

**MAHOMEDAN LAW—INHERITANCE.**
**—Primogeniture, Custom of—*continued.***

and which had been held by a succession of elder brothers for a long course of years, two of the members having in former trials had their rights to exclusive inheritance upheld by formal decisions,—*Held* by the High Court that, in the absence of any sunnuds declaring the contrary, the practice of succession by primogeniture must be accepted as prevailing on the estate. MAHOMED AKUL BEG *v.* MAHOMED KOYUM BEG . . . . . **25 W. R., 199**

9. ——— **Adopted son.**—An adopted son cannot inherit among Mahomedans. OHEED KHAN *v.* COLLECTOR OF SHAHABAD . **9 W. R., 502**

10. ——— **Daughters of deceased brother.**—*Brother.—Sister.*—Under Mahomedan law, the daughters of a deceased brother of a person who demises cannot take any share of such person's property so long as a brother and sister, or only a brother, survives. AZEEGUNNISSA *v.* RUHMANOOLLAH . . . . . **10 W. R., 306**

11. ——— **Daughter.**—*Hindu embracing Mahomedan religion.—Held* that a Hindu family having embraced the Mahomedan religion is bound by the laws of that religion as regards succession, and that the appellant, the daughter, was entitled under that law to inherit from her father. SOJAN *v.* ROOP RAM . . . . . **2 Agra, 61**

12. ——— **Illegitimate sons.**—*Succession to father's property.*—According to Mahomedan law, illegitimate sons can claim no relationship with their father's family. BOODHUN *v.* JAN KHAN **[13 W. R., 265**

13. ——— *Brothers.—Consanguinity.—Nasab.*—The children of fornication or adultery (wahid-uz-zina) have no nasab or consanguinity; hence, the right of inheritance being founded on nasab, one illegitimate brother cannot succeed to the estate of another. SHAHEBZADI BEGUM *v.* HIMMUT BAHADUR **[B. L. R., 4 A. C., 103 : 12 W. R., 512**

S. C. affirmed on review. HIMMUT BAHADUR *v.* SHAHEBZADI BEGUM . . **14 W. R., 125**

14. ——— **Illegitimate children.**—*Succession to property of illegitimate child.—Convert to Christianity.*—The State (and not the mother of an illegitimate Christian child) is entitled to succeed to the property of that child dying intestate after he has attained to man's estate, and having neither wife nor legitimate child. The Mahomedan law is not applicable to the illegitimate child of a Mahomedan woman brought up and dying a Christian. NANCY *alias* ZUHOORUN *v.* BURGESS . . **1 W. R., 272**

15. ——— **Residuaries.**—*Descendants in main line of paternal great-grandfather.*—By Mahomedan law, descendants in the male line of the paternal great-grandfather of an intestate are within the class of "residuary" heirs, and entitled to take, to the exclusion of the children of the intestate's sisters of the whole blood. MOHIDIN AHMID KHAN *v.* MUHAMMAD . . . . . **1 Mad., 92**

**MAHOMEDAN LAW—INHERITANCE.**
**—Residuaries—*continued.***

S. C. MOHEDEEN AHMED KHAN *v.* MAHOMED **[1 Ind. Jur., O. S., 132**

16. ——— *Descendants of paternal grandfather's brother.*—According to the Mahomedan law, descendants of a paternal grandfather's brother are entitled to rank among residuaries, and as such are preferable heirs to granddaughters. SHOWKUT ALI *v.* AHMUD ALI. MEHER ALI *v.* SHOWKUT ALI . . . **8 W. R., 39**

17. ——— *Step-sister.*—A step-sister of a deceased proprietor is, according to Mahomedan law, one of his heirs, and in the category of his residuaries. AMEERUN *v.* RUHEEMUN **[2 Agra, Pt. II, 162**

18. ——— *Renunciation of right to inherit.—Presumption of relinquishment from acts of parties.—Widow.*—In a suit in the nature of ejectment, by principal respondent as residuary heir according to the Mahomedan law of a deceased person, to recover from his widow, the appellant, three fourths of her deceased husband's estate, of the whole of which she had for upwards of eleven years been in possession, the plaintiff's title as residuary heir was put in issue, as well as other issues touching the widow's dower, &c. The Privy Council, thinking it of the utmost importance that those who had thus sanctioned a long possession should not be allowed lightly to disturb it, or to escape from those legitimate inferences and presumptions which on a conflict of evidence arose from their own acts and conduct, decided in favour of the widow, holding that the respondent had failed to establish the title upon which he sued. According to the Mahomedan law there may be a renunciation of the right to inherit, and such a renunciation need not be expressed, but may be implied from the ceasing or desisting from prosecuting a claim maintainable against another. As a general rule a widow takes no share in "the return," *i.e.*, on failure of residuaries; but some authorities seem to hold that if there are no heirs by blood alive, the widow would take the whole estate to the exclusion of the fisc. HURMUT-OOL-NISSA BEGUM *v.* ALLAHDIA KHAN. . . . **17 W. R., P. C., 108**

19 ——— *Collateral line.*—Under the Mahomedan law the succession of residuaries in their own right is as unlimited in the collateral as in the direct line, where it is expressly said to be how low and how high soever. MAHOMED HANEEF *v.* MAHOMED MASOOM . **21 W. R., 371**

20. ——— *Suit by legal sharer.—Simultaneous suit by residuaries.*—A suit by a Mahomedan widow (legal sharer) against her sons (residuaries) for her share of the property left by her deceased husband, is no bar to a suit being brought by some of the sons against the others for their shares. IMAM SAHEB *v.* KASIM SAHEB **[11 Bom., 104**

21. ——— **Widow's rights to return.**—*Absence of distant kindred.*—By the Mahomedan law of inheritance, in default of other sharers and in

**MAHOMEDAN LAW—INHERITANCE. —Widow's rights to return—*continued.***

the absence of distant kindred, the widow is entitled to the "return," to the exclusion of the fisc. MAHOMED ARSHAD CHOWDHRY *v.* SAJIDA BANOO [I. L. R., 3 Calc., 702 : 2 C. L. R., 46

22. ——— **Distant kindred.**—"*Return.*" —*Widow of the deceased.*—*Heirs.*—Under the Mahomedan law a widow has no claim to share in the "return" or residue of her deceased husband's estate as against other heirs. KOONARI BIBI *v.* DALIM BIBI [I. L. R., 11 Calc., 14

23. ——— **Sister.**—Under the Mahomedan law, a sister is entitled to obtain a share of the estate left by her deceased brother. BOOLINISHAREE BIBEE *v.* BUKAOOLLAH . . . . 17 W. R., 140

24. ——— **Sister's son.**—*Widow.*—According to Mahomedan law, when a man dies leaving no children, a sister's son can claim his inheritance after the widow has obtained her one-fourth share. MAHOMED NOOR BUKSH *v.* MAHOMED HAMEEDOOL HUQ . . . . . 5 W. R., 23

25. ——— **Childless widow.**—*Shiah law.* —According to the law of the Shiah sect, a childless widow is not entitled to share in the immoveable property left by her husband, but only in the value of the materials of the houses and buildings upon the land. TOONANJAN *v.* MEHNDEE BEGUM [3 Agra, 13

26. ——— *Immoveable property.*—Under the Mahomedan law which governs members of the Shiah sect, a widow having no child alive by her deceased husband inherits nothing of the land which he leaves. ASLOO *v.* UMDUTOONISSA. UMDUTOONISSA *v.* ASLOO . . 20 W. R., 297

27. ——— **Widow and daughters.**—According to Mahomedan law, a widow and two daughters are entitled between them to nineteen twenty-fourths of the property of their deceased husband and father in the proportion of one eighth and two thirds. MAHOMED RUHWAN KHAN *v.* KHAJAH BUKSH . . . . . 5 W. R., 221

28. ——— **Khoja Mahomedans, Custom of.**—*Succession to property of widow dying intestate.*—By the custom of the Khoja Mahomedans, when a widow dies intestate and without issue, property acquired by her from her deceased husband does not descend to her own blood-relations, but to the relations of her deceased husband. If no blood-relations of the deceased husband are forthcoming, the property left by the widow belongs to the Jamat. *Quære,*—As to the degree of ownership which will entitle members of the deceased husband's family to succeed. IN THE GOODS OF MULBAI. KARIM KHATAV *v.* PARDHAN MANJI [2 Bom., 292 : 2nd Ed., 276

29. ——— **Exclusion from inheritance.**—*Insanity.*—Mental derangement is no impediment to succession under the Mahomedan law. MAHAR ALI *v.* AMANI . 2 B. L. R., A. C., 306

S. C. KHYRATUN *v.* AMANEE . 11 W. R., 212

**MAHOMEDAN LAW—INHERITANCE. —Exclusion from inheritance—*continued.***

30. ——— *Daughter.*—*Semble,* —According to the Mahomedan law, want of chastity in a daughter, before or after the death of her father, whether before or after her marriage, is no impediment to her inheritance. NORONARAIN ROY *v.* NEEMAEECHAND NEOGY . . . 6 W. R., 303

**MAHOMEDAN LAW—JOINT FAMILY.**

1. ——— **Inference of joint possession.** —Where a Mahomedan lady with her daughters was found to be living with her brother, and to be supported by him from the proceeds of the patrimonial estate, it was held to be a proper and correct inference that the lady and her daughters were in possession along with the brother, who was the manager of the property. ACHINA BIBEE *v.* AJEEJOONISSA BIBEE [11 W. R., 45

2. ——— **Evidence of separation.**—*Separate registration of names.*—The separate registry of the names of shares in the zemindar's serishta is not proof of separation of their shares. GUREEBOOLLAH KHAN *v.* KEBUL LALL MITTER [13 W. R., 124

3. ——— *Onus probandi.* —*Registration of land in one name.*—In a dispute between two grandsons as to proprietary right in a village which had been registered in the name of a member of the elder branch of the family, the Privy Council held that the *ratio decidendi,* according to which the legal presumption was in favour of one grandson claiming against another, and the *onus probandi* placed on the one claiming to be sole possessor, was more consistent with equity and common sense than a hard-and-fast rule requiring the party who claims a joint interest to prove that the registered proprietor has duly accounted to him for his proportionate share of the profits. Registration of landed property in the name of one member of a family is not conclusive against the claim of those who might contend that they had nevertheless continued to retain a joint interest in the property. HYDER HOSSEIN *v.* MAHOMED HOSSEIN [17 W. R., 185 : 14 Moore's I. A., 401

4. ——— **Acquisition by managing member.**—*Presumption.*—Additions made to the joint estate by the managing member of a Mahomedan family will be presumed, in the absence of proof, to have been made from the joint estate, and will be for the benefit of all the members of the family entitled to share. VELLAI MIRA RAVUTTAN *v.* MIRA MOIDIN RAVUTTAN. VELLAI MIRA RAVUTTAN *v.* VARISAI MIRA RAVUTTAN . . . . 2 Mad., 414

5. ——— **Acquisition by the members severally.**—*Joint acquisition.*—*Presumption.*—When the members of a Mahomedan family live in commensality, they do not form a "joint family" in the sense in which that expression is used with regard to Hindus; and in Mahomedan law there is not, as there is in Hindu law, any presumption that the acquisitions of the several members are made for the benefit of the family jointly. *Abraham* v.

**MAHOMEDAN LAW—JOINT FAMILY.—Acquisition by the members severally—*continued.***

*Abraham, 9 Moore's I. A., 195;* and *Jowala Buksh* v. *Dharum Sing, 10 Moore's I. A, 511,* cited. *Rupchund Chowdhry* v. *Latu Chowdhry, 3 C. L. R., 96,* doubted. HAKIM KHAN *v.* GOOL KHAN [I. L. R., 8 Calc., 823 : 10 C. L. R., 603

JAKER ALI CHOWDHRY *v.* RAJCHUNDER SEN [I. L. R., 8 Calc., 831, note

6. ——— **Purchase by father in son's name.**—*Onus probandi.—Semble,*—Among Mahomedans where a purchase is made during a father's lifetime in the name of his son while living in the father's house, there is no such presumption as arises in the case of a similar purchase made in the lifetime of the father of a joint Hindu family; and the onus is not on the son to prove that the purchase was not made really for and by the father, but by the son for himself and with his own funds. GOLAM MAOKDOOM *v.* HAFERZOONNISSA . 7 W. R., 489

7. ——— **Joint or separate acquisition.**—*Onus probandi.—Presumption as to joint possession.*—In a suit by a member of a Mahomedan family to recover possession of a share in landed property alleged to be ancestral, where defendant claimed the same as his separately acquired property,—*Held* that it was not necessary for defendant to show that he had funds sufficient to enable him to obtain the property, and that the burden of proving that the property was acquired for and enjoyed by the whole family jointly was upon the plaintiff. MAHOMED AFAK *v.* EKRAM ALI . . . 14 W. R., 374

8. ——— **Onus probandi.**—*Hindu customs amongst Mahomedans.—Presumption when no allegation of custom made.*—*A.* and *B.* were two brothers, Mahomedans, who lived together in commensality. *A.*, whilst so living with his brother, purchased certain lands under a conveyance executed by the vendor and *A.* In a suit by the heirs of *B.* against the heirs of *A.* to obtain possession of such lands, in which they alleged they had been dispossessed by the heirs of *A.*, the Court found the land to be joint family property and to have been purchased with joint funds. On appeal, the onus of proving that the land was purchased by *A.* alone was put upon *A.* *Held* that, there being no allegation that the parties had adopted the Hindu law of property, the Judge by applying to Mahomedans the presumption of Hindu law had cast the onus on the wrong party. ABDOOL ADOOD *v.* MAHOMED MAKMIL [I. L. R., 10 Calc., 562

9. ——— **Liability of family for necessaries.**—*Marriage expenses.*—*A.* and *B.*, who were Mahomedans living joint in food and estate, separated in Kartick 1279, and at the time of the separation entered into an agreement that, "if claims relating to the joint estate are brought on the ground that they are debts due on account of the time we were joint and living in commensality, then I, *A.*, and I, *B.*, will pay such claims according to what is just in equal shares. If either of us do not pay and one of us shall pay the share of the other, then the person who has paid shall recover from the other the amount he has paid for the other." After the separation a decree was obtained against *A.* for the price of certain clothes supplied to him for his marriage, which took place while *A.* and *B.* were joint, and *A.* having paid the amount of this decree sued *B.* for one half of the amount so paid. *Held* that the debt was not incurred in a matter necessary to the existence of the family, but for the individual benefit of *A.*, and that as in a Mahomedan family the individual benefited, and not the family, is liable for expenses incurred for the benefit of any particular member, *A.* alone was liable for the debt. *Held*, also, that the agreement had reference only to such claims as the family were jointly liable for. ALIMUNESSA KHATUN *v.* HASSAN ALI . . . . . 8 C. L. R., 378

**MAHOMEDAN LAW—KAZI.**

1. ——— **Appointment of Kazi.**—*Hereditary office.—Bom. Reg. XXVI of 1827.—Act XI of 1864.*—The enactment of Bombay Regulation XXVI of 1827 was adverse to any supposition that the office of Kazi could be hereditary. The repeal of that Regulation by Act XI of 1864 left the Mahomedan law as it stood before the passing of that Regulation; and that law sanctioned no grant of such an office to a man and his heirs. The appointment of Kazi lies exclusively with the sovereign, or other chief executive officer of the State, and ought to be made with the greatest circumspection with regard to the fitness of the individual appointed; and though the sovereign may have full power to make the watan attached to the office of Kazi hereditary, yet he has, under the Mahomedan law, no power to make the office itself so. JAMAL WALLAD AHMED *v.* JAMAL WALLAD JALLAL . . . . I. L. R., 1 Bom., 633

2. ——— *Bom. Reg. XXVI of 1827.—Act XI of 1864.*—Where a sanad granted by the Emperor Aurangzib in A.D. 1693 did not purport to confer a hereditary Kaziship, but was a grant of the office of Kazi personally to an ancestor of the plaintiff,—*Held* that the subsequent recognitions or appointments of members of his family as Kazis by native governments did not prove that the office was or could be made hereditary. Regulation XXVI of 1827, relating to the appointment of Kazis, was repealed by Act XI of 1864, whereby it is recited that it is inexpedient that the appointment of Kazis should be made by Government. The continuance, therefore, by the Collector of an allowance to the plaintiff in 1867 could not be regarded as a constructive appointment of him to be Kazi. DAUDSHA *v.* ISMALSHA . . . I. L. R., 3 Bom., 72

3. ——— *Power to appoint Kazi of Bombay.—Disturbance of office.—Right of suit.—Fees received by Kazi.—Semble,*—The power to appoint a person to the office of Kazi of Bombay is vested in the Governor of Bombay, and not in the Governor in Council. According to Mahomedan law, the appointment of Kazi has always been vested in the chief executive officer of the State and the right

**MAHOMEDAN LAW—KAZI.—Appointment of Kazi**—*continued.*

to make such appointment has never rested with the Mahomedan community at large. When it was shown that the plaintiff had acted as Kazi of Bombay for more than twenty years, and the defendant, in an action brought against him for disturbing the plaintiff in his office of Kazi, was unable to show that the plaintiff had been illegally appointed, it was held that the plaintiff so acting as Kazi could maintain an action against the defendant who so disturbed him in his office, without proving that he, the plaintiff, had been legally appointed. The sums received by the Kazi of Bombay in respect of his office of Kazi are not mere gratuities, but are fixed and certain payments annexed to the discharge of official duties, and are therefore sums in respect of the privation whereof by a wrongful intruder, an action, either for money had and received or for disturbance in the office, will lie, MUHAMMAD YUSSAB *v.* AHMED

[1 Bom., Ap., 18

**MAHOMEDAN LAW—MAINTENANCE.**

1. ——— **Husband's liability for maintenance.**—*Wife not arrived at puberty living with parents.—Quære,*—In the case of Mahomedans, where a wife, although legally married, has not attained the age of puberty, is there a liability on the part of the husband to support her as long as she remains under the roof of her father? KOLASHUN BIBEE *v.* DIDAR BUKSH . . . 24 W. R., Cr., 44

2. ——— *Husband and wife.—Decree for past maintenance.*—In a suit for maintenance by a Mahomedan wife against her husband, where there was no decree or agreement for maintenance before suit,—*Held,* reversing the decision of the Court below, that the decree should not have awarded past maintenance, but that maintenance should have been made payable only from the date of the decree. *Held,* also, that future maintenance should have been given only during the continuance of the marriage, and not during the term of the plaintiff's natural life. ABDOOL FUTTEH MOULVIE *v.* ZABUNNESSA KHATUN

[I. L. R., 6 Calc., 631: 8 C. L. R., 242

3. ——— **Wife's right to maintenance.**—*Ascertainment of rate.—Right of suit.*—According to Mahomedan law, until there has been an ascertainment of the rate at which maintenance is payable, no right to maintenance accrues to a wife on which she can found a suit. MAHOMED MUSEEHOOD-DEEN KHAN *v.* MUSEEHOODDEEN

[2 N. W., 173

4. ——— **Agreement for maintenance.**—*Re-conveyance by wife (on consideration of maintenance) of her property received for dower.*—Where a Mahomedan wife, in re-conveying to her husband the property received from him in lieu of dower, took from him a written agreement in which he convenanted to pay her a certain sum of money annually without objection or demur,—*Held* that the husband could not avoid payment on any of the pleas on which

**MAHOMEDAN LAW—MAINTENANCE.**
**Agreement for maintenance**—*continued.*

a Mahomedan husband could avoid the payment of maintenance to a wife. YUSOOF ALI CHOWDHRY *v.* FYZOONISSA KHATOON CHOWDRAIN

[15 W. R., 296

5. ——— **Mutta wife.**—*Mutta form of marriage.—Criminal Procedure Code (Act X of 1872), s. 536.—Shiah sect.*—Under the law of the Shiah sect of Mahomedans a mutta wife is not entitled to maintenance, but such a provision of the law does not interfere with the statutory right to maintenance given by section 536 of the Code of Criminal Procedure. IN THE MATTER OF THE PETITION OF LUDDUN SAHIBA. LUDDUN SAHIBA *v.* KAMAR KUDAR . I. L. R., 8 Calc., 736: 11 C. L. R., 237

**MAHOMEDAN LAW—MARRIAGE.**

*See* CASES UNDER MAHOMEDAN LAW—ACKNOWLEDGMENT.

*See* MAHOMEDAN LAW—DOWER.

[I. L. R., 8 All., 149
I. L. R., 1 All., 483, 506
I. L. R., 4 All., 205
I. L. R., 2 All., 831

1. ——— **Validity of marriage.**—*Requisites for valid marriage.*—Under the Shiah as well as the Sunni law, any connection between the sexes which is not sanctioned by some relation founded upon contract or upon slavery is denounced as "zina," or fornication. Both schools prohibit sexual intercourse between a Mooslnah, *i.e.*, a Mahomedan woman, and a man who is not of her religion. According to the Shiah law, marriage must in all cases be lawful, except when there is error on the part of both or either of the parents. HIMMUT BAHADOOR *v.* SHAHEBZADI BEGUM . . 14 W. R., 125

Affirming on review S. C. SHAHEBZADI BEGUM *v.* HIMMUT BAHADOOR

[12 W. R., 512: 4 B. L. R., A. C., 103

2. ——— *Nikah marriage.*—The nikah form of marriage is well known and established among Mahomedans. The issue of such a marriage is legitimate by Mahomedan law. MONEEROODDEEN *v.* RAMDHUN BAJEEKUR

[18 W. R., Cr., 28

3. ——— *Woman's right to choose husband.—Guardian.—Marriage without consent of father.*—According to the doctrine of the Mussulman teacher, Abu Hanifa, a Mussulman female, after arriving at the age of puberty without having been married by her father or guardian, becomes legally emancipated from all guardianship, and can select a husband without reference to the wishes of the father or guardian; but according to the doctrine of Shafi, a virgin, whether before or after puberty, cannot give herself in marriage without the consent of her father. After attaining puberty a female of any one of the four sects can elect to belong to whichever of the other three sects she pleases, and the legality of her subsequent acts will be governed by the tenets of the Imam whose follower she may have become. A

MAHOMEDAN LAW—MARRIAGE.—Validity of marriage—*continued.*

girl whose parents and family are followers of the school of Shafi, and who has arrived at puberty, and has not been married or betrothed by her father or guardian, can change her sect from that of Shafi to that of Hanifa, so as to render valid a marriage subsequently entered into by her without the consent of her father. MUHAMMAD IBRAHIM *v.* GULAM AHMED [1 Bom., 236

4. ——— *Marriage of minor.—Assent of wife after puberty.*—A ceremony of marriage was performed between Mahomedan minors in the fazolee (nominal) form; the girl's father being dead, and the marriage being contracted by her paternal grandmother. Thereafter the girl died, having attained the age of puberty without ever meeting or communicating with her husband, and without ever expressing in any way assent to or dissent from the marriage. *Held* that, by the law of the Shiah sect which governed the case, the marriage, since the assent of the girl after attaining puberty was not shown, was imperfect from the want of the necessary ratification and could not create any rights or obligations. Though by the law of the Sunnis the option of dissent must be declared by the girl as soon as puberty is developed, yet by the doctrine of the Shiahs the matter ought to be propounded to her, so that she may advisedly give or withhold her assent. MULKA JEHAN SAHIBA *v.* MAHOMED USHTURREE KHAN [L. R. I., A., Sup. Vol., 192: 26 W. R., 26

5. ——— *Consent of parents.—Inequality of parties.—Held* that, under Mahomedan law the bride's father can set aside the marriage on the ground of inequality between the parties to the marriage if it had taken place without his consent, the consent of the bride's mother and brother notwithstanding; and that the bride herself is legally competent to refuse herself to her husband so long as her dowry remains unpaid. MOHUMDEE BEGUM *v.* BAIRAM KHAN . . 1 Agra, 130

6. ——— *Infant.—Consent.—Apostate father.*—The consent of the father was held not necessary to the marriage of a Mahomedan infant girl, he being an apostate from the Mahomedan faith; this being so, the consent of the mother was sufficient. IN THE MATTER OF MAHIN BIBI [13 B. L. R., 160

7. ——— *Consent of mother.*—Where the nearest guardian of a minor was precluded from giving his consent to the marriage of the minor, the marriage contracted by consent of the mother of the minor was held to be valid by Mahomedan law. KALOO *v.* GURIBOLLAH [13 B. L. R., 163, note: 10 W. R., 12

8. ——— *Mutta form of marriage.—Repudiation.—Divorce.*—The mutta form of marriage does not admit of repudiation under the law of the Shiah sect of Mahomedans. *Quære,*—Whether the form of divorce called *zihar* may be exercised in the mutta form of marriage. IN THE

MAHOMEDAN LAW—MARRIAGE.—Validity of marriage—*continued.*

MATTER OF THE PETITION OF LUDDUN SAHIBA. LUDDUN SAHIBA *v.* KAMAR KUDAR [I. L. R., 8 Calc., 736: 11 C. L. R., 237

9. ——— Presumption of marriage.—*Cohabitation.—Presumption of legitimacy of offspring.*—By the Mahomedan law continual cohabitation and acknowledgment of parentage is presumptive evidence of marriage and legitimacy. HIDAYUTOOLLAH *v.* RAI JAN KHANUM [3 Moore's I. A., 295

S. C. SHUMS-OON-NISSA KHANUM *v.* RAI JAN KHANUM . . . 6 W. R., P. C., 52

10. ——— *Cohabitation.—Acknowledgment of wife and of legitimacy of children.*—According to Mahomedan law, continued open cohabitation, accompanied by a declaration that the woman is the man's wife, and that the children, the issue of the cohabitation, are his children, or by conduct showing that he considers them to be so, is sufficient evidence from which to infer marriage. Even where the cohabitation has been casual only, and there has been no acknowledgment of the woman as his wife, or the issue as his children, the fact of such cohabitation raises a presumption of marriage, and that the children are legitimate; but in such a case the presumption may be rebutted. NAWABUNNISSA *v.* FUZOOLOONISSA. NAWABUN *v.* JUMEERUN [Marsh., 428

S. C. FUZLOONNISSA *v.* NAWABUNNISSA [2 Hay, 479

11. ——— *Cohabitation.*—According to Mahomedan law, cohabitation as husband and wife will raise a presumption of a marriage if the parties are Mahomedans, or persons between whom a valid marriage can be celebrated. MONOWAR KHAN *v.* ABDOOLLAH KHAN . 3 N. W., 177

12. ——— *Legitimacy, Proof of.—Cohabitation.*—The mere residence of a woman in the house of a Mahomedan as a menial servant, and the circumstance that she had a son, do not raise the presumption of marriage or legitimacy of the son. Cohabitation means something more than mere residence in the same house. It should be shown that cohabitation continued, that children were born, and that the woman was treated as a wife, and lived as such, and not as a servant. KUREEMOONISSA *v.* ATTAOOLLAH . . . . 2 Agra, 211

13. ——— *Legitimacy.—Cohabitation.*—If a child has been born to a father of a mother where there has been not a mere casual concubinage, but a more permanent connection, and where there is no insurmountable obstacle to a marriage, according to the Mahomedan law, the presumption is in favour of such marriage having taken place, and the mother and child are entitled to inherit. SHUMS-OON-NISSA KHANUM *v.* RAI JAN KHANUM . . . . 6 W. R., P. C., 52

S C. HIDAYUTOOLLAH *v.* RAI JAN KHANUM [3 Moore's I. A., 295

**MAHOMEDAN LAW—MARRIAGE.—Presumption of marriage—*continued.***

14. ——— *Cohabitation.—Legitimacy.*—Though there is no evidence of the celebration of any marriage ceremony, still the fact of a woman having constantly lived as a married woman with her husband, and the fact of her children having lived as legitimate children with their parents, make the case fall within the rule as to the presumption of marriage and legitimacy laid down by the Privy Council in *Mahomed Bauker Hossein Khan* v. *Shurfoonnissa Begum*, 8 *Moore's I. A.*, 136; and by the High Court in *Nawabunnissa* v. *Fuzoolonisso*, *Marsh.*, 428. ASHRUFFUNNISSA *v.* AZEEMUN BARODA KOOERY *v.* ASHRUFFUNNISSA [1 W. R., 17

15. ——— *Acknowledgment of wife.*—The acknowledgment of a wife which the Mahomedan law requires as proof of marriage should be specific and definite. The mere fact of a man keeping a woman within the purdah and treating her to outward semblance as a wife, does not necessarily, in the absence of express declaration and acknowledgment, constitute the *factum* of marriage. KADARNATH CHUCKERBUTTY *v.* DONZELLE [20 W. R., 352

16. ——— In a suit by *A.* for possession of property which belonged to her uncle *B.*, the defendants *C.* and *D.* each alleged herself to be the wife of *B.*, and each said that the other was his concubine. *C* also set up a will in her favour by *B.* *C.* admitted that she had been once *B.'s* concubine, but alleged that she had been subsequently married to *B.* The evidence was conflicting, and the Courts below pronounced against both the marriages and also against the will. *C.* alone appealed to the Privy Council, who held that lapse of time and propriety of conduct, and the enjoyment of confidence, with powers of management reposed in her, are not sufficient to raise the presumption that *A.* was a lawful wife. JARIUTOOL BUTOOL *v.* HOSSEINEE BEGUM . . . 10 W. R., P. C., 10 [11 Moore's I. A., 194

17. ——— *Celebration of pregnancy and of birth of son.*—The celebration of the seventh month of pregnancy, and the celebration of the birth of the son, are sufficient to prove the marriage and legitimacy of the son. WISE *v.* SUNDULOONISSA CHOWDHRANEE . 7 W. R., P. C., 13 [11 Moore's I. A., 177

18. ——— *Acknowledgment of wife.*—An equivocal expression in a document executed by a Mahomedan which might be applicable to the ladies in respect to whom it is used, whether they were wives or not, cannot be considered such an express recognition of their being wives as to establish their claims as such to a share in the estate on his decease. Where a lady has cohabited with a Mahomedan for years and has had a child by him who has been openly acknowledged and treated by him as his lawful son, although there may be no evidence of the actual fact of marriage, the Court is justified in presuming a marriage. MAHATALA

**MAHOMEDAN LAW—MARRIAGE.—Presumption of marriage—*continued.***

BIBEE *v.* AHMED HALEEMOOZOOMAN. CURREEMUNNISSA BEGUM *v.* AHMED HALEEMOOZOOMAN [10 C. L. R., 293

19. ——— *Re-marriage, Presumption of legality of.*—In a suit by a Mahomedan to compel the defendant to rejoin him as his wife, a mere declaration by the defendant in a mortgage-deed executed by her, that she was the wife of the plaintiff, would not be evidence of the removal of the legal impediment to the re-marriage created by the divorce; neither can a presumption be drawn from the fact of the re-marriage that the impediment had been removed and that the defendant had again become lawful wife to the plaintiff after remarriage. AKHTAROONNISSA *v.* SHARIUTOOLLAH CHOWDHRY . . . . 7 W. R., 268

**MAHOMEDAN LAW—MUSJID.**

——— *Constitution of musjid.*—Two essential conditions to the constitution of a musjid are requisite: first, that the site must be publicly appropriated to the purpose of a musjid; secondly, that public prayer should be performed in it. *Held*, in a suit to establish a right to repair and endow a mosque, that under the circumstances the condition had not been fulfilled, and therefore the suit should fail. YAKOOB ALI *v.* LUCHMUN DASS . 6 N. W., 80

**MAHOMEDAN LAW—PRE-EMPTION.**


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| 1. RIGHT OF PRE-EMPTION . . . | 3704 |
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## 1. RIGHT OF PRE-EMPTION.

### (*a*) GENERALLY.

1. ——— **Origin of right.**—*Law or custom.—Cessation of right.*—The right of pre-emption arises from a rule of law by which the owner of the land is bound; and it exists no longer if there ceases to be an owner who is bound by the law either as a Mahomedan or by custom. BYJNATH PERSHAD *v.* KOPILMON SINGH . . . 24 W. R., 95

2. ——— **Requisites for right.**—*Extinguishment of vendor's right.—Incomplete sale.—Right of pre-emption.*—In a suit claiming a right to pre-emption, where it was found as a fact that the sale had not been completed, and that there had not been cessation of the vendor's right, it was held that, whether under the ordinary principles which relate to contracts of sale, or under the principles of Mahomedan law, no right could arise in favour of the pre-

MAHOMEDAN LAW—PRE-EMPTION —*continued.*

1. RIGHT OF PRE-EMPTION—*continued.*

(*a*) GENERALLY—*continued.*

**Requisites for right**—*continued.*

emptor. The privilege of shuffa refers to cases in which the sale has been actually completed by the extinction of the rights of the vendor. LADUN *v.* BHYRO RAM . . . . . **8 W. R., 255**

3. ——————— *Extinguishment of vendor's right.*—Under Mahomedan law, the right of pre-emption does not arise until the seller's right of property has been completely extinguished. SOONDUR KOOER *v.* LALLA RUGHOOBUR DYAL **[10 W. R., 246**

BUKSHA ALI *v.* TOFEE ALI . **20 W. R., 216**

4. ——————— *Sales.—Leases in perpetuity.*—Under the Mahomedan law, the right of pre-emption applies to sales only, and cannot be enforced with reference to leases in perpetuity like a mokurrari, which (however small the reserved rent) are not sales and in which there is no "milkyut" or ownership on the part of the shuffa or pre-emption. RAM GOLAM SINGH *v.* NURSING SAHOY **[25 W. R., 43**

5. ——————— *Bonâ fide sale.*—There is no right of pre-emption where there has not been a real *bonâ fide* sale according to the Mahomedan law. MOHNO BIBEE *v.* JUGGURNATH CHOWDHRY . . . . . **2 W. R., 78**

6. ——————— *Sale.—Transfer in nature of gift.*—A transfer without money or other consideration, and which is in fact a gift, is held not to be a sale to which the right of pre-emption attaches. AMEER ALI *v.* PEARUN . **W. R., 1864, 239**

7. ——————— *Proof of right on private sale.—Auction sale.—Held* that in a case of private sale the right of pre-emption must be based on usage or contract, and that an instance of pre-emption in an auction sale is not sufficient. BHAE KOONWAR *v.* ZAHOOR ALI . . **1 Agra, 258**

8. ——— **Exercise of right.**—*Re-sale.—Claim after waiver upon incompleted sale.*—The right of pre-emption, according to the Mahomedan law, may be exercised upon a re-sale of the property, after a previous sale which has fallen through, and with respect to which no claim of pre-emption was made. BUSUNT KOOMAREE *v.* KALI PERSAD SINGH **[Marsh., 11 : 1 Hay, 32**

9. ——————— *Property sold in execution of decree.—Right of judgment-debtor.*—The right of pre-emption cannot be exercised by a judgment-creditor in respect of the sale of property in execution of his decree. NUZMOODEEN *v.* KANYE JHA . . . **Marsh., 555 : 2 Hay, 651**

10. ——————— *Sale by public auction.—Opportunity to bid.*—When property is sold by public auction at a sale in execution of a decree, and the neighbour or partner has the same opportunity to bid for the property as other parties present in Court, the law of pre-emption does not apply. ABDUL JABEL *v.* KHELAT CHANDRA GHOSE **[1 B. L. R., A. C., 105 : 10 W. R., 165**

MAHOMEDAN LAW—PRE-EMPTION —*continued.*

1. RIGHT OF PRE-EMPTION—*continued.*

(*a*) GENERALLY—*continued.*

**Exercise of right**—*continued.*

11. ——————— *Repudiation of sale by seller or buyer.*—As, according to Mahomedan law, when either the seller or buyer repudiates the sale, there can be no sale, so neither can there be any right of pre-emption in such a case. OJHOONISSA BEGUM *v.* RUSTUM ALI . **W. R., 1864, 219**

12. ——— **Exercise of pre-emption.**—*Effect of allowing pre-emption.—Conditions of pre-emption.—Held* that the right of pre-emption, when once allowed and exercised by the pre-emptor, cannot be disputed at subsequent occasions of sale, and that neither manhood, puberty, justice, or respectability of character, are conditions of pre-emption under the Mahomedan law. PUNNA *v.* JUGGUR NATH **[1 Agra, 236**

Nor is indebtedness of the pre-emptor. RAM KHELAWAN RAI *v.* SHIVA DASS . **2 Agra, 76**

13. ——— **Evidence of right.**—*Suit to enforce right.*—In a suit to enforce a right of pre-emption, where there is other evidence, and the Court can come to a distinct finding upon it, it is not incumbent on the Court to put the purchaser upon his oath. HUNSRAJ SINGH *v.* RASH BEHAREE SINGH . . . . . **7 W. R., 211**

HUNSRAJ SINGH *v.* CHOKA SINGH **[7 W. R., 486**

14. ——————— *Decision on evidence.*—Where evidence is gone into, the Court must decide according to the view it takes of the evidence, any preference which may be given to the evidence for the person claiming the right of pre-emption being given only in the event of the evidence being very evenly balanced. HUNSRAJ SINGH *v.* RASH BEHAREE SINGH . . . . **7 W. R., 211**

15. ——————— *Nature of pre-emption.—Ground for allowing right.*—The right of pre-emption is not matter of title to property, but is rather a right to the benefit of a contract; and when a claim is advanced on such a right it must be shown that defendant is bound to concede the claim either by law or by some custom to which the class of which he is a member is subject on grounds of justice, equity, and good conscience. MOHESH LALL *v.* CHRISTIAN . . . . **8 W. R., 446**

16. ——————— *Nature of right.—Onus probandi.*—The right of pre-emption is not one which attaches to property, and the obligation it implies may be limited to the residents of a district or to a family, or to any particular class of persons, it being for the claimant in each case to show that it attaches to the defendant. AKHOY RAM SHAHAJEE *v.* RAM KANT ROY . . . **15 W. R., 223**

MAHOMEDAN LAW—PRE-EMPTION —*continued.*

1. RIGHT OF PRE-EMPTION—*continued.*

(*a*) GENERALLY—*continued.*

17. ——— **Applicability of right.**—*Nature and extension of right.*—The right to pre-emption is very special in its character, and is founded on the supposed necessities of a Mahomedan family arising out of their minute subdivision of ancestral property; and as the result of its exercise is generally adverse to public interest, it will not be recognised by the High Court beyond the limits to which those necessities have been judicially decided to extend. NUSRUT REZA *v.* UMBUL KHYR BIBEE **[8 W. R., 309**

18. ——— *Proof of existence of custom of pre-emption.*—*Held* that a solitary case or two is not sufficient to prove the custom of pre-emption in a locality where the privilege is not binding upon the parties by positive law. BENARSEE DOSS *v.* PHOOL CHUND . . **1 Agra, 243**

19. ——— *Decisions as to prevalence of custom.*—In *Inder Narain Chowdhry* v. *Mahomed Nazirooddeen, 1 W. R., 234,* the Court only meant to say that it could not be held upon decisions that were in conflict with other decisions of the same district, that the custom of pre-emption prevailed there; it did not say that when there were decisions tending the same way, that that would not be satisfactory proof of the fact. KODRUTOOLLAH *v.* MOHURÊE SHAHA . . . **9 W. R., 537**

20. ——— *Hindus.—Local custom.—Sale to a stranger.*—The right of pre-emption, when it exists among Hindus, is a matter of contract or custom agreed to by the members of a village or community. Such a custom is not properly described as attached to the land, and as soon as any members of a Hindu community, who have agreed to be governed by it, sell to any one who is a stranger to the agreement, the land is no longer subject to pre-emption. HIRA *v.* KALLU **[I. L. R., 7 All., 916**

21. ——— *Hindus.—Usage and custom.*—Unless a prescriptive usage and local custom be clearly established, a Hindu defendant is not bound by the Mahomedan law in a case in which a Mahomedan seeks to enforce his right of pre-emption. SHERAJ ALI CHOWDHRY *v.* RAMJAN BIBEE **[8 W. R., 204: 2 Ind. Jur., N. S., 249**

HUBEEBUL HOSSEIN *v.* LALLA DEWKEE NUNDUN **[W. R., 1864, 75**

22. ——— *Hindu purchaser.*—A claim for pre-emption under the Mahomedan law cannot be maintained against a Hindu purchaser. MOTI CHAND *v.* MAHOMED HOSSEIN KHAN . . . . . **7 N. W., 147**

CHUNDO *v.* ALIMOODDEEN . **6 N. W., 28**
**[S. C. Agra, F. B., Ed. 1874, 305**

23. ——— *Hindu purchaser.—Mahomedan vendor and co-sharer.—Per*

MAHOMEDAN LAW—PRE-EMPTION —*continued.*

1. RIGHT OF PRE-EMPTION—*continued.*

(*a*) GENERALLY—*continued.*

**Applicability of right**—*continued.*

PEACOCK, *C. J.*, and KEMP and MITTER, *JJ.*—A Hindu purchaser is not bound by the Mahomedan law of pre-emption in favour of a Mahomedan copartner, although he purchased from one of several Mahomedan coparceners; nor is he bound by the Mahomedan law of pre-emption on the ground of vicinage. A right of pre-emption in a Mahomedan does not depend on any defect of title on the part of his Mahomedan copartner to sell except subject to the right of pre-emption, but upon a rule of Mahomedan law, which is not binding on the Court, nor on any purchaser other than a Mahomedan. *Per* NORMAN and MACPHERSON, *JJ.* (*dissentientes*).—Wherever a Mahomedan co-sharer or neighbour has a right of pre-emption, and his property is sold by his neighbour or co-sharer, also a Mussulman, his right is not defeated by the mere fact that the purchaser is a Hindu. KUDRATULLA *v.* MAHINI MOHUN SHAHA. SAYAMA KUMAR ROY *v.* JAN MAHOMED. FARMAN KHAN *v.* BHARAT CHANDRA SHAHA CHOWDRY. **[4 B. L. R., F. B., 134: 13 W. R., F. B., 21**

24. ——— *Hindu vendor.—Right to enforce pre-emption.*—*Held* (STUART, *C. J.*, and PEARSON, *J.*, dissenting) that where the vendor is a Hindu a suit to enforce a right of pre-emption founded upon Mahomedan law is not maintainable. *Chundo* v. *Alim-ood-deen, 6 N. W., 28,* overruled. *Purno Singh v. Hurry Churn Surmah, 10 B. L. R., 117,* followed. DWARKA DOSS *v.* HUSAIN BAKSH **[I. L. R., 1 All., 564**

25. ——— *Hindu purchaser.—Mahomedan vendor and pre-emptor.—Act VI of 1871 (Bengal Civil Courts Act), s. 24.—"Religious usage or institution."—"Parties."—Held,* by the Full Bench, that, in a case of pre-emption, where the pre-emptor and the vendor are Mahomedans, and the vendee a non-Mahomedan, the Mahomedan law is to be applied to the matter, in advertence to the terms of section 24 of the Bengal Civil Courts Act (VI of 1871). *Kudratulla* v. *Mahini Mohan Shaha, 4 B. L. R., F. B., 134,* dissented from. *Per* PETHERAM, *C. J.*, and OLDFIELD, *J.*, that, by the provisions of section 24 of the Bengal Civil Courts Act, the Court was not bound to administer the Mahomedan law in claims for pre-emption; but that, on grounds of equity, that law had always been administered in respect of such claims as between Muhomedans, and it would not be equitable that persons who were not Mahomedans, but who had dealt with Mahomedans in respect of property, knowing the conditions and obligations under which the property was held, should, merely by reason that they were not themselves subject to the Mahomedan law, be permitted to evade those conditions and obligations. *Per* MAHMOOD, *J.*, that by a liberal construction, the rule of the Mahomedan law as to pre-emption is a "religious usage or institution" within the meaning of section 24 of the Bengal Civil

MAHOMEDAN LAW—PRE-EMPTION —*continued.*

1. RIGHT OF PRE-EMPTION—*continued.*

(*a*) GENERALLY—*continued.*

**Applicability of right**—*continued.*

Courts Act, and, as such, is binding on the Courts. Also *per* MAHMOOD, *J.*, that the word "parties," as used in section 24 of the Bengal Civil Courts Act, does not mean the parties to an action, but must be interpreted with reference to the inception of the right to be adjudicated upon. Also *per* MAHMOOD, *J.*—The right of pre-emption is not a right of "*re-purchase*" either from the vendor or from the vendee, involving any new contract of sale; but it is simply a right of *substitution*, entitling the pre-emptor, by reason of a legal incident to which the sale itself was subject, to stand in the shoes of the vendee in respect of all the rights and obligations arising from the sale under which he has derived his title. The history and nature of the right of pre-emption discussed by MAHMOOD, *J. Shumsh-ool-nissa* v. *Zohra Bibi, 6 N. W., 2; Chundo* v. *Alim-ood-deen, 6 N. W., 28; Ibrahim Saib* v. *Muni Mir Uddin, 6 Mad., 26; Moti Chand* v. *Mahomed Hossein Khan, 7 N. W., 147;* and *Dwarka Das* v. *Husain Bakhsh, I. L. R., 1 All., 564*, referred to. GOBIND DAYAL *v.* INAYATULLAH. BRIJ MOHAN LAL *v.* ABUL HASAN KHAN . . . . I. L. R., 7 All., 775

26. ——————— *Hindus.—Custom prevailing among Hindus.—Obligation to fulfil conditions.*—Where the custom of pre-emption prevails among Hindus, it does not necessarily follow that the person claiming pre-emption must fulfil all the conditions of the Mahomedan law regarding pre-emption. It should be determined whether the custom is a custom under which it is incumbent upon him to fulfil those conditions. JAI KUAR *v.* HEERA LAL [7 N. W., 1

27. ——————— *Hindu vendor and purchaser.—Mahomedan pre-emptor.—"Talab-i-ishtihad."—Invocation of witnesses.*—A Mahomedan sued to enforce a right of pre-emption in respect of a sale between Hindus, founding such right on local custom. The formality of "*ishtihad*," or express invocation of witnesses, required by the Mahomedan law of pre-emption, was not one of the incidents of such custom. *Held* that the circumstance that the plaintiff was a Mahomedan did not preclude him from claiming to enforce such right against the defendants, who were Hindus; and that the formality of "*ishtihad*" not being one of the incidents of such custom, it was not necessary that the plaintiff should have observed that formality as a condition precedent to the enforcement of such right. *Fakir Rawot* v. *Emam Baksh, B. L. R., Sup. Vol., 35; Bhodo Mahomed* v. *Radha Churn Bolia, 13 W. R., 332*, referred to. *Kudratulla* v. *Mahini Mohan Shaha, 4 B. L. R., F. B., 134;* and *Dwarka Das* v. *Husain Bakhsh, I. L. R., 1 All., 564*, distinguished. *Chowdree Brij Lal* v. *Goor Sahai, Rul. June-Dec. 1867, p. 129;* and *Jai Kuar* v. *Heera Lal, 7 N. W., 1*, followed. ZAMIR HUSAIN *v.* DAULAT RAM . . . . I. L. R., 5 All., 110

MAHOMEDAN LAW—PRE-EMPTION —*continued.*

1. RIGHT OF PRE-EMPTION—*continued.*

(*a*) GENERALLY—*continued.*

**Applicability of right**—*continued.*

28. ——————— *Hindus.—Province of Behar.*—The custom of pre-emption has been recognised among Hindus in the province of Behar. JOY KOER *v.* SUROOP NARAIN THAKOOR [W. R., 1864, 259

29. ——————— *Hindus.—Province of Behar.*—A native of Lower Bengal seeking his fortune in Behar would not be bound by the rule of Mahomedan law of pre-emption if nothing were shown to the contrary. BYJNATH PERSHAD *v.* KOPILMON SINGH . . . . 24 W. R., 95

30. ——————— *Hindus.—Province of Behar.*—There is no judicial finding to the effect that the custom of pre-emption is recognised among the Hindus of the province of Behar. It is doubtful whether, even under Mahomedan law, the owners of two adjacent lakhiraj estates, wholly unconnected with one another, could either of them claim a right of pre-emption on the ground of vicinage. No such right of pre-emption on the ground of the mere vicinage has been known to exist among Hindus. KANTIRAM *v.* WOLI SAHU [2 B. L. R., A. C., 330: 11 W. R., 251

31. ——————— *Hindus.—Province of Behar.—Custom.*—A right or custom of pre-emption is recognised as prevailing among Hindus in Behar and some other provinces of Western India. In districts where its existence has not been judicially noticed, the custom will be matter to be proved; such custom, when it exists, must be presumed to be founded on and co-extensive with the Mahomedan law upon that subject, unless the contrary be shown. The Court may, as between Hindus, administer a modification of that law as to the circumstances under which the right may be claimed, where it is shown that the custom in that respect does not go the whole length of the Mahomedan law of pre-emption; but the assertion of the right by suit must always be preceded by an observance of the preliminary forms prescribed in Mahomedan law. FAKIR RAWOT *v.* EMAMBAKSH [B. L. R., Sup. Vol., 35: W. R., F. B., 143

RAMDULAR MISSER *v.* JHUMACK LAL MISSER [8 B. L. R., 455: 17 W. R., 265

RAMGUTTY SURMA *v.* KASI CHUNDER SURMA [W. R., 1864, 317

SHEOJUTTUN ROY *v.* ANWAR ALI [13 W. R., 189

32. ——————— *Christians in Bhaugulpore.*—The custom of pre-emption, as applicable to Christians in Bhaugulpore, must be proved on the same principle as has been applied to Hindus in Behar. MOHESHEE LALL *v.* CHRISTIAN [6 W. R., 250

33. ——————— *Europeans.—District of Cachar.*—The right of pre-emption

MAHOMEDAN LAW—PRE-EMPTION —*continued.*

1. RIGHT OF PRE-EMPTION—*continued.*

(*a*) GENERALLY—*continued.*

**Applicability of right**—*continued.*

arises from a rule of law by which the owner of the land is bound. It is essential that the vendor should be subject to the rule of law. Therefore, where the vendor of certain land situate in Cachar was a European, the Court held that there was no right of pre-emption. POORNO SINGH *v.* HURRYCHURN SURMAH

[10 B. L. R., 117 : 18 W. R., 440

34. ——————— *Hindus.—Chittagong.*—Conflicting decisions of the Subordinate Courts held not to prove that the custom of the right of pre-emption under the Mahomedan law prevails among the Hindus of Chittagong. INDER NARAIN CHOWDHRY *v.* MAHOMED NAZIROODDEEN

[1 W. R., 234

S. C. on review, where the Judges differed. NAZIROODDEEN KHAN *v.* INDER NARAIN CHOWDHRY . . . . . 5 W. R., 237

35. ——————— *Hindus of Gujarat.*—The existence of a local custom as to the right of pre-emption among the Hindus of Gujarat recognised. Such a custom, where it exists, is regulated by the rules and restrictions of the Mahomedan law. GORDHANDAS GIRDHARBHAI *v.* PRANKOR

[6 Bom., A. C., 263

36. ——————— *Hindus.—Law in Jessore.—Quære,*—Whether the law of pre-emption extends to transactions as between Hindus in Jessore. MADHUB CHUNDER NATH BISWAS *v.* TAMER BEWAH . . . . . 5 W. R., 279

37. ——————— *Presidency of Madras.*—The Mahomedan doctrine of pre-emption is not law in the Madras Presidency. IBRAHIM SAIB *v.* MUNI MIR UDIN SAIB . 6 Mad., 26

Nor in Sylhet. JAMEELAH KHATOON *v.* PAGUL RAM . . . . . 1 W. R., 251

*Quære,*—Whether in Tipperah. DEWAN MUNAR ALI *v.* ASHUROODDEEN MAHOMED

[5 W. R., 270

(*b*) CO-SHARERS.

38. ——— **Right of tenant.**—The Mahomedan law nowhere recognises the right of pre-emption in favour of a mere tenant upon the land. GOOMAN SINGH *v.* TRIPOOL SINGH . 8 W. R., 437

39. ——— **Right of shareholder.**—*Effect of private partition on right of pre-emption.*—According to Mahomedan law, a shareholder in the property sold has the first or strongest right of pre-emption. A private partition, though not sanctioned by official authority, if full and final as among the parties to it, will have the same effect as the most formal partition on the right of pre-emption. GOPAL SAHI *v.* OJOODHEA PERSHAD . 2 W. R., 47

MAHOMEDAN LAW—PRE-EMPTION —*continued.*

1. RIGHT OF PRE-EMPTION—*continued.*

(*b*) CO-SHARERS—*continued.*

**Right of shareholder**—*continued.*

40. ——————— *Right of co-sharer in part of estate sold.*—When part of an estate is sold in execution of a decree, a co-sharer in the estate is a partner in the thing actually sold, and according to Mahomedan law is entitled to the right of pre-emption. IMAMOODDEEN SOWDAGUR *v.* ABDOOL SOBHAN . . . . . 5 N. W., 170

41. ——————— *Shiah law.—Case in which more than two partners.*—Under Shiah law the authorities leave the point doubtful whether there can be any right of pre-emption in respect of property where there are more than two partners, but the Court held in accordance with the practice of the Courts in which no claim for pre-emption had ever been defeated on that ground. DAMI *v.* ASHOOHA BEBEE . . . . . 2 N. W., 360

42. ——————— *Equality of rights.*—Where there is a plurality of persons entitled to the privilege of pre-emption, the right of all is equal without reference to the extent of their shares in the property. MOHARAJ SINGH *v.* LALLA BHEECHUK LALL . . . . . 3 W. R., 71

43. ——————— *Claim by one sharer.*—Under the Sunni law the right of pre-emption may be exercised by one or more of a plurality of co-sharers. NUNDO PERSHAD THAKUR *v.* GOPAL THAKUR . . . I. L. R., 10 Calc., 1008

44. ——————— *Owner of separated share of estate.—Shafee khalit.*—The proprietor of a divided one-anna share in a four-anna share of an estate is not entitled to a right of pre-emption as a Shafee khalit in the remaining three-anna share. *Quære,*—Whether, if there remained any adjoining ground in which the community of interest still continued since the separation, he would be entitled in right of vicinage to pre-emption, the point not being allowed to be taken. MAHADEO SINGH *v.* ZITANNISSA

[7 B. L. R., 45, note : 11 W. R., 169

45. ——————— *Sharers in appendages, and in body of estate.*—A sharer in the appendages has not an equal right to pre-emption with a sharer in the body of the estate. GOLAM ALI KHAN *v.* AGURJEET ROY . . 17 W. R., 343

46. ——————— *Undefined share.*—In order to establish a right of pre-emption on the part of a sharer, it is not necessary that the property sold should be actually separated or defined. GOBIND CHUNDER GOOPTO *v.* RAJ KISHORE SEIN

[14 W. R., 365

47. ——————— *Khalit.—Sharik.—Partition, Effect of, as to pre-emption.*—The word "khalit" is not improperly used in a plaint in a pre-emption suit to designate a sharik or partner in the substance of a thing; and if it is not clear whether

MAHOMEDAN LAW—PRE-EMPTION —*continued.*

1. RIGHT OF PRE-EMPTION—*continued.*

(*b*) CO-SHARERS—*continued.*

**Right of shareholder**—*continued.*

the plaintiff claimed pre-emption as khalit or sharik, it may be shown by express words or it may be inferred from the written statement whether the plaintiff claimed on the one or on the other ground. Where the intention of the co-proprietors of an estate is, to make a complete butwara of the whole, but an inconsiderable part is by oversight or accident left out of the division, that will not have the effect of giving one co-proprietor a claim of pre-emption on the sale to a stranger by another co-proprietor of his share or division of the estate. *Semble,*—Where an integral portion or property, as a wall, is left purposely joint and undivided, the community of interest continues. LALA PRAG DUTT *v.* BANDI HOSSEIN [7 B. L. R., 42

S. C. LALLA PURIAG DUTT *v.* BUNDEH HOSSEIN [15 W. R., 225

and on review, BUNDEY HOSSEIN *v.* LALLA PURIAG DUTT . . . . . 16 W. R., 110

48. ——— *Co-partners—Partners between whom there has been separation.*—In a suit to recover by right of pre-emption, on the ground that plaintiff was in the position of a co-partner in the property to be sold, notwithstanding a private separation having taken place between the shareholders, inasmuch as he was still liable for arrears of Government revenue, and might still apply for a public butwara,—*Held* that, as plaintiff had divided off his own share by regular metes and bounds, and made himself in every respect independent of his co-partners so far as lay in his power to do so, he had by his own act deprived himself of any advantage which the law might have given him under different circumstances. BYJ NATH SINGH *v.* DOOLY MAHTOON . . . . . 11 W. R., 215

49. ——— The term "sharik" cannot be restricted to cases in which the parties enjoy the properties jointly. In the contemplation of Mahomedan law those who occupy other houses in the same mansion are regarded as partners together with the person the sale of whose share in a house gives rise to the question of pre-emption. GUREEBOOLLAH KHAN *v.* KEBUL LALL MITTER [13 W. R., 124

50. ——— *Right against coparcener.*—No right of pre-emption can exist as against a coparcener. MOHESHEE LALL *v.* CHRISTIAN . . . . . 6 W. R., 250

51. ——— *Coparceners.*—There is no rule of Mahomedan law giving one coparcener any right of pre-emption where another coparcener is the purchaser. LALLA NOWBUT LALL *v.* LALLA JEWAN LALL [I. L. R., 4 Calc., 831 : 2 C. L. R., 319

52. ——— *Joint purchase by co-sharers and stranger.—Pre-emptor not compelled to pre-empt share purchased by co-sharers.*—If a co-sharer associates a stranger with him in the purchase of a share, another co-sharer is entitled to pre-empt the whole of the property sold, but it is not obligatory upon him to impeach the sale, so far as the co-sharer vendee is concerned. HARJAS *v.* KANHYA [I. L. R., 7 All., 118

53. ——— *Shareholder or neighbour.*—The Mahomedan law of pre-emption was never intended to apply to a case in which the purchaser is not a stranger, but one who is already either a shareholder or a neighbour. TEEKA DHAREE SINGH *v.* MOHUR SINGH . . 7 W. R., 260

54. ——— *Sale of share in zemindari.—Vicinage.*—A right of pre-emption attaches to the sale of the share of the zemindari in the case of a co-sharer, though it may not attach on the ground of vicinage. AKHOY RAM SHAHAJEE *v.* RAM KANT ROY . . . 15 W. R., 223

55. ——— *Coparcener or neighbour.*—A coparcener has a higher right of pre-emption than a neighbour, and there is nothing in the Mahomedan law to prevent his enforcing his right when the purchaser happens to be a neighbour. HUR DYAL SINGH *v.* HEERA LALL . 16 W. R., 107

56. ——— *Preferential right.—Extent of shares.*—One of two joint sharers has no preferential title to the right of pre-emption in his capacity of neighbour, but is equally entitled with his co-sharer to the privilege of pre-emption, without regard to the extent of their shares. ROSHUN MAHOMED *v.* MAHOMED KULEEM . 7 W. R., 150

57. ——— **Vicinage.**—*Right of partner to pre-emption on sale of villages or large estates.*—According to the Mahomedan law, a partner has a right of pre-emption in villages or large estates. But a neighbour cannot claim such a right on the ground of vicinage. IN THE MATTER OF THE PETITION OF CHATTERNATH JHA *alias* JHINGHA JHA. MAHOMED HOSSEIN *v.* MOHSIN ALI [6 B. L. R., 41 : 14 W. R., F. B., 1

MAHOMED HOSSEIN *v.* MOHSUN ALI [14 W. R., 266

58. ——— *Adjacent plots of land.—Quære,*—Whether, as between owners of adjacent plots of land, pre-emption can exist by right of vicinage. NIRPUT MUHTOON *v.* DEEP KOONWAR [8 W. R., 2

59. ——— *Equal right of pre-emption in two persons.*—Where two persons have by vicinage an equal right of pre-emption, the property is to be decreed to them in halves, on payment of their respective moieties of the purchase-money. KHEM KURUN *v.* SEETA RAM [2 N. W., 257

MAHOMEDAN LAW—PRE-EMPTION —*continued.*

1. RIGHT OF PRE-EMPTION—*continued.*

(*b*) CO-SHARERS—*continued.*

**Vicinage**—*continued.*

**60.** ——————— *Ownership.*—Mere possession gives no "huk shuffa" according to Mahomedan law: there must be ownership (mileck) in the contiguous land, the onus being on the plaintiff to prove ownership. BEHAREE RAM *v.* SHOOBHUDRA [9 W. R., 455

**61.** ——————— *House on land.*—*Separate ownership.*—The owner of land is not entitled by Mahomedan law to pre-emption of a house standing thereon where his property in the land is wholly separate and distinct from the property in the house which belongs to another person with whom the owner has nothing in common. PERSHADI LAL *v.* IRSHAD ALI . . 2 N. W., 100

**62.** ——————— *Large estates.*—*Small holdings.*—*Mutual convenience.*—A claim to rights of pre-emption on the ground of vicinage alone will not lie in the case of large estates, but only when either houses or small holdings of land make parties such near neighbours as to give a claim on the ground of convenience and mutual service. EJNASH KOOER *v.* AMJUD ALLY . 2 W. R., 261

**63.** ——————— *Large estates.*—*Partners.*—The Mahomedan law of pre-emption on the score of vicinage applies only to houses or small plots of land, and not to large estates, or to a claim based on partnership when it is in proof that a separation of the estate has been effected. CHOWDHRY JOOGUL KISHORE SINGH *v.* POOCHA SINGH [8 W. R., 413

**64.** ——————— *Parcels of land.*—*Entire estate.*—The right of pre-emption on the ground of vicinage is limited to parcels of land and houses, and does not extend to the purchase of an entire estate, even though it be entirely surrounded by the lands of the would-be pre-emptor. ABDUL AZIM *v.* KHONDKAR HAMED ALI [2 B. L. R., A. C., 63 : 10 W. R., 356

**65.** ——— **Large or small estates.**—The right of a shareholder to pre-emption exists whether the parcel of land sold, and in respect of which the claim is made, be large or small. JEHANGIR BAKSH *v.* LALA BHIKARI LALL [6 B. L. R., 42, note

JAHANGEER BUKSH *v.* BHICKAREE LALL [11 W. R., 71

S. C. affirmed on review. IN THE MATTER OF THE PETITION OF JEHANGIR BAKSH [7 B. L. R., 24 : 11 W. R., 480

MAHATAB SINGH *v.* RAMTAHAL MISSER [6 B. L. R., 43, note : 10 W. R., 314

**66.** ——— **Agricultural estates.**—*Partners.*—Pre-emption extends to agricultural estates and is not merely confined to urban properties or small plots. Where there are several properties to which a common appurtenance in the shape of an undivided plot of land, a few trees and tanks, is attached, partners in the appurtenance can claim pre-emption in respect of the properties. KARIM BUKSH *v.* KAMR-UD-DEEN AHMAD . . 6 N. W., 377

(*c*) PRE-EMPTION IN TOWNS.

**67.** ——— **Owners of upper and lower floors of house.**—*Pre-emption among Hindus.*—Wherever the custom of pre-emption exists in towns or amongst Hindus, the presumption is, until the contrary be shown, that the custom is based upon the Mahomedan law of pre-emption. Therefore, where a person owns the lower floor of a house, and another person owns the upper floor, with a right of way to it through the house of a third party, and sells the upper floor with its right of way, the owner of the house in which the way lies has under such custom a right of pre-emption of the upper floor, preferable to the right of the owner of the lower floor. GANESHI LALL *v.* LUCHMAN DASS [5 N. W., 31

**68.** ——— **Dwelling-house.**—*Separate ownership of site of house.*—Where a dwelling-house was sold as a house to be inhabited as it stood with the same right of occupation as the vendor had enjoyed, but without the ownership of the site,—*Held* that a right of pre-emption under Mahomedan law attached to such house. ZAHUR *v.* NUR ALI [I. L. R., 2 All., 99

**69.** ——— **Land from which irrigation is received.**—*Owner of such land.*—*Preferential right.*—Under the Mahomedan law, the owner of the land, through which the land in respect of which a right of pre-emption is claimed, receives irrigation, has a preferential right to purchase rather than a mere neighbour. CHAND KHAN *v.* NAIMAT KHAN [3 B. L. R., A. C., 296 : 12 W. R., 162

(*d*) MORTGAGES.

**70.** ——— **Accrual of right.**—*Foreclosure of equity of redemption.*—In the case of a mortgage, the right of pre-emption does not arise until the equity of redemption is finally foreclosed. (BAYLEY, *J.*, dissenting.) GURDIAL MUNDAR *v.* TEKNARAYAN SINGH . B. L. R., Sup. Vol., 166 : 2 W. R., 215

**71.** ——————— *Right of suit to enforce right of pre-emption.*—*Foreclosure.*—*Possession by mortgagee.*—On the foreclosure of a mortgage, after the expiry of the year of grace, but before a decree for possession had been obtained by the mortgagee, a suit to enforce the right of pre-emption in respect of the property mortgaged is maintainable. TARA KUNWAR *v.* MANGRI MEEAH [6 B. L. R., Ap., 114

MAHOMEDAN LAW—PRE-EMPTION —*continued.*

1. RIGHT OF PRE-EMPTION—*continued.*

(*d*) MORTGAGES—*continued.*

**Accrual of right**—*continued.*

**72.** ——————— *Mortgage without actual transfer of possession.*—In a suit for a declaration of plaintiff's right of pre-emption in a property which had been originally mortgaged, but which, owing to a subsequent arrangement, had not passed from the mortgagor to the mortgagee,—*Held* that, as the ownership was still with the mortgagor, who could redeem his property within a stipulated period, no right of pre-emption had arisen from the Mahomedan law. BHOWANEE PERSHAD *v.* PURSHUNNO SINGH [11 W. R., 282

(*e*) WAIVER OF RIGHT OR REFUSAL TO PURCHASE.

**73.** ——— **Subsequent re-conveyance by purchaser to vendor.**—*Effect of, as against right of pre-emptor.*—Where one of two neighbours has sold his land to a stranger, and the other neighbour has thereupon claimed a right of pre-emption, no subsequent dissolution of the contract affects the right of the pre-emptor which has once accrued and been duly asserted. BHADU MAHOMED *v.* RADHA CHURN BOLIA . . 4 B. L. R., A. C., 219

S. C. BHODO MAHOMED *v.* RADHA CHURN BOLIA [13 W. R., 332

**74.** ——— **Surrender of right of pre-emption before sale.**—Where an offer of sale was made to a pre-emptor, and he refused to avail himself of it, and consented to a sale to a stranger,—*Held* that after a sale to a stranger he could not set up his right of pre-emption. BRAJA KISHOR SURMA *v.* KIRTI CHANDRA SURMA [7 I. L. R., 19 : 15 W. R., 247

But *see* IN THE MATTER OF THE PETITION OF JEHANGIR BAKSH . . 7 B. L. R., 24, note

S. C. JAHANGEER BUKSH *v.* LALLA BHIKHAREE LALL . . . . . 11 W. R., 480

where, however, the point was not directly decided, there being no sufficient proof of the refusal to purchase, and no evidence of consent to sell to another.

**75.** ——— **Refusal to purchase when property offered for sale.**—*Subsequent suit to enforce right.—Estoppel.*- A Mahomedan offered to sell his share of certain property to a partner, and on the refusal of the latter to purchase the same, sold it to a stranger. *Held*, the partner could not sue to enforce his right after the sale. TORAL KOMHAR *v.* AUCHHI . 9 B. L. R., 253 : 18 W. R., 401

SHEO TUHUL SINGH *v.* RAM KOOER [W. R., 1864, 311

KOOLDEEP SINGH *v.* RAM DEEN SINGH [24 W. R., 198

**76.** ——— **Right of refusal on sale to stranger.**—*Co-sharers paying rent separately.*—*A.* and *B*, Mahomedan co-sharers of a talook, made separate agreements to pay rent to the zemindar, each

MAHOMEDAN LAW—PRE-EMPTION —*continued.*

1. RIGHT OF PRE-EMPTION—*continued.*

(*e*) WAIVER OF RIGHT OR REFUSAL TO PURCHASE —*continued.*

**Right of refusal on sale to stranger**—*continued.*

shareholder being liable for his own share of the rent merely. Subject to this arrangement, the lands continued ijmali. *Held* that on a sale by *A.* of part of his share to a stranger, who was also a Mahomedan, *B.* was entitled to pre-emption. KOROMALI *v.* AMIR ALI . . . . 3 C. L. R., 166

**77.** ——— **Right of refusal.**—*Conditional right.—Co-sharers.—Minor.*—Where a condition for pre-emption contained in a record-of-rights was intended to take effect at the time of a sale, and its language implied that the co-sharers in whose favour it was made were to be persons who were competent at that time to make a binding contract to accept or refuse an offer, no right of pre-emption accrued under the condition to a co-sharer who was a minor at the time of a sale and unrepresented by any person competent to conclude a binding contract on his behalf, whether it was assumed that the condition arose out of special contract or general usage. RAJA RAM *v.* BANSI . . . I. L. R., 1 All., 207

**78.** ——————— *"Stranger."—"Sale."—Assignment by way of dower.—Assignment in lieu of dower.—Debt.*—The heirs of a Mahomedan have no legal interest or share in his property so long as he is alive, and cannot therefore be regarded as in any sense co-sharers or coparceners in his property, so as to be entitled to claim the right of pre-emption in case of a sale by him of his property. *Held*, therefore, where a husband sold his share of an undivided estate to his wife, that, although one of his heirs, she had not on that account a right of pre-emption in respect of such sale. A husband transferred certain property to his wife in consideration of a certain sum which was due by him to her as dower. *Held* that such transfer was a "sale," within the meaning of the Mahomedan law of pre-emption, and gave rise to the right of pre-emption. *Pearee Begum* v. *Hushmut Ali, 1 N. W., S. D. A., 1864, p. 475*, followed. The meaning of "stranger" and "sale," as used in the Mahomedan law of pre-emption, explained. FIDA ALI *v.* MUZAFFAR ALI [I. L. R., 5 All., 65

**79.** ——— **Refusal to purchase without absolute relinquishment or surrender.**—The right of pre-emption may be claimed after a sale notwithstanding there has been a refusal to purchase before the sale, where there has been no absolute surrender or relinquishment of the right, and such refusal has been made simply in consequence of a dispute as to the actual price of the property. ABADI BEGAM *v.* INAM BEGAM [I. L. R., 1 All., 521

**80.** ——— **Acquiescence in sale.**—*Notice to pre-emptor of projected sale.—Purchase-money.—Inaction of pre-emptor.*—The plaintiff in a suit to

## MAHOMEDAN LAW—PRE-EMPTION —*continued.*

### 1. RIGHT OF PRE-EMPTION—*continued.*

#### (*e*) WAIVER OF RIGHT OR REFUSAL TO PURCHASE —*continued.*

**Acquiescence in sale—*continued.***

enforce the right of pre-emption alleged that the true consideration for the sale was less than the amount stated in the sale-deed. It was found that he made no communication to the vendor after he became aware that a sale was being negotiated, nor did he make it known to him that, while he stood upon his pre-emptive right, he declined to pay the price stated in the deed, because it was not the consideration agreed on between the vendor and the vendee. *Held* that the plaintiff was bound, instead of remaining silent, to communicate to the vendor that he was prepared to purchase at the price within a reasonable time, and that not having done so, he must be taken to have countenanced the completion of the bargain with the vendee, and to have waived his right of pre-emption. BHAIRON SINGH *v.* LALMAN

[I. L. R., 7 All., 23

81. ——————— *Relinquishment of right.*—According to the Mahomedan law, if a pre-emptor enters into a compromise with the vendee, or allows himself to take any benefit from him in respect of the property which is the subject of pre-emption, he by so doing is taken to have acquiesced in the sale and to have relinquished his pre-emptive right. In a suit to enforce the right of pre-emption founded on the Mahomedan law, it appeared that the purchasers, by an agreement made with the plaintiffs on the same date as the sale in respect of which the suit was brought, agreed to sell the property to the plaintiffs any time within a year, and if the latter paid the price and purchased the property for themselves. *Held* that by the very fact of their taking the agreement, the plaintiffs had relinquished their right of pre-emption, and were precluded from enforcing it. HABIB-UN-NISSA *v.* BARKAT ALI

[I. L. R., 8 All., 275

### 2. PRE-EMPTION AS TO PORTION OF PROPERTY.

82. ——— **Assertion of right as to portion of property.**—*Ground for refusing whole.*—In the absence of sufficient ground for refusing to take the whole of the lands to be sold, the right of pre-emption cannot be asserted as to a portion only. CAZEE ALI *v.* MUSSEEUTOOLLAH . 2 W. R., 285

83. ——————— *Circumstances disentitling party to enforce the right.*—The right of pre-emption cannot ordinarily be claimed in respect of only a portion of any property conveyed away in a single sale; but this rule holds good only when the property sold is one entire property. Where a single sale embraces two distinct properties, in respect of one of which a right of pre-emption resides in any person who has not a similar right in regard to the other,—*Held* that it would be equally unreasonable to rule that he could claim both, and that he could claim neither—the only reasonable rule being

## MAHOMEDAN LAW—PRE-EMPTION —*continued.*

### 2. PRE-EMPTION AS TO PORTION OF PROPERTY—*continued.*

**Assertion of right as to portion of property—*continued.***

that he could claim as much as he could take by a decree if it were separately sold. SURDHAREE LALL *v.* LABOO MOODEE . . . 25 W. R., 500

84. ——————— *Suit to enforce the right in respect of a part of the property sold.*—Every suit for pre-emption must include the whole of the property subject to the plaintiff's pre-emption, conveyed by one bargain of sale to one stranger; and a suit by a plaintiff pre-emptor, which does not include within its scope the whole of such pre-emptional property, is unmaintainable as being inconsistent with the nature and essence of the pre-emptive right. *Izzatulla* v. *Bhikari Mollah, 6 B. L. R., 386: 14 W. R., 469;* and *Baisun Thakooranee* v. *Ram Singh, N. W., S. D. A., 1863, p. 394,* followed. *Oomur Khan* v. *Moorad Khan, N. W., S. D. A., 1865, p. 173;* and *Salig Ram* v. *Debi Prasad, 7 N. W., 38,* distinguished. *Cazee Ali* v. *Musseeutoollah, 2 W. R., 285; Abdool Gufoor* v. *Nur Banu, 1 B. L. R., A. C., 78: 10 W. R., 111; Sheodyal Ram* v. *Bhyroo Ram, N. W., S. D. A., 1860, p. 53; Guneshee Lal* v. *Zaraut Ali, 2 N. W., 343;* and *Bhawani Prasad* v. *Damru, I. L. R., 5 All., 197,* referred to. DURGA PRASAD *v.* MUNSI

[I. L. R., 6 All., 423

85. ——————— *Suit to enforce pre-emption to portion of property sold.*—Under a deed of sale the vendor conveyed to the purchaser five lots of land. In a suit by a third party to enforce a right of pre-emption in respect of one out of the five plots,—*Held* that he could divide the bargain and sue on the ground of pre-emption for a portion only of the property covered by the deed of sale. IZZATULLA *v.* BHIKARI MOLLA

[6 B. L. R., 386: 14 W. R., 469

RAGHUNUNDAN SINGH *v.* MAJBUTH SINGH

[6 B. L. R., 387, note: 10 W. R., 379

86. ——————— *Sale of property of which shares belonged to minors.*—The property of several co-sharers, some of whom were minors, was sold to a single purchaser, under a deed of sale, which contained a covenant by the vendors, who professed to act on behalf of themselves and the minors, that they would compensate the vendee for any loss he might incur should the minors, when they came of age, not ratify the sale. *A.* sued to enforce her right of pre-emption in respect of the lands sold. The lower Appellate Court was of opinion that *A.* could not enforce her claim of pre-emption in respect of the share of the minors; and on the Court's suggestion the plaint was amended, so as to ask for enforcement of her claim in respect only of the shares of the vendors of full age. *Held* that *A.* was bound to claim her right against all the shares, and could not enforce it in respect of some only. ABDOOL GUFOOR *v.* NURBANU

[1 B. L. R., A. C., 78: 10 W. R., 111

**MAHOMEDAN LAW—PRE-EMPTION** —*continued.*

2. PRE-EMPTION AS TO PORTION OF PROPERTY—*continued.*

**Assertion of right as to portion of property**—*continued.*

87. ——————— *Co-sharer.—Mouzahs distinct from one another.*—The plaintiffs, who were shareholders in a particular mouzah, sued to enforce a claim to a right of pre-emption upon a sale under a kobala for a particular sum of money by another shareholder of a share in the mouzah, along with other properties with which the plaintiffs had no concern, to a third person who was not a shareholder. *Held* that as the plaintiffs were entitled to claim a right of pre-emption in respect of the mouzah only, and that mouzah was distinct from the other properties sold, the suit was maintainable. ROWSHUN KOER *v.* RAM DIHAL ROY [13 C. L. R., 45

88. ——————— *Rival suits.—Suit to enforce the right in respect of a part of the property sold.*—The prior institution of a suit by rival pre-emptors in no way entitles a pre-emptor to depart from the general rule of pre-emption by suing for a portion only of the property sold. *Kashi Nath* v. *Mukta Prasad, I. L. R., 6 All., 370,* referred to. HULASI *v.* SHEO PRASAD . I. L. R., 6 All., 455

3. CEREMONIES.

89. ——— **Necessity of proof of performance of preliminary ceremonies.**—In the case of pre-emption, strict proof is necessary of the performance of the preliminaries. HOSSEINEE KHANUM *v.* LALLUN . . . W. R., 1864, 117

JADU SINGH *v.* RAJKUMAR [4 B. L. R., A. C., 171

ISSUR CHUNDER SHAHA *v.* NISAR HOSSEIN [W. R., 1864, 351

PROKAS SINGH *v.* JOGESWAR SINGH [2 B. L. R., A. C., 12

90. ——————— The right of pre-emption being a right weak in its nature, where such right is claimed under Mahomdan law, it should not be enforced except upon strict compliance with all the formalities which are prescribed by that law. ALI MUHAMMAD *v.* TAJ MUHAMMAD [I. L. R., 1 All., 283

91. ——————— *Omission to perform ceremonies.—Evidence of relinquishment of right.—Negligence.*—There are certain ceremonies to be performed in order to lay a foundation for the establishment in a Court of Law of a right of this kind, when it is menaced; and though, on the one hand, the effect of the omission to prove performance of these ceremonies is not cancelled by pleas advanced in later petitions put in during the progress of a case, just as, on the other, that omission is not of necessity evidence of a relinquishment of the right, yet, in this case, in which defendant had exhibited strange haste in some stages of the negotiations, with the apparent purpose of forestalling

**MAHOMEDAN LAW—PRE-EMPTION** —*continued.*

3. CEREMONIES—*continued.*

**Necessity of proof of performance of preliminary ceremonies**—*continued.*

plaintiff in his rights; but plaintiff's proceedings had been characterised with great negligence, if nothing worse; it was held that the plaintiff was not entitled to a decree. SURDHAREE LALL *v.* LABOO MOODEE . . . . . 25 W. R., 500

92. ——— **Acts or omissions by pre-emptor's authorised agent, Effect of.**—It is a general rule of pre-emption that any act or omission on the part of a duly authorised agent or manager of the pre-emptor has the same effect upon pre-emption as if such act or omission had been made by the pre-emptor himself. HARIHAR DAT *v.* SHEO PRASAD [I. L. R., 7 All., 41

93. ——— **Performance of ceremonies by agent or manager.**—Under Mahomedan law, the legal forms to be observed under that law by a person claiming a right of pre-emption may be observed on behalf of such person by an agent or manager of such person. ABADI BEGAM *v.* INAM BEGAM . . . . I. L. R., 1 All., 521

94. ——— **Performance of ceremonies by agent.**—*Affirmation by witnesses.—Repudiation of sale.*—According to Mahomedan law, the affirmation by witnesses need not be made by the claimant of the right of pre-emption in person, but may be made by a duly constituted agent. OJHEOONISSA BEGUM *v.* RUSTUM ALI . . . W. R., 1864, 219

95. ——— **Talab-i-mawasabat.**—*Intention to assert right.—Talab-i-ishtahad.—Demand in presence of witnesses.*—To entitle a person, otherwise favourably situated, to the right of pre-emption, two conditions must be fulfilled: first (talab-i-mawasabat), on receiving information of the sale he must immediately declare his intention to assert his right; and, secondly (talab-i-ishtahad), he must, as soon after as possible, make the demand of the vendor or purchaser, or upon the premises, and in the presence of witnesses. JHOTEE SINGH *v.* KOMUL ROY [10 W. R., 119

96. ——————— In order to sustain a claim for pre-emption in Mahomedan law, it is essential that the ceremony of talab-i-mawasabat should be properly performed. JAFFAN KHAN *v.* JABBAR MEAH . . I. L. R., 10 Calc., 383

97. ——————— *Necessity of immediate claim.*—Under Mahomedan law the "talab-i-mawasabat," or immediate claim to the right of pre-emption, should be made as soon as the fact of the sale is known to the claimant, otherwise the right is lost; and it was consequently held that the plaintiff, having failed to make the "talab-i-mawasabat" until twelve hours after the fact of the sale became known to him, had lost his right of pre-emption. ALI MUHAMMAD *v.* TAJ MUHAMMAD . I. L. R., 1 All., 283

98. ——————— *Delay in making claim.*—On hearing of a sale, the pre-emptor must im-

MAHOMEDAN LAW—PRE-EMPTION —*continued.*

3. CEREMONIES—*continued.*

Talab-i-mawasabat—*continued.*

mediately make his demand called talab-i-mawasabat. Where a pre-emptor, on hearing of the sale of a property to which he had a right of pre-emption, went to the property in dispute and there declared his right as pre-emptor,—*Held* that such delay was fatal to his claim. RAM CHARUN *v.* NARBIR MAHTON . 4 B. L. R., A. C., 216 : 13 W. R., 259

99. ——————— *Time taken to ascertain if information of sale is correct.*—According to the Mahomedan law, the mere fact of the pre-emptor taking a short time before performance of the talab-i-mawasabat for ascertaining whether the information conveyed to him was correct or not, does not invalidate his right. The Mahomedan law allows a short time for reflection before performance of the first demand. AMJAD HOSSEIN *v.* KHARAG SEN SAHU . 4 B. L. R., A. C., 203 : 13 W. R., 299

100. ——————— *Making claim standing or sitting.*—The act of a claimant rising from his seat to claim his right of pre-emption, instead of claiming it as he sat, is not a delay sufficient to entail a forfeiture of his right. MAHARAJ SINGH *v.* LALLAH BHUCHOOK LALL . W. R., 1864, 294

101. ——————— *Witnesses, Necessity of.*—Although, according to Mahomedan law books, it is not necessary, in respect to the talab-i-mawasabat, or first preliminary required to establish a right of pre-emption, that witnesses should hear the exclamation it involves, yet it does not follow that, as matter of evidence, courts of law are bound to decree a suit to establish such a right simply on the deposition of the plaintiff. ABDOOL HOSSEIN KHAN *v.* GOBIND CHANDRA SHAHA [11 W. R., 404

102. ——— Talab-i-ishtahad.—*Necessity of proof of performance.*—To establish a claim to pre-emption under the Mahomedan law, it is not enough to prove that the ceremony of talab-i-mawasabat was performed; it is also necessary to prove the talab-i-ishtahad. NARBHASE SINGH *v.* LUCHMEE NARAIN POOREE . . . . . 11 W. R., 307

103. ——————— *Necessity of finding as to performance.*—The "talab-i-ishtahad" is a preliminary act as essential as the "talab-i-mawasabat" to secure to the claimant the right of enforcing pre-emption. There should always, therefore, be a distinct finding as to whether it was properly made or not. RAZEHOODDEEN *v.* ZEENUT BIBEE [8 W. R., 463

104. ——————— *Necessity of proof of performance.*—Under the Mahomedan law it is essential to the right of pre-emption to prove the performance of the talab-i-ishtahad. BHOWANEE DUTT *v.* LOKHOO SINGH . . W. R., 1864, 60

105. ——————— *Mode or form of ceremony.—Performance.—Hindus.*—To the due performance of the ceremony of talab-i-ishtahad, it is

MAHOMEDAN LAW—PRE-EMPTION —*continued.*

3. CEREMONIES—*continued.*

Talab-i-ishtahad—*continued.*

not necessary that any particular form of words should be employed. RAMDULAR MISSER *v.* JHUMACK LAL MISSER [8 B. L. R., 455 : 17 W. R., 265

106. ——————— *Mode or form of ceremony.—Talab-i-mawasabat.*—To establish a right of pre-emption, it is necessary to show that the ceremony of talab-i-ishtahad has been observed, which requires the pre-emptor to make an affirmation, not necessarily in the precise words of the form given in the Hedaya, but in substance to the effect of declaring, before witnesses, that the earlier preliminary—*viz.*, talab-i-mawasabat—has already been performed. GIRDHAREE SINGH *v.* ROJUN SINGH [24 W. R., 462

107. ——————— *Requisites for ceremony.—Invocation of witnesses.*—To the ceremony of ishtahad or talab-i-istahad, it is essential that there should be an express invocation of witnesses. PROKAS SINGH *v.* JOGESWAR SINGH [2 B. L. R., A. C., 12

108. ——————— *Requisites for ceremony.—Declaration and invocation of witnesses.*—According to the Mahomedan law, strict adherence to the rules for the performance of the talab-i-ishtahad is especially necessary. In performing the talab-i-ishtahad, the pre-emptor must clearly declare his right and invoke witnesses. He must declare that "he has a right of pre-emption to which he has laid claim, and that he still claims it," and invokes witnesses "to bear witness therefore to the fact." JADU SINGH *v.* RAJKUMAR . 4 B. L. R., A. C., 171: 13 W. R., 177

DAYEMOOLLAH *v.* KIRTEE CHUNDER SURMAH [18 W. R., 530

109. ——————— *Requisites for ceremony.—Invocation of witnesses to demand.*—According to the Mahomedan law, it is essential to the performance of the talab-i-ishtahad that third persons should be formally called upon, either in the presence of the purchaser or on the land; or, if the vendor is in possession, in the presence of the vendor, to bear witness to the demand. GOLAKRAM DEB *v.* BRINDABAN DEB [6 B. L. R., 165 : 14 W. R., 265

110. ——————— *Performance in presence of purchaser.*—The ceremony of talab-i-ishtahad, or affirmation before witnesses, may, at the option of the pre-emptor, be performed in the presence of the purchaser only, though he has not yet obtained possession. JANGER MAHOMED *v.* MAHOMED ARJAD [I. L. R., 5 Calc., 509 : 5 C. L. R., 370

111. ——————— *Performance in presence of person in possession, vendor or purchaser.*—To establish the right of pre-emption, the talab-i-ishtahad, or affirmation before witnesses, must be performed in the presence of the person in posses-

MAHOMEDAN LAW—PRE-EMPTION —*continued.*

3. CEREMONIES—*continued.*

Talab-i-ishtahad—*continued.*

sion of the lands, whether it be the vendor or the purchaser. CHAMROO PASBAN *v.* PUHLWAN ROY [16 W. R., 3

112. ——————— *Omission to invoke witnesses.—Talab-i-mawasabat.—Ceremonies of "immediate demand," and "demand with invocation."*—A person claiming a right of pre-emption made the talab i-mawasabat in the presence of witnesses, but when doing so was neither at the place, the subject of the right of pre-emption, nor was he in the presence of the vendor or vendee. *Held*, on second appeal, that the lower Appellate Court having found that the talab-i-ishtahad was invalid on the ground that there was no evidence of a demand with invocation of witnesses having been made, the right of pre-emption could not be claimed. JADUNUNDUN SINGH *v.* DULPUT SINGH . I. L. R., 10 Calc., 581

113. ——————— *Mode of invocation of witnesses.*—In a suit to establish the right of pre-emption, where the witnesses said that on the refusal of the vendor the pre-emptor had nominated them witnesses, the lower Courts were held to have been justified in their inference that he had complied with the exigency of the Mahomedan law. SHAM LALL SAHOO *v.* AFSUROONISSA . . 22 W. R., 184

114. ——————— *Invocation of witnesses where talab-i-mawasabat is made in presence of witnesses.—Performance of talab-i-mawasabat and ishtahad.—Witnesses.*—Where the first talab (talab-i-mawasabat) is made in the presence of witnesses, and the witnesses are then called to bear testimony to the fact, it is not necessary to invoke witnesses on the occasion of the second talab (talab-i-ishtahad). *Wazid Ali Khan* v. *Hunuman Prosad, 4 B. L. R., A. C., 139*; and *Gureeboolah Khan* v. *Kebul Lall Mitter, 13 W. R., 125*, cited. KOROMALI *v.* AMIR ALI [3 C. L. R., 166

115. ——————— *Invocation of witnesses.—Claim where there are several co-sharers.—Tender of price for the land claimed.—One out of several co-sharers claiming a right to pre-emption.*—A person seeking pre-emption declared his right thereto when he first heard of the sale, in the presence of witnesses; and as soon as was possible on the same day, in the presence of the same witnesses, demanded his right from the vendors and the purchasers. *Held* that it was unnecessary that he should again state, when making his demand, or that his witnesses should testify to the fact, that he had declared his right as soon as he heard of the sale. The principle of the law of pre-emption is, that the pre-emptor should assert his right as soon as he has heard of the sale; that he should demand his right from the vendor or purchaser, or on the ground, in the presence of witnesses; and this assertion and demand may be simultaneous; but if they are not, the pre-emptor, when he makes the demand, is required to make a declaration before witnesses that he asserted his right when first he heard of the sale. NUNDO PERSHAD THAKUR *v.* GOPAL THAKUR [I. L. R., 10 Calc., 1008

116. ——————— *Necessity of immediate demand.*—To entitle a person to a right of pre-emption under Mahomedan law, it must be shown that the talab-i-ishtahad was made as soon as possible. NURADDIN MAHOMED *v.* ASGAR ALI [12 C. L. R., 312

117. ——————— *Necessity of immediate demand.*—It is not a binding rule of law that the talab-i-ishtahad by a pre-emptor, if made within a day after the receipt of intelligence of the purchase, is necessarily in time for the preservation of the right of pre-emption. The due and sufficient observance of the formality of talab-i-ishtahad as to time, is a question to be decided in each case by the Court which has to deal with the facts. JAMILAN *v.* LATIF HOSSEIN [8 B. L. R., 160 : 16 W. R., F B., 13

118. ——————— *Mode of performance.*—The personal performance of the talab-i-ishtahad, or demand for pre-emption by the pre-emptor, depends on his ability to perform it. He may do it by means of a letter or messenger, or may depute an agent, if he is at a distance and cannot afford personal attendance. WAJID ALI KHAN *v.* LALA HANUMAN PRASAD [4 B. L. R., A. C., 139 : 12 W. R., 484

IMAMUDDIN *v.* SHAH JAN BIBI [6 B. L. R., 167, note

119. ——————— *Delay in making demand.—Ceremonies of affirmation.*—A delay of one day is not such a delay as to interfere with the right of pre-emption under the Mahomedan law. The demand by affirmation should be made with the least practicable delay. The ceremony of affirmation should be carried out before either the vendor or the purchaser, or be performed on the premises. MAHOMED WARIS *v.* HAZEE EMAMOODDEEN [6 W. R., 173

120. ——————— *Delay in making demand.*—A claim to pre-emption should be made as soon as the claimant becomes aware of the completion of the sale. AJOOLHYA POOREE *v.* SOHUN LALL . . . . . 7 W. R., 428

ELAHEE BUKSH *v.* MOHAN . . 25 W. R., 9

121. ——— Performance of preliminary ceremonies.—*Expression of readiness to purchase.*—Under the Mahomedan law, when a person claims a right of pre-emption, it is necessary to the validity of his claim that he should promptly assert, after the completion of the sale, his willingness to become a purchaser. GHOLAM HOSSEIN *v.* ABDOOL KADIR . . . . . 5 N. W., 11

122. ——————— *Delay in making preliminary declaration.*—According to the Ma-

MAHOMEDAN LAW—PRE-EMPTION —*continued.*

3. CEREMONIES—*continued.*

**Performance of preliminary ceremonies** —*continued.*

homedan law of pre-emption, the first thing to be done by the claimant of pre-emption is to make the preliminary declarations. First going to his house to get the money is not a compliance with the law. MONA SINGH *v.* MOSRAD SINGH . **5 W. R., 203**

4. MISCELLANEOUS CASES.

**123. ——— Enforcement of right.**—*Delivery or registration of bill of sale.*—A contract having been entered into for sale and purchase of certain property, the plaintiff, pre-emptor, was not bound to defer the enforcement of his right of purchase till the bill of sale had been delivered or registered, or payment made. LUCHMEE NARAIN *v.* BHEEMUL DOSS . . . . **8 W. R., 500**

*See* GIRDHAREE LALL *v.* DEANUT ALI **[21 W. R., 311**

**124. ——— Offer to purchase at time of registration.**—*Sufficiency of claim.*—*Held* that the parties to pre-emption being Mahomedans must be bound by the strict conditions of law of pre-emption, and that the offer to purchase before the registrar at the time of registration of the sale-deed was not a sufficient compliance with the provisions of that law. KAREEMOODDEEN *v.* MOEIZOODDEEN KHAN **[1 Agra, 184**

**125. ——— Tender of price.**—*Necessity of tender.*—It is not incumbent on a pre-emptor to tender the price at the time of making his claim. KHOFFEH JAN BEBEE *v.* MOHOMED MEHDEE **[10 W. R., 211**

HEERA LALL *v.* MOORUT LALL . **11 W. R., 275**

**126. ——— *Statement of readiness and willingness to pay.***—In a suit for pre-emption it is unnecessary to prove a tender of the actual price paid for the property claimed, it being sufficient if the person claiming the right to pre-emption states that he is ready to pay for the land such sum as the Court may assess as the proper price for the property. NUNDO PERSHAD THAKUR *v.* GOPAL THAKUR . . . **I. L. R., 10 Calc., 1008**

**127. ——— *Lien of vendor.***—The right of the first purchaser is simply a vendor's lien,—*i.e.*, to retain the property until he has the money from the party claiming pre-emption. It is no part of the Mahomedan law that the claimant of a right of pre-emption must carry the money in his hands and tender it to the first purchaser. A right of pre-emption may be decreed in respect of land within the putti of the party claiming such right. DULBOOD SINGH *v.* MAHADEO DUTT **[2 W. R., 10**

**128. ——— *Conclusion of contract of sale.***—As soon as a contract is ratified by acceptance and the vendor has gone so far that he

MAHOMEDAN LAW—PRE-EMPTION —*continued.*

4. MISCELLANEOUS CASES—*continued.*

**Tender of price**—*continued.*

cannot legally draw back, it is time for the pre-emptor to step in. A pre-emptor is not required to tender the purchaser's price, or any price, at the time of making his demand; and so long as a party claiming a right of shuffa pays the amount which the Court considers to be the proper price, he brings himself in Court within a reasonable time. On the question of pre-emption the Court must act in strict accordance with the provisions of the Mahomedan law rather than on what it thinks just and equitable. NUBEE BUKSH *alias* GOLAM NUBEE *v.* KALOO LUSHKER **[22 W. R., 4**

**129. ——— Loss of right.**—*Claim disproved to specific land at specific price.*—The right of pre-emption is lost where there is a dispute as to the purchase-money, if the plaintiff (instead of offering by his plaint to pay the real amount, whatever it may be) claims to purchase a specific quantity of land at a specific price, and that right is shown to have no existence. ACHURBUR PANDAY *v.* BUCKSHEE RAM **[2 W. R., 38**

**130. ——— Rights of purchaser on allowance of claim.**—*Profits between time of purchase and transfer to pre-emptor.*—*Held* that a purchaser is entitled to the profits of the property purchased by him accruing between the time of purchase and subsequent transfer to a pre-emptor. BULDEO PERSHAD *v.* MOHUN . **1 Agra, Rev., 30**

MAHOMEDAN LAW—PRESUMPTION OF DEATH.

**1. ——— Missing person.**—*Evidence Act, I of 1872, s. 108.—Act VI of 1871, s. 24.*—The rule contained in section 108 of the Evidence Act governs the case of a Mahomedan who has been missing for more than seven years, when the question of his death arises in cases to which, under the provisions of section 24 of Act VI of 1871 (Bengal Civil Courts Act), the Mahomedan law is applicable. *Per* MAHMOOD, *J.*—The rule of the Mahomedan law that a missing person is to be regarded as alive till the lapse of ninety years from the date of his birth is, according to the most authoritative texts of the Mahomedan law itself, a rule of evidence and not of "succession, inheritance, marriage, or caste, or any religious usage or institution," within the meaning of section 24 of Act VI of 1871. MAZHAR ALI *v.* BUDH SINGH **[I. L. R., 7 All., 297**

**2. ——— *Right of inheritance.***—*Held* that, as under the Mahomedan law a missing person is considered "defunct" as regards others' property, and cannot inherit from others during the period allowed for his reappearance, the plaintiff, his son, and nearest relative of the widow, was entitled to get the money claimed, it being compensation for land which had been found to belong to her exclusively, and not as having descended from her husband. IMAM ALI KHAN *v.* ABDOOL ALI KHAN **[2 Agra, 28**

**MAHOMEDAN LAW—PRESUMPTION OF DEATH.—Missing person—*continued.***

3. ——————— *Position of, as to inheritance during absence.—Person in unlawful possession.—Legal heir.—Held* that, assuming the Mahomedan law to provide that the share of a missing person, which has devolved on him during his absence, is to be reserved or held in suspense until the expiration of the term after which he is to be regarded as dead, a claimant who had no title whatsoever to possession could not benefit by such provision of Mahomedan law in face of the person who would be the legal heir failing the missing person, and the possession of such unlawful holder can be disturbed by such legal heir. DOWLUT KHATOON *v.* ALI JAN [2 Agra, 59

4. ——————— *Alienation by heirs of.—Right of alienee.*—In a suit to recover possession of a share of landed property, where plaintiff claimed on the ground of purchase from the heirs of the proprietor, who had been missing for many years, and in which the defendant set up a mokurrari, and pleaded that as ninety years had not elapsed since the disappearance of the proprietor the property could not, under Mahomedan law, be inherited by his heirs, and the alienation by them was therefore invalid,—*Held* that, as plaintiff had been found in possession under the conveyance from the heirs, who did not dispute his title, the defendant, a stranger, who had failed to prove either title or possession under the mokurrari which he set up, was not in a position to advance the plea in question. *Held* that ninety years is the least period within which, according to Mahomedan law, the estate of a missing person can be alienated by his heirs. HOSSEINEE KHANUM *v.* TIJUN LALL . . . . . 14 W. R., 293

5. ——————— *Alienation of property by his heirs.—Claim of other heirs.*—A claim by the wife and daughters of a missing person to obtain possession of the shares to which the missing person would have been entitled in the estate of two brothers and a sister on surviving them, was rightly dismissed, under Mahomedan law, on the ground that the death of the missing person was not proved, and ninety years had not elapsed from his birth. A sale of the shares by *R.*, the brother of the missing person, who was in possession, was properly declared null and void. As *R.* would have excluded the wife and daughters of the missing person from inheritance, it was held that he should be allowed to retain the shares in his hands, subject to their surrender on the reappearance of the missing person. RAKHI BIBI *v.* RAHAT BIBI . . . . . 7 N. W., 191

6. ——————— *Act I of 1872, s. 108.—Act VI of 1871, s. 24.—F.*, one of the heirs to the property of his parents (the family being Mahomedans) was "missing" when they died, and subsequently, when the other heirs to such property sued his daughter *M.* for the possession of a portion of such property, *M.* set up as a defence to the suit that her father was alive, and that during his lifetime the plaintiffs could not claim his share in such portion, —*Held* by STUART, *C. J.*, and SPANKIE, *J.*, that the suit, being one to enforce a right of inheritance, must be governed by the Mahomedan law relating to a "missing" person. *Parmeshar Rai* v. *Bisheshar Singh, I. L. R., 1 All., 53*, distinguished. *Held* by STUART, *C. J.*, that, according to Mahomedan law, ninety years not having elapsed from *F.'s* birth, his share could not be claimed by the plaintiffs, but must remain in abeyance until the expiry of that period or his death was proved. *Held* by PEARSON, *J.*, and SPANKIE, *J.*, that *F.* being a "missing" person when his parents died, his daughter, according to that law, was not entitled to hold his share either as heir or trustee. HASAN ALI *v.* MAHEEBAN [I. L. R., 2 All., 625

**MAHOMEDAN LAW—SLAVERY.**

*See* SLAVERY . I. L. R., 3 Bom., 422 [12 Bom., 156

**MAHOMEDAN LAW—SOVEREIGNTY.**

——————— *Sovereign's rights as to property.*—By Mahomedan law, *semble*, the dominion of the sovereign is equally absolute and uncontrolled over all his possessions of every kind; but, *quære*, whether all his possessions are necessarily subject to the ordinary rules of inheritance and partition among descendants. A reigning Mahomedan prince may possess property held *jure coronæ*, as well as property acquired by some other title. GHULAM MUHAMMAD NAIAMUT KHAN *v.* DALE . . 1 Mad., 281

**MAHOMEDAN LAW—USURPED PROPERTY.**

——————— *Conversion of usurped property.—Right of suit for damages by party injured.*—Under Mahomedan law, where there has been a change in usurped property, the injured party has a claim to recover damages in respect of the property usurped, but cannot claim to share in the property into which it has been converted. An heir cannot therefore claim estates purchased with moneys belonging to the ancestral estate of the deceased which have been misappropriated by a co-heir, but must claim to recover his share in money. NOOR-OOL-HOSSEIN *v.* MOONEERAM . . 4 N. W., 103

**MAHOMEDAN LAW—USURY.**

1. ——————— Interest.—*Act XXVIII of 1855.*—The custom of taking interest as between Mahomedans is recognised by the Courts. *Semble,—Per* PHEAR, *J.* (dissenting from *Ram Lall Mookerjee* v. *Haran Chunder Dhur, 3 B. L. R., 308, O. C., 130*).—Act XXVIII of 1855 repealed the Mahomedan laws relating to usury. By "laws relating to usury" the Legislature meant laws affecting the rate of interest. MIA KHAN *v.* BIBI BIBIJAN [5 B. L. R., 500: 14 W. R., 308

2. ——————— *Interest on dower.*—With respect to the awarding of interest on a claim of dower by a Mostem widow, the principle of Mahomedan law will not apply. SOORMA KHATOON *v.* ATTAFFOONNISSA KHATOON . . 2 Hay, 210

## MAHOMEDAN LAW—WIFE.

1. ——— **Power of alienation.**—*Power of wife as one of several tenants-in-common to grant lease.*—The District Judge's decision that a Mahomedan married woman cannot execute a valid lease which may endure beyond her lifetime, of property of which she is one of several tenants-in-common, held bad in law. NICHHABHAI PRAGJI *v.* ISSEKHAN HAJI ABDULA KHAN
[2 Bom., 313 : 2nd Ed., 297

2. ——— **Husband and wife.**—*Presumption of ownership of property.*—Where rights of ownership had been exercised for a series of years by the husband, and never by the wife, over property which had descended from his wife's father (his own uncle), the husband having mortgaged the property and dealt with it in all respects as if he were the owner, and the wife possessing none of the documents which she would have been able to produce if she had acted as the owner, it was held that she had no such interest in the property as entitled her to maintain a suit to recover possession of it after it was sold in satisfaction of the husband's debts. OZEEROONISSA BIBEE *v.* RAMDHUN ROY . . 11 W. R., 17

## MAHOMEDAN LAW—WILL.

1. ——— **Gift operating as will.**—*Gift in contemplation of death.—Legacy.*—According to the Mahomedan law, a gift made in contemplation of death, though not operative as a gift, operates as a legacy. Ordinarily it conveys to the legatee property not exceeding one third of the deceased's whole property, the remaining two thirds going to the heirs. In the absence of heirs a will carries the whole property. EKIN BIBEE *v.* ASHRUF ALI
[1 W. R., 152

2. ——— **Invalid will.**—*Will disinheriting heirs.*—A wasi-ut-namah, or will, divesting all the property from the next heirs, is illegal under Mahomedan law. JUMUNOODDEEN AHMED *v.* HOSSEIN ALI . . . . . 2 W. R., Mis., 49

3. ——— *Will made without consent of heirs.*—A will which has never received the assent of the heirs of the testator is inoperative to alter their rights to succeed according to the Mahomedan law of inheritance. KADIR ALI KHAN *v.* NOWSHA BEGUM . . 2 Agra, 154

4. ——— *Will devising more than half estate to daughter.*—Under the Mahomedan law a person cannot devise more than one half of his estate to his daughter, and a will devising more to her is invalid. MAHOMED MUDUN *v.* KHODEZUNNISSA *alias* KHOOKEE BEBEE . 2 W. R., 181

5. ——— *Bequest by married woman.—Consent of husband.—Held* that the bequest by a married woman of the whole of her estate to her brother, without the assent of her husband, was invalid according to the Mahomedan law. MUHAMMAD *v* IMAMUDDIN
[2 Bom., 53 : 2nd Ed., 50

6. ——— *Legacy to one of several heirs.—Want of consent of others.*—A legacy cannot be left to one of a number of heirs without the consent of the rest. ABEDOONISSA KHATOON *v.* AMEEROONISSA KHATOON. . 9 W. R., 257

## MAHOMEDAN LAW—WILL.—Invalid will—*continued.*

7. ——— *Power of testator to interfere with devolution of property.*—By the Mahomedan law, a testator may bequeath one third of his estate to a stranger, but cannot leave a legacy to one of his heirs without the consent of the rest. A will purporting to give one third of the testator's property to one of his sons as his executor, to be expended at the son's discretion in undefined pious uses, and conferring on such son a beneficial interest in the surplus of such third share,—*Held* to be an attempt to give, under colour of a religious bequest, a legacy to one of the testator's heirs, and to be invalid without the confirmation of the other heirs. KHAJOOROONNISSA *v.* ROUSHAN JEHAN
[I. L. R., 2 Calc., 184 : 26 W. R., 36
L. R., 3 I. A., 291

8. ——— *Will made without consent of heirs.*—Plaintiffs claimed as purchasers from the daughters (as heirs) of a Mahomedan. The son, intervening, was made a party to the suit, and set up a will executed by his father, under which a large portion of the estate was endowed for charitable purposes, and the rest divided among the heirs. The lower Appellate Court found the will to be *bonâ fide*, and dismissed the suit. *Held* that the will having been put in issue, the lower Appellate Court should have found whether the heirs were consenting parties; for the bequest by a Mahomedan of more than one third of his estate without the consent of his heirs is invalid. BABOOJAN *v.* MAHOMED NUROOL HUQ . 10 W. R., 375

9. ——— *Suit for share of property against persons in possession under will.—Onus probandi.*—In a suit for an undivided share of property claimed by the plaintiffs as heirs of the deceased owner, where the defendants pleaded possession under a wasi-ut-namah, or will,—*Held* that the Court could not tell how far the will was valid or invalid under the Mahomedan law, which allows a testator to give away from his heirs only one third of his property, and therefore the onus was on the defendant to furnish a complete statement of the testator's property at the time of his death; failing which the plaintiff's claim must prevail. SUKOOMUT BIBEE *v.* WARRIS ALI . . 22 W. R., 400

10. ——— *Consent of heirs.—Consent before testator's death.*—By Mahomedan law the consent given by heirs to a testator's will before his death is no assent at all; to be valid it must be given after the testator's death. NUSRUT ALI *v.* ZEINUNNISSA . . . 15 W. R., 146

11. ——— *Assent given after testator's death.*—According to Mahomedan law, the consent of the heirs can validate a testamentary disposition of property in excess of one third of the property of the testator, if the consent be given after the death of the testator. But if the consent be given during the lifetime of the testator it will not

**MAHOMEDAN LAW—WILL.—Invalid will—*continued.***

render valid the alienation, for it is an assent given before the establishment of their own rights. CHERACHOM VITTIL AYISHA KUTTI UMAH *v.* VALIA PUDIAKEL BIATHU UMAH . . **2 Mad., 350**

**12.** ——— *Consent of heiress to will.—Evidence of consent.*—To establish the consent of a Mahomedan heiress to a will, evidence of some act done at the time of its execution, or some act done subsequently, amounting to a ratification of it, is necessary. The Court will not presume the consent of a Mahomedan heiress to a will, even although she continues to reside in a dwelling-house assigned to her by the will in question. RAMCOOMER CHUNDER ROY *v.* FAQUEEROONISSA BEGUM. FAQUEEROONISSA BEGUM *v.* SUFDAR ALI **[1 Ind. Jur., O. S., 119**

**13.** ——— *Consent of heir.—Evidence of consent.*—According to Mahomedan law, a will is valid as against an heir if he affixed his signature to it as a consenting party thereto without undue influence. KHADEJAH BIBEE *v.* SUFFUR ALI . . . . **4 W. R., 36**

**14.** ——— **Form of will.**—*Nuncupative will.—Evidence of will.*—The rule that by Mahomedan law a will does not require to be in writing is universal. The omission to write the wish, where there was ample time for that purpose, may throw doubt on the fact of the words being used as the expression of the testator's last will. But if the Court finds that the testator expressed his will, and that this was his last will, the omission to render it into writing will not deprive it of legal effect. TAMEEZ BEGUM *v.* FURHUT HOSSEIN **[2 N. W., 55**

**15.** ——— *Nuncupative will.—Law of Shiah sect.*—A nuncupative will by a Mahomedan of the Shiah sect bequeathing property less in amount than one third of his estate held valid by the Mahomedan law, and effect was given to the bequests. *Semble,*—Such verbal bequests would have been valid even if beyond a third of the testator's estate, provided the heirs concurred in the bequests. AMINOODDOWLAH *v.* ROSHUN ALI KHAN **[5 Moore's I. A., 199**

**16.** ——— *Proof of intention where purpose not completed.*—Where a testatrix devises a certain disposition of her whole property in the course of a wajib-ul-urz relating to only a portion of it, and independent testimony of her intention to make this disposition was produced,—*Held* that the disposition was valid against a claim of possession set up by a rival claimant. MAHOMED ALTAF ALI KHAN *v.* AHMED BUKSH **[25 W. R., 121**

**17.** ——— *Assignment to take effect on death.—Sale.*—An assignment of his property made by a Mahomedan in favour of his widow and his two sons, reserving to himself full power over it during his life, and restricting the son's right to alienate during their mother's life, as

**MAHOMEDAN LAW—WILL.—Form of will—*continued.***

she was to enjoy it in lieu of her dower, held to be a disposition of a testamentary nature, and void of the requisites of a sale under the Mahomedan law. MOGUL BEGUM *v.* FUKEERUN BEBEE . **3 Agra, 288**

**18.** ——— **Construction of will.**—A Mahomedan lady made a will disinheriting her nearest relations and leaving her whole estate to her nephew "Nuslun bad nuslun battun bad battun" (from generation to generation). *Held* that the devise to the nephew was absolute to him, and did not extend to his sons in case of his death before his aunt. OOMUTOONNISSA BEEBEE *v.* OOREEFOONISSA BEEBEE . . . . . **4 W. R., 66**

**19.** ——— *Disposition of estate among sharers.—Words of duration of estate not denoting more than interest for life.—Construction.—Restriction upon alienation.*—Words such as "always" and "for ever," used in an instrument disposing of property, do not in themselves denote an extension of interest beyond the life of the person named as taking, their meaning being satisfied by the interest being for life. An instrument in the nature of a will, made by a Mahomedan, gave shares in his property to his surviving widow, son, and grandchildren, and devoted a share to charitable purposes. It directed that his son "should continue in possession and occupancy of the full sixteen annas of all the estates.....All the matters of management in connection with this estate should necessarily and obligatorily rest 'always' and 'for ever' in his hands." It also, with the express object of keeping the property in the family, attempted to restrict alienation by the sharers. There were other provisions to the same effect in regard to the management by his son, who retained it till his death. The defendant, who was a son of that son, having claimed to retain possession of the property in order to carry out the provisions of the will,—*Held* that, on its true construction, the plaintiff, a sharer under it, was entitled to the full proprietary right in, and to the possession of, her share, notwithstanding the above expressions in the will, and the attempt to control alienation by the sharers. MUHAMMAD ABDUL MAJID *v.* FATIMA BIBI . . **I. L. R., 8 All., 39 [L. R., 12 I. A., 159**

**20.** ——— *Bequest to persons not in existence at testator's death.*—A Mahomedan testator who died in 1861 by his will left his property in equal fourth shares to his second and third sons *V.* and *E.*, to the lawful son (if any) of his eldest son *M*, and to his (the testator's) brother *A*. His eldest son *M.* he disinherited. He directed that the property was not to be divided until *V.* and *E.* had attained the age of twenty, and as to the share of the lawful son of *M.*, it was to be held in trust until such son should reach the age of twenty. At the time of the testator's death no son of *M.* was living. Shortly after his death a son was born to *M.*, but he lived only for a few months. The testator's brother *A.* was appointed executor of the will. In 1878 *V.* and *E.* sued the executor *A.* and his son *S.* for an account and division of the pro-

**MAHOMEDAN LAW—WILL.—Construction of will—*continued.***

perty, and by a consent-decree passed in 1881 three fifths of the property were given to *V.* and *E*, and the remaining two fifths to *A.* and *S.* The estate was duly divided in accordance with the decree, and the parties got possession of their respective shares. In February 1884 another son was born to *M.*, and in May 1884 the infant brought this suit by his father and next friend, claiming to be entitled, on his attaining the age of twenty, to one third of the property received by *V.* and *E.* under the consent-decree. *Held* that the plaintiff could not recover, not having been in existence at the date of the testator's death. According to Mahomedan law as well as Hindu law, persons not in existence at the death of a testator are incapable of taking any bequest under his will. ABDUL CADUR HAJI MAHOMED *v.* TURNER (OFFICIAL ASSIGNEE)

**[I. L. R., 9 Bom., 158**

**21.** ——————— *Charitable bequest.—Statute 43 Eliz., c. 4.—"Dharm," Meaning of.*—In the will of a Khoja Mahomedan, written in the English language and form, a gift of a fund "to be disposed of in charity as my executor shall think right" is a valid charitable bequest, and it will be referred to the proper officer of the Court to settle a scheme for the application of the fund to charitable objects by analogy to Act 43 Elizabeth, Cap. 4. Where, however, the will is in the native language, and the word "dharm" or "daram" is used, the word is held too vague and uncertain for the gift to be carried into effect by the Court, the Court dharm or daram including many objects not comprehended in the word "charity" as understood in English law. GANGBHAI *v.* THAVAR MULLA . **1 Bom., 71**

**22.** ——————— *Invalid gift for want of assent of heirs.*—A Mahomedan by his will bequeathed the rents of a certain house in trust for his children, and directed that, after the death of the last surviving child, such rents should be paid to the Committee of the District Charitable Society. *Held* that, as the gift to the children being a gift to the heirs of the testator to which there was no assent was invalid, the gift to the District Charitable Society also failed. FATIMA BIBEE *v.* ABIFF ISMAILJEE BHAM . . . **9 C. L. R., 66**

**23.** ——————— *Prohibition of alienation or partition.*—A Mahomedan testator by will decreed that his moveable estate should not be divided or alienated by any of his heirs, and directed his executor to appropriate the net income, according to a schedule annexed to his will, among certain specified persons divided into two classes, *viz.*,—those who took and those who did not take by inheritance. *Held* that the intention of the testator was to endeavour to prevent any partition of the estate, and not to convert his heirs-at-law into mere annuitants taking grants from him. The executor held the estate in trust to pay the profits in certain defined shares to the heirs, and their representatives could not plead adverse possession against them so as to bar their claims by lapse of time. KHAJOORUNISSA *v.* ROHEEMUNNISSA . . **17 W. R., 190**

**MAHOMEDAN LAW—WILL—*continued.***

**24.** ——————— **Executor.**—*Right to nominate successor.*—Under Mahomedan law an executor is entitled to nominate a successor to carry out the purposes of the will under which he was made an executor. HAFEEZ-OOR-RAHMAN *v.* KHADIM HOSSEIN . . . . . **4 N. W., 106**

**25.** ——————— *Khoja Mahomedan administrator with the will annexed.—Executor, Powers of.*—The powers of a Khoja Mahomedan executor or administrator, like those of a Cutchi Mahomedan executor or administrator, seem to be generally limited to recovering debts and securing debtors paying such debts. Where a will gave the executor full powers with regard to the payment of the testator's debts,—*Held* that an administrator with the will annexed, who was a Khoja Mahomedan, succeeded to those powers, and, in a suit brought against him as such administrator by an alleged creditor of the testator's estate, represented all the persons interested in the estate. AHMEDBHOY HUREIBHOY *v.* VULLEEBHOY CASSUMBHOY

**[I. L. R., 6 Bom., 703**

**26.** ——————— *Infidel executor.*—The appointment by the will of a Mahomedan of an infidel executor does not invalidate the will. All the acts of such an executor, and his dealings with the property under the will, until he is removed and superseded by the Civil Court, are good and valid. *Quære,*—Whether, if an application were made by a person interested in the will to have the infidel executor removed, and a proper person appointed in his place, the application would be granted. JEHAN KHAN *v.* MANDY

**[1 B. L. R., S. N., 16 : 10 W. R., 185**

**MAINPRIZE.**

——————— *Power of High Court to issue writ of.*—A writ of mainprize could only be issued where the party applying for it was bailable, and had offered security, but bail had been refused: it could not be issued to a prisoner confined under Bengal Regulation III of 1818, which authorises his detention absolutely and unconditionally, and gives him no right to demand to be released on bail. The writ is one which could be issued only on the Common Law side of the Court of Chancery in England. The power of the Common Law side of the Court of Chancery to issue such writ was not conferred on the Supreme Court, nor is there anything in the Charter of the High Court to give that Court power to issue it. IN THE MATTER OF AMEER KHAN . **6 B. L. R., 456**

**MAINTENANCE.**

*See* CASES UNDER CHAMPERTY.

*See* CONTRACT ACT, S. 23—ILLEGAL CONTRACTS—GENERALLY.

**[I. L. R., 5 Calc., 4**

*See* HINDU LAW—ALIENATION—ALIENATION BY FATHER.

**[I. L. R., 3 Calc., 214**

**MAINTENANCE**—*continued.*

*See* HINDU LAW—INHERITANCE—ILLEGITIMATE CHILDREN.
[I. L. R., 1 Bom., 97
4 W. R., P. C., 132: 7 Moore's I. A., 18

*See* CASES UNDER HINDU LAW—MAINTENANCE.

*See* JURISDICTION OF CIVIL COURT—SOVEREIGN PRINCES.
[I. L. R., 9 Calc., 535
12 C. L. R., 473

*See* CASES UNDER MAHOMEDAN LAW—MAINTENANCE.

*See* PARTIES—PARTIES TO SUITS—MAINTENANCE, SUITS FOR—
[I. L. R., 2 Bom., 140
I. L. R., 7 Mad., 428

——— **future, Attachment of—**

*See* CASES UNDER ATTACHMENT—SUBJECTS OF ATTACHMENT—MAINTENANCE.

——— **Grant in lieu of—**

*See* RESUMPTION—RIGHT TO RESUME.
[I. L. R., 3 Calc., 793
I. L. R., 5 Calc., 113

——— **Grant of money in lieu of, power of widow to dispose of—**

*See* HINDU LAW—WIDOW—POWER OF WIDOW—POWER OF DISPOSITION OR ALIENATION . I. L. R., 1 Mad., 166

——— **Ground for stopping—**

*See* CUSTODY OF CHILDREN.
[I. L. R., 4 Calc., 374

**MAINTENANCE, ORDER OF CRIMINAL COURT FOR—**

*See* APPEAL IN CRIMINAL CASES—CRIMINAL PROCEDURE CODES.
[7 W. R., Cr., 10
2 Ind. Jur., N. S., 88

*See* MAGISTRATE, JURISDICTION OF—APPEARANCE OF JURISDICTION ON PROCEEDINGS . 22 W. R., Cr., 30

*See* MAGISTRATE, JURISDICTION OF—RETRIAL OF CASES . 1 C. L. R., 89

*See* RES JUDICATA—ADJUDICATIONS.
[I. L. R., 5 All., 224

*See* REVISION—CRIMINAL CASES—MISCELLANEOUS CASES . 5 Bom., Cr., 81

1. ——— **Jurisdiction.**—*Criminal Procedure Code (Act X of 1882), s. 488.—"The District Magistrate," Meaning of the expression.—Complaint by a wife against her husband for maintenance.*—A complaint under section 488 of the Criminal Procedure Code (Act X of 1882) falls within the cognisance of the Magistrate competent to entertain such complaint, and within the local limits of whose jurisdiction the husband or the father is actually residing

**MAINTENANCE, ORDER OF CRIMINAL COURT FOR.—Jurisdiction**—*continued.*

at the date of such complaint. The expression "The District Magistrate, a Presidency Magistrate, a Subdivisional Magistrate, and a Magistrate of the first class" in section 488 means the Magistrate of the particular district in which the person resides against whom such a complaint is made. IN RE THE PETITION OF FAKRUDIN .
[I. L. R., 9 Bom., 40

2. ——— *Criminal Procedure Code, 1872, s. 536.—Former application refused at another place.*—A Magistrate of the first class has, as such, power to pass an order under the provisions of section 536 of the Code of Criminal Procedure, notwithstanding he may not be empowered to take cognisance of offences without complaint. The petitioner, a resident of Cawnpore, was summoned to Allahabad to answer an application for the maintenance of his children. He was ordered to make them a monthly allowance. A somewhat similar application had been made at Cawnpore, which was rejected on the ground of jurisdiction. *Held* that the jurisdiction of the Magistrate who disposed of the case was not barred by the circumstance of the petitioner being resident at Cawnpore, or of the former application having been rejected. IN THE MATTER OF OF THE PETITION OF TODD . . 5 N. W., 237

3. ——— **Procedure in maintenance cases.**—*Criminal Procedure Code, 1872, s. 536.—Mode of recording evidence.*—Cases under Act X of 1872, section 536, are not in the nature of summary trials, but require the usual procedure laid down for summons cases, and that the evidence be recorded in full as required by section 335. HURKISHORE MALO *v.* BHAROTI JELYANI . . 24 W. R., Cr., 61

4. ——— **Proof of charge.**—*"Due proof."—Criminal Procedure Code, 1861, s. 316, Order under.*—Before an order under section 316 of the Code of Criminal Procedure for the maintenance of a wife or child can be passed against a person, the charge must be legally proved against him, the words "due proof" in that section meaning legal proof on oath. GONDA *v.* PYARI DOSS GOSSAIN
[13 W. R., Cr., 19

5. ——— *Nature of evidence.—Ground for making order.*—An order made by a Magistrate under section 316 of the Code of Criminal Procedure must be founded upon proof in the same proceedings, and not upon knowledge acquired by him in some other case. LOPOTEE DOMNEE *v.* TIKHA MOODAI . . 8 W. R., Cr., 67

6. ——— **Application for maintenance.**—*Application by wife of Christian who had reverted to Hinduism and married again.*—The rejection of an application for maintenance made by the wife of a Christian who had reverted to Hinduism and married a second wife is not warranted by the decision in *Anonymous Case, 3 Mad., Ap. 7.* ANONYMOUS CASE . . . . 4 Mad., Ap., 3

7. ——— **Marriage, Proof of.**—*Karao marriage, Validity of.—Legitimacy of offspring of.*

**MAINTENANCE, ORDER OF CRIMINAL COURT FOR.—Marriage, Proof of—*continued.***

—*Right to maintenance.*—A woman of the Jat caste applied under section 316 of the Code of Criminal Procedure for an order of maintenance. As she had only gone through the ceremony of "Karao" with her alleged husband, the Joint Magistrate rejected her application. His order was set aside on reference, a "Karao" marriage among the Jats being held valid, and the offspring of such unions being entitled to inherit. QUEEN *v* BAHADUR SINGH **[4 N. W., 128**

**8. ———— Ground for allowing maintenance.**—*Inability to live together.*—The inability of a husband and wife to agree to live together is no ground for decreeing a separate maintenance to the wife. JESMUT *v.* SHOOJAUT ALI **[6 W. R., Cr., 59**

**9. ———— *Criminal Procedure Code, 1872, s. 536.*—*Separate maintenance on ground of ill-treatment.***—The proviso to section 536 of Act X of 1872 does not authorise a Magistrate to entertain an application for separate maintenance, on the ground of ill-treatment, from a wife whose husband has not neglected or refused to maintain her, but who has of her own accord left her husband's house and protection, and to order an allowance to be paid to such wife on evidence of ill-treatment. IN THE MATTER OF THE PETITION OF THOMSON **[6 N. W., 205**

**10. ———— Offer to maintain wife.**—*Criminal Procedure Code, 1872, s. 536.*—*Refusal to cohabit.*—An offer by a Hindu, having two wives, to maintain his first wife by allowing her to live in his house and by supplying her with grain to be cooked and eaten separately, coupled with a refusal to live with her as husband and wife, does not come within the meaning of the proviso to section 536 of the Code of Criminal Procedure, 1872. MARAKKAL *v.* KANDAPPA GOUNDAN **[I. L. R., 6 Mad., 373**

**11. ————Refusal by Hindu wife to live with husband for sufficient reason.**—*Criminal Procedure Code, 1882, s. 488.*—*Second marriage by husband.*—A Hindu wife having applied for an order for maintenance against her husband, the husband offered to maintain her in his house, but the offer was refused on the ground that the husband had, without cause, married a second wife. The Magistrate ordered the husband to pay a monthly sum by way of maintenance. *Held* that the fact that the husband had married a second wife was not a sufficient reason, within the meaning of section 488 of the Code of Criminal Procedure, to justify the order. ARUMUGAM *v.* TULUKANAM **[I. L. R., 7 Mad., 187**

**12. ———— Wife not permitted to live with husband.**—*Criminal Procedure Code, 1872, s. 536.*—In a case in which a Magistrate made an order under section 536, Criminal Procedure Code,

**MAINTENANCE, ORDER OF CRIMINAL COURT FOR.—Wife not permitted to live with husband—*continued.***

1872, directing the husband to pay a monthly sum for the maintenance of his wife, the High Court set aside the order on the ground that it appeared that the husband had not been called upon to maintain the wife, who had up to that time lived with her father, and that the father had refused to let the wife live with her husband without receiving money from him. An order under section 536 cannot be made by a Magistrate of the second class. SOMREE *v.* JITUN SONAR . . . **22 W. R., Cr., 30**

**13. ———— Ground for cancelling order.**—*Proof of adultery.*—It is open to a husband upon whom an order to make an allowance for the maintenance of his wife has been made under section 316, Criminal Procedure Code, 1869, after such order has been made to prove that his wife is living in adultery; and upon such proof a Magistrate is justified in cancelling such order for maintenance. CHAKU *v.* ISHVAR BHUDAR . . . **8 Bom., Cr., 124**

**14. ———— Alteration or withdrawal of order.**—*Divorce.*—*Criminal Procedure Code (Act X of 1872), s. 536.*—An order for maintenance had been made under section 536, Act X of 1872, against a Mahomedan, and came before the Magistrate on petition from the wife for the purpose of being enforced. The Magistrate called on the husband to show cause why the order should not be enforced, and the husband appeared, and in the Magistrate's presence divorced his wife by words sufficient by Mahomedan law for that purpose. *Held*, the Magistrate should have enforced the order until application was made by the husband under section 537 for alteration of the order owing to the "change of circumstances" which had occurred. The husband was bound to pay maintenance up to the time of divorce. *Quære*,—Whether what occurred was such a change of circumstances within section 537 as would justify an alteration or withdrawal of the order. NEPOOR AURUT *v.* JURAI **[10 B. L. R., Ap., 33 : 19 W. R., Cr., 73**

**15. ———— *Presidency Magistrates' Act (IV of 1877), ss. 234, 235.*—*Effect of divorce on maintenance order.***—A Presidency Magistrate is competent to stay an order for maintenance granted under section 234 of Act IV of 1877, and to refuse to issue his warrant under the 3rd clause of that section, and to try all questions raised before him which affect the right of a woman to receive maintenance. There can be no distinction raised between a dissolution of marriage obtained under the Indian Divorce Act and a dissolution obtained under the Mahomedan law. It is only on proof of the existence of the relationship of husband and wife that a Magistrate can make an order under section 234 granting maintenance to a wife; but where proof has been given that such relationship has ceased to exist, he may stay an order already made under that section. ABDUR ROHOMAN *v.* SAKHINA. SOBHAN *v.* SHUBRATON. OSSUFF *v.* SHAMA . **I. L. R., 5 Calc., 558 : 5 C. L. R., 21**

MAINTENANCE, ORDER OF CRIMINAL COURT FOR—*continued.*

16. ——— **Effect of maintenance order on right of divorce.**—*Presidency Magistrates' Act (IV of 1877), s. 234.—Borah Mahomedan sect.—Husband and wife.*—An order made under section 234 of Act IV of 1877 by the Presidency Magistrate directing a Borah Mahomedan husband of the Imami sect to pay a sum monthly for the maintenance of his wife belonging to the Hanafi sect, does not deprive the husband of his right to divorce his wife, and after such divorce the Magistrate's order can no longer be enforced. IN RE ABDUL ALI ISHMAILJI . . . I. L. R., 7 Bom., 180

Also so held with regard to an order under section 10 of the Police Amendment Act, XLVIII of 1860. IN RE KASAM PIRBHAI . . 8 Bom., Cr., 95

17. ——— *Act X of 1872 (Criminal Procedure Code), s. 536.—Mahomedan law.—Divorce.—"Iddat."*—An order for the maintenance of a wife, passed under chapter XLI of Act X of 1872, becomes inoperative, in the case of a Mahomedan, by reason of his lawfully divorcing his wife, and thus putting an end to the conjugal relation, but it does not become so before the expiration of the divorced wife's "iddat." *Abdur Rohoman* v. *Sakhina, I. L. R., 5 Calc., 558; In re Kasam Pirbhai, 8 Bom., Cr., 95;* and *Luddun Sahiba* v. *Kamar Kudar, I. L. R., 8 Calc., 736;* Madras High Court Proceedings, 2nd December 1879; referred to and followed. IN THE MATTER OF THE PETITION OF DIN MUHAMMAD . . I. L. R., 5 All., 226

*See* LARAITI v. RAM DIAL [I. L. R., 5 All., 224

18. ——— **Effect of decree of Civil Court on order for maintenance.**—*Decree in suit for restitution of conjugal rights.*—An order for maintenance ceases to have any effect after the order of a Civil Court in a suit for restitution of conjugal rights by the husband giving him a decree. LUTPOTEE DOOMONY v. TIKHA MOODOI [13 W. R., Cr., 52

19. ——— *Order as to paternity of child.*—The order of a Civil Court as to the paternity of a child was held to have no effect on a contrary order of the Criminal Court making the putative father, whom the order of the Civil Court had exonerated, liable for maintenance. SUBAD DOMNI v. KATIRAM DOME . 20 W. R., Cr., 58

20. ——— **Effect of decree of Civil Court on right to apply for maintenance.**—*Decree of Civil Court refusing to enforce agreement for maintenance.*—A decision of the Civil Court, refusing to enforce a contract or agreement against a man for the maintenance of a woman, cannot conclude either the woman from applying, or a Magistrate from making an order, under section 316 of the Code of Criminal Procedure, 1861, for the maintenance of their illegitimate daughter. IN THE MATTER OF THE PETITION OF MEISLEBACH [17 W. R., Cr., 40

MAINTENANCE, ORDER OF CRIMINAL COURT FOR—*continued.*

21. ——— **Grounds for releasing person from obligation to support illegitimate child.**—The circumstance that the father of an illegitimate child is sixteen years old only, and still studying at school, is not by itself a sufficient reason for holding him excused from the necessity of providing for his illegitimate offspring. The law requires that the person on whom the order of maintenance is issued must have sufficient means to support the child. QUEEN ON THE INFORMATION OF NARAIN KOER v. ROSHUN LALL . . . 4 N. W., 123

22. ——— **Willingness of husband to take charge of children on conditions.**—*Criminal Procedure Code (Act XXV of 1861), s. 316.*—On an application by a wife for maintenance under section 316, Act XXV of 1861, the Magistrate held she had failed to establish her right of maintenance under that section, but he awarded maintenance to her for her two infant children, though the husband stated he was willing to take charge of them, provided they lived with him. *Held,* the order was illegal. PANCHUDAS v. SHUDHAMAYI [8 B. L. R., Ap., 19: 16 W. R., Cr., 72

23. ——— **Order for maintenance of unborn child.**—*Criminal Procedure Code, 1861, s. 316.*—No order can be passed under section 316 of the Criminal Procedure Code, 1861, for the maintenance of an unborn child. LARLEE v. BUNSEE DITCHIT . . . . . 3 N. W., 70

24. ——— **Order with reference to husband's means.**—*Criminal Procedure Code, 1861, s. 317.*—The proceedings of a Magistrate awarding the payment of a certain sum of money per mensem for maintenance with reference to the means of the husband were held to be legal. If the husband is aggrieved, he ought to apply to the Magistrate under section 317, Code of Criminal Procedure. GOYAMONEY SURINEE v. MOHESH CHUNDER SHAHA [9 W. R., Cr., 1

25. ——— **Prospective order for increased maintenance as child gets older.**—*Criminal Procedure Code, 1861, s. 316.*—An order made under section 316 of the Criminal Procedure Code, fixing a sum for the maintenance of a child, containing a prospective order for an increase of the amount awarded as the child grows older, is unauthorised by the law. MUNGLO v. JUMNA DASS [2 N. W., 454

26. ——— **Order at progressively increasing rate.**—*Criminal Procedure Code (Act X of 1882), ss. 488, 489.*—A Magistrate has no power, under section 488 of the Code of Criminal Procedure, to make an order for maintenance at a progressively increasing rate. He may, however, under section 489, from time to time alter the rate of the monthly allowance granted as maintenance under section 488. UPENDRA NATH DEAL v. SOUDAMINI DASI . . . . I. L. R., 12 Calc., 585

**MAINTENANCE, ORDER OF CRIMINAL COURT FOR**—*continued.*

27. ——— **Security for performance of order.**—*Criminal Procedure Code, 1872, s. 536.—Power to take security for prevention of default.*—In making an order for maintenance under the Code of Criminal Procedure, section 536, a Magistrate has no power to take security for possible default. KANOO SOUDAGUR *v.* ALABUNDEE BEWA [24 W. R., Cr., 72

28. ——— **Agreement by husband to maintain wife.**—*Criminal Procedure Code, 1872, s. 536.*—An agreement by a husband to maintain his wife by giving her a house and jewels, and by delivering to her annually a certain quantity of grain and money, cannot be made the subject of an order under section 536 of the Code of Criminal Procedure, 1872, nor enforced under the provisions of that section. VIRAMMA *v.* NARAYYA [I. L. R., 6 Mad., 283

29. ——— **Question as to right of guardianship.**—*Criminal Procedure Code, 1872, ss. 536, 538.—Custody of child.*—In determining questions under chapter XLI of Act X of 1872, as to the maintenance of wives and families in certain cases, a Magistrate has no power to enter into any question as to the lawful guardianship of a child. LAL DAS *v.* NEKUNJO BHAISHIANI . I. L. R., 4 Calc., 374

30. ——— **Effect of order for maintenance.**—*Suit for maintenance.*—Section 316 of Act XXV of 1861 is no bar to a suit by a wife against her husband for maintenance. LALLAH GOPEENATH *v.* JEETUN KOER . . 6 W. R., 57

31. ——— **Mode of enforcing order for accumulated arrears of maintenance.**—*Criminal Procedure Code, 1872, s. 536.*—There is nothing in section 536 of the Criminal Procedure Code, 1872, to render the levy of accumulated arrears of maintenance by a single warrant illegal. ANONYMOUS . . . . 7 Mad., Ap., 37

32. ——— **Warrant for collection of arrears of maintenance.**—*Criminal Procedure Code, 1872, ss. 536, 538.*—Notwithstanding the provisions of section 538 of the Code of Criminal Procedure, the Magistrate who has made an order for maintenance under section 536 may issue a warrant for collection of arrears of maintenance when the husband is out of his jurisdiction. QUEEN *v.* KARRI PAPAYAMMA . I. L. R., 4 Mad., 230

33. ——— **Mode of enforcing order.**—*Criminal Procedure Code, 1869, s. 316.*—The issue of a warrant under section 316 of the Code of Criminal Procedure is permissible for every breach of an order of maintenance made under that section, but there seems no ground for saying that a defendant can get out of his liability for any payment by the failure to issue a warrant for the levy of that payment. The result of issuing it for an aggregate of payments is that one month's imprisonment would alone be awardable in default. ANONYMOUS [6 Mad., Ap., 23

**MAINTENANCE, ORDER OF CRIMINAL COURT FOR**—*continued.*

34. ——— **Imprisonment for default of payment.**—*Criminal Procedure Code, s. 488.—Subsequent offer to pay.—Sentence absolute.*—A sentence of imprisonment awarded under section 488 of the Code of Criminal Procedure for wilful neglect to comply with an order to pay maintenance is absolute, and the defaulter is not entitled to release upon payment of the arrears due. BIYACHA *v.* MOIDIN KUTTI . . . I. L. R., 8 Mad., 70

**MAINTENANCE, SUIT FOR—**

*See* DECLARATORY DECREE, SUIT FOR—MISCELLANEOUS SUITS . 9 B. L. R., 11

*See* CASES UNDER HINDU LAW—MAINTENANCE.

*See* LIMITATION—STATUTES OF LIMITATION—LIMITATION ACT, 1871, s. 1. [I. L. R., 3 Calc., 331

*See* CASES UNDER LIMITATION ACT, 1877, ART. 128.

*See* CASES UNDER MAHOMEDAN LAW—MAINTENANCE.

*See* RES JUDICATA—ESTOPPEL BY JUDGMENT . I. L. R., 9 Calc., 945 [12 C. L. R., 473

*See* CASES UNDER SMALL CAUSE COURT, MOFUSSIL — JURISDICTION — MAINTENANCE.

——— **Suit for reduction of—**

*See* HINDU LAW—MAINTENANCE—FORM OF ALLOWANCE AND CALCULATION OF AMOUNT . I. L. R., 1 All., 594 [I. L. R., 8 Mad., 94

**MAJORITY ACT, IX OF 1875.**

*See* MAJORITY, AGE OF— [I. L. R., 7 All., 490

——— **s. 2.**

*See* MAJORITY, AGE OF— [I. L. R., 7 All., 763

1. ——— *Minor.—Mahomedan law.—Capacity to contract.—Capacity to sue.—Civil Procedure Code, 1877, ch. XXXI, ss. 440-464.*—Section 2 of Act IX of 1875 refers only to the capacity to contract, which is limited by section 11 of the Contract Act, and not to the capacity to sue, which is purely a question of procedure and regulated by the Civil Procedure Code, chapter XXXI. PUYIKUTH ITHAYI UMAH *v.* KAIRHIRAPOKIL MAMOD . . . . I. L. R., 3 Mad., 248

2. ——— **s. 2, cl. b.**—*Minor, Custody of.—Guardian.—Change of religion.*—A Brahman boy, sixteen years of age, having left his father's house, went to and resided in the house of a missionary, where he embraced Christianity and was baptised. In a suit by the father to recover possession of his son from the missionary,—*Held* that the question whether the

**MAJORITY ACT, IX OF 1875, s. 2, cl. b.** —*continued.*

boy was a minor was to be decided, not according to Hindu law, but by Act IX of 1875; (2) that the claim was not affected by section 2, clause (*b*), of that Act; (3) and that the father was entitled to a decree that his son should be delivered into his custody. READE *v.* KRISHNA . **I. L. R., 9 Mad., 391**

——— **s. 3.**

*See* ACT XL OF 1858, s. 3.

**[I. L. R., 9 Calc., 901**
**I. L. R., 8 Calc., 714**

**1.** ——— *Testamentary guardian obtaining probate.—"Guardian appointed by Court."* —Where a person who by his father's will is made guardian of his minor brother, applies for and obtains probate of the will, the grant of probate only establishes the authority of his appointment. Such a guardian is not one "appointed by a Court of Justice" within the meaning of clause 1, section 3, Act IX of 1875, and the minor attains majority on his completing the age of eighteen years. JOGESH CHUNDER CHUCKERBUTTY *v.* UMATARA DEBYA **[2 C. L. R., 577**

**2.** ——— *Age of majority.—Order of Court under Act XL of 1858 appointing guardian, Effect of.*—In a suit in Calcutta against one of the makers of a joint promissory note executed in Calcutta on the 9th June 1877, the defendant, who was a Mahomedan, pleaded infancy. It appeared that the defendant was born on the 22nd July 1857; that, by an order of a competent Court, dated 6th November 1865, the father of the defendant was, under Act XL of 1858, appointed guardian of his property, portion of which was situated in the mofussil. *Held* that the effect of the order under Act XL of 1858 was to extend the minority of the defendant to the age of eighteen years, and that consequently he was a minor on the 22nd June 1875, when the Majority Act IX of 1876 came in force; and therefore, under section 3 of the latter Act, his minority was further extended to the age of twenty-one years, so that on the date of the execution of the note the defendant was still a minor. RAJ COOMAR ROY *v.* ALFUZUDDIN AHMED . **8 C. L. R., 419**

**3.** ——— *Minor.—Guardian ad litem.* —The appointment of a guardian *ad litem* is sufficient to make the minor party subject to section 3, Act IX of 1875, and to constitute his period of majority at twenty-one, at any rate so far as relates to the property in suit, notwithstanding that such minor would but for such appointment have attained majority at eighteen. SUTTYA GHOSAL *v.* SUTTYANUND GHOSAL **[I. L. R., 1 Calc., 388**

**4.** ——— *Guardian.—Minor.—Disability of infancy; its continuance.—Period of minority, how affected by Act XL of 1858.*—When a guardian has once been appointed to a minor under the provisions of Act XL of 1858, the disability of infancy will last till the age of twenty-one, whether the original guardian continue to act or not. RUDRA PROKASH MISSER *v.* BHOLA NATH MUKHERJEE **[I. L. R., 12 Calc., 612**

**MAJORITY ACT, IX OF 1875, s. 3**—*continued.*

**5.** ——— *Minor under Court of Wards.*—A "minor under the jurisdiction of the Court of Wards" means a person of whose estate the Court of Wards has actually assumed the management, not a person of whose estate the Court of Wards might with the sanction of Government take charge. PERIYASAMI *v.* SESHADRI AYYANGAR **[I. L. R., 3 Mad., 11**

**MAJORITY, AGE OF—**

*See* LIMITATION ACT, 1877, s. 7.

**[5 C. L. R., 543**

**1.** ——— **Hindu, resident and domiciled in Calcutta, Majority of.**—The age of majority of a Hindu resident and domiciled in the town of Calcutta, and not possessed of any property in the mofussil, is the end of fifteen years. CALLY CHURN MULLICK *v.* BHUGGOBUTTY CHURN MULLICK. IN THE MATTER OF BENUD BEHARY MULLICK

**[10 B. L. R., F. B., 231: S. C., 19 W. R., 110**

DEOBO MOYEE DOSSEE *v.* JUGGESSUR HATI **[1 W. R., 75**

*Contra,* IN THE MATTER OF HEMNATH BOSE **[1 Hyde, 111**

PURMESHUR OJHA *v.* GOOLBEE . **11 W. R., 446**

TARINEE PERSHAD SEIN *v.* DWARKANATH RUKHEET . . . . **15 W. R., 451**

**2.** ——— *Hindu law.—Act XL of 1858.*—A Hindu, resident and domiciled in Calcutta, and possessed of lands in the mofussil, borrowed in Calcutta a sum of money from the plaintiff, a professional money-lender, and agreed by his bond to repay the principal with interest at 36 per cent. per annum in Calcutta. The defendant's age, at the time he executed the bond, was sixteen years and one or two months; but neither his person nor his property had been taken charge of by the Court of Wards, or by any Civil Court. The defendant having made default in payment, the plaintiff brought the present suit. The defendant pleaded his minority. *Held* by the Full Bench that the law as to the age of minority governing the case was not Act XL of 1858, but the Hindu law, under which the defendant was not a minor at the time he executed the bond, and that therefore he was liable on it. MOTHOORMOHUN ROY *v.* SOORENDRO NARAIN DEB . **I. L. R., 1 Calc., 108: 24 W. R., 464**

**3.** ——— **Construction of will.**—*Executor.—Grant of probate, Refusal of, to minor.*—A Hindu domiciled with his family at Serampore, in the zillah of Hooghly, died, leaving a will, in which was the following direction: "In order to look after the affairs, to conduct suits and manage the debts and dues relative to my real and personal estates, my eldest son, *H. C. G.*, who has attained the age of majority, remains executor, for my younger son, *G. C. G.*, is an infant; but as my eldest sister, *S. H. D.*, is prudent and sensible, all the affairs of the estates shall be under her superintendence; and my eldest son shall do all the acts according to her

**MAJORITY, AGE OF.—Construction of will—*continued.***

advice and direction. But when my younger son, *G. C. G.*, will come of age, then both the brothers shall be competent personally to manage the affairs; at that time the advice and superintendence of my said sister shall not remain." *G. C. G.*, after attaining the age of sixteen, but before he had reached the age of eighteen, applied for grant of probate of his father's will to himself, jointly with his brother *H. C. G.*, in respect of property in Calcutta. The Court below refused to grant probate of the will to the son of the testator, on the ground that he was under the age of eighteen years. *Held*, on appeal, that he had not attained the age contemplated in his father's will at which he was to be joined in the executorship with his brother. IN THE GOODS OF GANGA PRASAD GOSAIN . **4 B. L. R., Ap., 43**

S. C. on appeal . . . **5 B. L. R., 80**

4. ——— **Mahomedans not subject to Court of Wards.**—In the case of Mahomedans not subject to the Court of Wards, the limit of minority was held to be at least sixteen years. ABDOOL OAHAB CHOWDHRY *v.* ELIAS BANOO **[8 W. R., 301**

5. ——— **Proprietors paying revenue to Government.**—*Beng. Reg. XXVI of 1793, s. 3.*—The holder of an estate paying revenue direct to Government, whether the settlement of that estate be temporary or permanent, was a proprietor within the meaning of section 3, Regulation XXVI of 1793; and the minority of such a proprietor extended to the end of the eighteenth year. HURO MONEE DEBIA *v.* TUMEEZOODEEN CHOWDHRY . . **7 W. R., 181**

BEER KISHORE SUHYE SINGH *v.* HUR BULLUB NARAIN SINGH . . . **7 W. R., 502**

6. ——— *Beng. Reg. XXVI of 1793, s. 2.—Contracts as to real estate and personal contracts.*—Section 2, Regulation XXVI of 1793, extended the term of minority of proprietors of estates paying revenue to Government from the end of the fifteenth to the end of the eighteenth year, in respect of all acts done by such proprietors, both as to matters connected with real estate and matters of personal contract. BYKUNTNATH ROY CHOWDHRY *v.* POGOSE . . . . . **5 W. R., 2**

7. ——— *Proprietors out of possession.—Beng. Reg. XXVI of 1793.*—Regulation XXVI of 1793 applied to proprietors out of possession as well as to those in possession, and was not overridden by the Mahomedan law with reference to majority. ENAET HOSSEIN *v.* ROSHAN JAHAN. ROSHAN JAHAN *v.* ENAET HOSSEIN . **5 W. R., 4**

8. ——— *Sale of estate by Mahomedan proprietor.—Beng. Reg. XXVI of 1793, s. 2.—Semble,*—In respect of a transaction in which a Mahomedan, the proprietor of an estate paying revenue to Government, disposes of that estate, the period of minority was that of eighteen years, as fixed by section 2, Regulation XXVI of 1793. AMEEROONNISSA KHATOON *v.* ABADOONNISSA KHATOON **[15 B. L. R., 67: 23 W. R., 208 • L. R., 2 I. A., 87**

**MAJORITY, AGE OF.—Proprietors paying revenue to Government—*continued.***

9. ——— *Co-sharer.—Beng. Reg. XXVI of 1793.*—Regulation XXVI of 1793 (fixing eighteen years as the legal age for the exercise of the powers of a proprietor of an estate paying revenue to Government) applied to a co-sharer, as well as to the proprietor of an entire estate. ROUSHUN JAHAN *v.* ENAET HOSSEIN . . **W. R., 1864, 83**

10. ——— **Hindu.**—*Bom. Reg. V of 1827, s. 7.—Minor.—Application for execution of decree.*—*Held* that a Hindu of the age of seventeen years was competent to apply for the execution of a decree obtained by a deceased person of whom he was the representative. Regulation V of 1827, section 7, clause 3, did not prevent a Hindu less than eighteen years of age from suing, but restricted him to a particular period, after which he was no longer a minor. GANGADHAR RAGHUNATH *v.* CHIMNAJI KESHAV DAMLE . . . **5 Bom., A. C., 95**

11. ——— **Person not European British subject.**—*Act XL of 1858.—Majority of Hindus.*—Every person not being a European British subject, who has not attained the age of eighteen years, is a minor for the purposes of Act XL of 1858; and unless he is a proprietor of an estate paying revenue to Government, who has been taken under the jurisdiction of the Court of Wards, the care of his person and the charge of his property are subject to the jurisdiction of the Civil Court; and he is a minor, whether proceedings have been taken for the protection of his property or the appointment of a guardian or not. MADHUSUDAN MANJI *v.* DEBIGOBINDA NEWGI . . . . **1 B. L. R., F. B., 49**

S. C. MODHOO SOODUN MANJEE *v.* DABEE GOBIND NEWGEE . . . **10 W. R., F. B., 36**

ABDOOL HOSSEIN *v.* LUTEEFOONNISSA **[11 W. R., 235**

12. ——— **Person subject to Act XL of 1858.**—*Act XL of 1858, Certificate under.*—When a certificate of guardianship has been granted under Act XL of 1858, it is by the terms of that Act, and not by reference to Mahomedan or Hindu law, that the period at which the ward is to be considered of full age must be determined. MAHOMED ABSUD CHOWDHRY *v.* OOSUN BEBEE **[2 W. R., 217**

13. ——— *Limit of minority.*—Discussion as to the limit of minority of Hindus (who are not proprietors paying revenue to Government), and as to the proper construction of section 26 of Act XL of 1858. MONSOOR ALI *v.* RAMDYAL **[3 W. R., 50**

14. ——— *Revenue-paying proprietors.*—The age of majority fixed by Act XL of 1858 is not only for proprietors of land paying revenue to Government, but for all persons not being British subjects. LAKHIKANT DUTT *v.* JAGABANDHU CHUCKERBUTTY . . **3 B. L. R., Ap., 79**

S. C. LUCKHEE KANT DUTT *v.* JUGOBUNDHOO CHUCKERBUTTY . . . **11 W. R., 561**

**MAJORITY, AGE OF.—Person subject to Act XL of 1858—*continued.***

**15. ——————— *Jurisdiction.—High Court, original jurisdiction.*—**The period of minority among Hindus, by the operation of Act XL of 1858, extends to eighteen years, as well within the original civil jurisdiction of the High Court as within the jurisdiction of the Civil Courts in the mofussil, and that whether the father is alive and of full age or not. JADUNATH MITTER *v.* BOLYCHAND DUTT . . . . . **7 B. L. R., 607**

**16. ——————— *Power to sue.—Act XL of 1858, s. 3.*—**Where a person (a native of this country) has not attained the age of eighteen years, he is not competent to institute and maintain a suit without the intervention of a guardian appointed under section 3 of Act XL of 1858. NOOR AHMED *v.* LULTA PERSHAD . . **2 N. W., 189**

**17. ——————— *European British subject.*—**The defendant was, at the time of making a promissory note, of the age of nineteen years. The evidence showed that her father was born at sea, and lived the greater part of his life at Calcutta. It was not shown of what country his parents were, or whether the ship in which he was born was a British ship. The defendant pleaded minority at the time of making the note. *Held*, the defendant was not a European British subject, and not exempted from the operation of Act XL of 1858. She, therefore, attained her majority at eighteen years. ARCHER *v.* WATKINS . . . . **8 B. L. R., 372**

**18. ——————— *Act IX of 1875 (Majority Act), s. 3.—Minor.*—**A minor, of whose person or property a guardian has been appointed under Act XL of 1858, does not attain his majority when he completes the age of eighteen years, but when he completes the age of twenty-one years. KHWAHISH ALI *v.* SURJU PRASAD SINGH **[I. L. R., 3 All., 598**

**19. ——— European British subject not domiciled in India.—*Capacity to contract.—Minor, Suit against.—Civil Procedure Code, s. 443.—Majority Act, IX of 1875.—Lex loci.—Contract Act, IX of 1872, s. 11.—Cheque.—Liability of indorser.—Act XXVI of 1881, ss. 35, 43.*—**A cheque was indorsed in blank by a European British subject who at that time was under twenty years of age, and was temporarily residing, and not domiciled, in British India. It was subsequently dishonoured, and a suit was then brought by the bank which had cashed the cheque, to recover the amount from the indorser and drawer. The former alleged that the drawer had requested him to sign his name to the cheque, saying that it was a mere matter of form, and he would not be liable for the amount, and that the bank would only cash the cheque when indorsed by him; and in consequence he consented to indorse it, but that he did so without any intention of incurring liability as indorser; that he received no consideration, and that his indorsement was in blank, and not in favour of the bank, and was converted into a special indorsement without his knowledge and consent. The Court held that, at the time of indorsement, the indorser was a minor under English law, and dismissed the suit on the ground of minority. *Held* that if the Court was satisfied of the fact of the defendant's minority, it should have complied with the provisions of section 443 of the Civil Procedure Code. *Held* that, assuming the indorser to have been *sui juris*, the indorsement, taken in conjunction with the facts proved, established a contract by which the indorser was bound to pay the cheque. *Per* STRAIGHT, *Offg. C. J.*, and DUTHOIT, *J.*, that it was by no means clear or certain that there was any rule of international law recognising the *lex loci contractus* as governing the capacity of the person to contract, but that, assuming such a rule to be established, the specific limitation of the Majority Act (IX of 1875) to "domiciled persons" necessarily excluded its application to European British subjects not domiciled in British India; that section 11 of the Contract Act must be interpreted as declaring that the capacity of a person in point of age to enter into a binding contract was to be determined by his own personal law, wherever such law was to be found; that this rule was not affected by the Majority Act, so far as concerned persons temporarily residing but not domiciled in British India, whose contractual capacity was still left to be governed by the personal law of their personal domicile; and that such law in the case of European British subjects was the common law of England, which recognised twenty-one as the age of majority. *Per* OLDFIELD, *J.*, that by the rule of the *jus gentium*, as hitherto understood and recognised in England, the *lex loci* would govern in respect to the capacity to contract, but that in framing the Indian Majority Act, which was the *lex loci* on the subject in India, the Legislature would appear not to have adopted that rule, but, by limiting the operation of the Act to persons domiciled in British India, to have intentionally excluded from its operation persons not domiciled there, and to have left such persons to be governed by the law of their domicile. *Per* BRODHURST, *J.*, that Act IX of 1875 was intended by the Legislature to be applicable, and in fact was applicable, only to European British subjects domiciled in those parts of India referred to in section 1, and that to any other European British subject whose domicile was in England, but who was temporarily residing in any part of India above alluded to, the privileges and disabilities of minority attached until he had attained the age of twenty-one years. ROHILKHAND AND KUMAON BANK *v.* ROW **[I. L. R., 7 All., 490**

**20. ——— Mahomedan over 16 years of age before Act IX of 1875 came into force.—*Capacity to contract.—Mahomedan law.—Act IX of 1872 (Contract Act), s. 11.—Act XL of 1858 (Bengal Minors Act), s. 26.—Act IX of 1875 (Majority Act), s. 3 (c).*—**In a suit upon a bond executed on the 5th June 1875 by a Mahomedan who at that date was sixteen years and nine months old, the defendant pleaded that at the time when the bond was executed he was a minor, and that the agreement was therefore not enforceable as against him. *Held* that the defendant, having at

**MAJORITY, AGE OF.—Mahomedan over 16 years of age before Act IX of 1875 came into force—*continued.***

the date of the execution of the bond reached the full age of sixteen years, and so attained majority under the Mahomedan law, which, and not the rule contained in section 26 of the Bengal Minors Act (XL of 1858), was the law applicable to him under section 2 (*c*) of the Majority Act (IX of 1875) before the latter Act came into force, was competent in respect of age to make a contract in the sense of section 11 of the Contract Act (IX of 1872), and the agreement was therefore enforceable as against him. The rule contained in section 26 of the Bengal Minors Act is limited by its terms to "the purposes of that Act," which provides exclusively for the care of the persons and property of minors possessed of property which has not been taken under the protection of the Court of Wards; and it is to such persons only, when they have been brought under the operation of the Act as in it provided, that the prolongation of nonage under section 26 applies. DAMODAR DASS *v.* WILAYET HUSAIN . **I. L. R., 7 All., 763**

**21. ——— European British subject.** —*Law governing capacity to contract.*—The *lex loci contractus* determines the capacity of a person to contract, and reference ought not to be made to the law of his domicile of origin. The privileges and disabilities of minority, so far as they are not removed by express enactment, attach to European British subjects in this country until they have attained the age of twenty-one years. The same rule ought, on principles of justice, equity, and good conscience, to be observed in the Non-Regulation as in the Regulation Provinces. HEARSEY *v.* GIRDHAREE LAL . . . **3 N. W., 338**

**22. ———** *A.* stated that he was born in 1848; that his great-grandfather was, according to the tradition of the family, a European (but of what country in Europe he did not know) residing at Madras, and his grandmother a native, Hindu or Mahomedan; that he did not know whether his great-grandfather and great-grandmother were married, or who his grandmother was, or whether his grandfather was married; that his father married a lady bearing an English name; that he himself and all his relations were Christians; that he was born in Calcutta, and knew of no relatives in Europe. *Held* that he was the legitimate descendant of a European British subject, and therefore his age of majority was twenty-one years. ROLLO *v.* SMITH . . **1 B. L. R., O. C., 10**

**23. ——— Bombay Minors Act, XX of 1864.**—*Minor.*—A Hindu to whom Act XX of 1864 (Bombay Minors Act) is not applied, and who is not governed by the Majority Act, 1875, attains his majority when he attains the age of sixteen years. SHIDDESHRAV *v.* RAMCHANDRARAY **[I. L. R., 6 Bom., 463**

**24. ———** *Charge of property of minor.—Act XL of 1858, s. 2.*—Under Act XX of 1864, section 1, it is the charge of a minor's property, and not the property itself, which shall vest in the Civil Court a distinction which has been over-

**MAJORITY, AGE OF.—Bombay Minors Act, XX of 1864—*continued.***

looked in *Bai Kesar v. Bai Ganga, 8 Bom., A. C., 33.* The meaning of the 1st section of Act XX of 1864, when regarded in connection with the sequel thereof (which provides, for the information of the Civil Court, no such means, regarding the deaths of persons leaving infant children, as would enable the Court to act *ex mero motu* in every such case), is that the care of the persons of all minors (not being European British subjects) and the charge of their property shall be, as expressly provided in the Bengal Minors Act, XL of 1858, "subject to the jurisdiction of the Court;" and there is nothing in the subsequent sections of the Bombay Minors Act which would lead to the conclusion that, until the Court is moved to exercise its jurisdiction, the care of the minors themselves or the charge of their property is vested in the Court, or that more was intended than that, like the Court of Chancery in England, the principal Civil Courts of districts should have the right, if moved so to do, and if they so think proper, to take care of the persons of minors and charge of their property; and that, until the Court does so, the minors cannot be regarded as wards of the Court, or their property as in its charge. It is only for the purposes of Act XX of 1864 that eighteen is laid down as the age of majority (section 30). The Legislature has not, by that Act, intended to prescribe eighteen as the age of majority for all persons of all castes and creeds and for all purposes. That limit is not applicable to any person until the Act be brought into play by the exercise of the Civil Court's jurisdiction. One member (although an infant) of an undivided family, governed by the Mitakshara law, has not such an interest in the joint property as is capable of being taken charge of and managed by the Civil Court or a guardian appointed under Act XX of 1864. *Quære,*—Whether, under Act XX of 1864, the principal Civil Court of original jurisdiction in the district can take charge of the property of a person who has completed his sixteenth year, but is under eighteen. SHIVJI HASAM *v.* DATU MAVJI KHOJA . **12 Bom., 281**

**MALABAR LAW—CUSTODY OF CHILD.**

——— *Nephews.—Guardianship, Right of.—Ground for exercise of jurisdiction of Civil Court.*—The Civil Judge removed two children, governed by the rule of Marumakatayam, from the custody of their karnavan, and placed them under the guardianship of their father. *Held,* by the High Court on appeal, that the order should be reversed on the grounds that no case had arisen for the exercise of the Civil Judge's power, and that the order was wholly opposed to the very principle upon which Marumakatayam depends. THATHU BAPUTTY *v.* CHAKAYATH CHATHU . . **7 Mad., 179**

**MALABAR LAW—CUSTOM.**

**1. ——— Nambudri Brahmans.**—*Proof.—Adoption of sister's son.*—A Division Bench of the High Court having directed an issue to be tried by the Subordinate Judge of North Malabar as to whether,

**MALABAR LAW—CUSTOM.—Nambudri Brahmans**—*continued.*

by the custom of Malabar, the adoption of a sister's son among Nambudri Brahmans was valid, the subordinate Judge examined eleven witnesses selected by the parties to the suit, all of whom were described as Nambudris of note in both districts of North and South Malabar. These witnesses (with the exception of one whose testimony was self-contradictory) agreed that the adoption of a daughter's or sister's son is recognised by the customary law of Malabar, and supported their opinion by giving instances of such adoption which had taken place within their knowledge, and named the persons alleged to have been adopted in pursuance of the custom as holding estates by virtue of the title thereby acquired. The Division Bench referred to a Full Bench the question whether the evidence sufficiently established the custom alleged. *Held* by the Full Bench (TURNER, *C. J.*, INNES, KINDERSLEY, and MUTTUSAMI AYYAR, *JJ.*) that the evidence was sufficient to establish that the adoption of a sister's son by Nambudri Brahmans is sanctioned by the customary law of Malabar. (Per TURNER, *C. J.*, and KINDERSLEY, *J.*) *Semble*,—The ruling in *Gopalayyan* v. *Ragupathi Ayyan, 7 Mad., 250*, as to what constitutes sufficient proof of custom, has been too strongly expressed. ERANJOLI ILLATH VISHNU NAMBUDRI *v.* ERANJOLI ILLATH KRISHNAN NAMBUDRI . . . **I. L. R., 7 Mad., 3**

2. ——— **Nambudris.**—*Introduction of stranger to perpetuate existence of illam.*—According to the custom prevailing amongst Nambudris in Malabar, a person may be introduced into an illam (family) to perpetuate its existence. Such person thereupon becomes a member of the illam, and is *primâ facie* entitled to exercise the uraima rights of the illam (*i.e.*, to act as trustee of temples, the hereditary trusteeship of which is vested in the illam), as well as to enjoy the properties belonging to the illam. KESHAVAN *v.* VASUDEVAN **[I. L. R., 7 Mad., 297**

3. ——— **Custom in family of the Zamorin Rajas of Calicut.**—*Presumption as to property in possession of member of family.*—According to the custom obtaining in the family of the Zamorin Rajas of Calicut, property acquired by a stanom-holder and not merged by him in the property of his stanom, or otherwise disposed of by him in his lifetime, becomes, on his death, the property of the kovilagom in which he was born, and, if found in the possession of a member of the kovilagom, belongs presumedly to the kovilagom as common property. VIRA RAYEN *v.* VALIA RANI (RANI OF CALICUT) . . . **I. L. R., 3 Mad., 141**

**MALABAR LAW—ENDOWMENT.**

1. ——— **Uralans.**—*Agreement to increase number of uralans (trustees).—Binding effect on minority.*—An agreement by the majority of the uralans (trustees) of a Malabar devaswam (temple) to increase the number of uralans is not binding on a dissentient minority. NARAYANAN *v.* SRIDHARAN **[I. L. R., 5 Mad., 165**

**MALABAR LAW—ENDOWMENT.—Uralans**—*continued.*

2. ——— *Trust management.—Power of majority.*—Where the majority of the uralans of a Malabar devaswam agreed to renew a kanam on terms beneficial to the devaswam after the question of the renewal had been fairly considered by all the uralans,—*Held* that the decision of the majority was binding upon a dissentient minority. CHARAVUR TERAMATH *v.* URATH LAKSHMI **[I. L. R., 6 Mad., 270**

3. ——— **Alienation of endowed property.**—*Sale of joint property.—Uralans of devaswam.—Sale by one tarawad without consent of others.*—When the uralans of a devaswam were four tarawads,—*Held* that a sale of the urayama right by one tarawad, without the consent of the others, was altogether invalid, and that the vendee could not redeem a kanam mortgage of the devaswam land, though the mortgagor was karanavan of the tarawad which assumed to sell the urayama right. UKANDA VARRIYAR *v.* RAMEN NAMBUDIRI . . **1 Mad., 262**

4. ——— **Transfer of right to manage temple.**—*Lease.*—A transfer of the right to manage a Malabar temple and its lands by way of lease for a sum of money is illegal. RAMA VARMA TAMBARAN *v.* RAMAN NAYAR . . **I. L. R., 5 Mad., 89**

5. ——— *Alienation.—Custom.*—The founder of a Hindu temple who provides that the uralans (trustees or managers) thereof for the time being shall be the karanavans (chiefs) of four distinct families, may be supposed to have established this species of corporation with the object of securing the due performance of the worship and the due administration of the property of the temple by the instrumentality of a class of persons whom he has selected on grounds of special fitness; and it cannot be supposed that he intended to empower such trustees at their mere will to transfer their office and its duties, with all the trust property, to a person unconnected with the families from which the trustees were to be taken, to be used according to his discretion. There is no authority under the general principles of Hindu law for holding that such trustees have power to make such a transfer. Where a custom relied on as sanctioning such a transfer implies the right to sell the trusteeship for the pecuniary advantage of the trustees, that circumstance alone may justify a decision that the custom relied on is bad in law. Where, from the absence of direct evidence of the nature of a Hindu religious foundation, and the rights, duties, and powers of the trustees, it becomes necessary to refer to usage, the custom to be proved must be one which regulates the particular institution. The cases of *Greedharee Doss v. Nundo Kishore Doss, 11 Moore's I. A., 405*; and *Rajah Muttu Ramalinga Sethupati* v. *Perianayagam Pillai, L. R., 1 I. A., 209*, referred to and approved. VURMAH VALIA *v.* RAVI VURMAH **[I. L. R., 1 Mad., 235**
**L. R., 4 I. A., 76**

Affirming decision of High Court in VARMA VALIA (RAJAH OF CHERAKOT KOVILAGOM) *v.* KOTTAYATH KIYAKI KOVILAGATH REVI VARMA MOOTHA RAJAH . . . . . **7 Mad., 210**

**MALABAR LAW — ENDOWMENT —** *continued.*

6. ——— **Alienability of "sthanam" lands.**—*Payment of debt.*—Lands attached to the "sthanam" of sthanamdars in Malabar are, unless the contrary be specifically proved in any particular case, liable to alienation and charge, at all events for the payment of debts incurred for the conservation of the sthanam. CHEMMINIKARA MUPPIL NAIR *v.* KILIYANAT UKONA MENON . **I. L. R., 1 Mad., 88**

*See* VENKATESWARA IYAN *v.* SHEKHARI VARMA **[I. L. R., 3 Mad., 384: L. R., 8 I. A., 143**

7. ——— *Grant of perpetual lease.*—The grant of a perpetual lease at a fixed rent is not necessarily beyond the powers of a sthanamholder in a Malabar royal family. MANA VIKRAMAN *v.* SUNDARAN PATTAR . **I. L. R., 4 Mad., 148**

**MALABAR LAW—GIFT.**

1. ——— **Validity of gift.**—*Delivery of possession.*—Plaintiff sued to recover certain land in virtue of an alleged gift from her deceased husband. The parties were subject to the Marumakatayam law. The facts were that the land being in the hands of tenants, a deed of gift with the counterpart lease was delivered by the donor to the plaintiff. It did not appear that there were any title-deeds belonging to the property. *Held*, reversing the decision of the Principal Sudder Ameen, that the rule of law applicable is that a gift is perfectly valid if such delivery is made as the nature of the object permits, and that this had been done in the present case. WANNATHAN KANDILE CHIRUTHAI *v.* KEYAKADATH PYDEL KURUP . . . . . **6 Mad., 194**

2. ——— **Restriction on enjoyment.**—*Attempt to create estate subject to incidents of Malabar tarawad property.—Sale of interest of donee by judgment-creditor.*—The owner of certain land in Malabar made a gift thereof to his two sons and daughter, with the intention that it should be enjoyed by them subject to the incidents of tarawad property,—*i.e.*, that the estate should be impartible and held by the donees as joint family estate descendible to the heirs in the female line. *Held* that the interest of one of the donees in the land was liable to be attached and sold in execution of a decree against him. NARAYANAN *v.* KANNAN **[I. L. R., 7 Mad., 315**

**MALABAR LAW—INHERITANCE.**

1. ——— **Issue of parents governed by different systems of law.**—Where a woman belonging to a Malabar tarwad governed by the Marumakatayam law (succession by nephews) has issue by a man who is governed by the Makatayam law (succession by sons), such issue are *primâ facie* entitled to their father's property in accordance with the Makatayam law, and to the property of their mother's tarwad in accordance with the Marumakatayam law. CHATHUNNI *v.* SANKARAN **[I. L. R., 8 Mad., 238**

2. ——— **Nambudris.**—*Inheritance.—Sarvasvadhanam marriage.—Rights of son.*—Among

**MALABAR LAW — INHERITANCE.— Nambudris—***continued.*

Nambudris in Malabar, the son of a daughter given in the Sarvasvadhanam form of marriage does not inherit in the family of his father so long as other heirs exist. KUMARAN *v.* NARAYANAN **[I. L. R., 9 Mad., 260**

3. ——— **Mode of succession to Polliam.**—*Private property left by poligar.*—The mode of succession in a polliam is not such as to render the holder responsible for the debts of his predecessor. There is not a continuance of the previous estate in each successive holder, but a fresh estate created by the gift. However, as respects private property left by a deceased poligar, liability to the extent of the assets taken will attach upon the takers, if there was an obligation upon the owner of the property so taken to pay the debt. SUBBA CHETTY *v.* MASTI IMMADI . . . . **3 Mad., 303**

**MALABAR LAW—JOINT FAMILY.**

1. ——— **Taverai.**—*Succession.—Tarwad.*—In Malabar the word "taverai" has several distinct meanings. In the families of the princes all the houses have separate property, and the senior in age of all the houses succeeds to the royalty with the property specially devoted to it. This mode of succession may be regarded as rather due to public than to private law. Private families have sometimes adopted the same customs, but there is the strongest presumption against the truth of this in the case of the private family. Families becoming very numerous have often split into various branches. In the language of the people, there is community of purity and impurity between them, but no community of property. In the only sense of the word with which Courts of Justice are concerned, people so related are not of the same tarwad. Where there are several houses bearing the same original tarwad name, but with an addition, and there is no evidence of the passing of a member of one house to another, there is the strongest ground for concluding that this separation has taken place. ERAMBAPALLI KORAPEN NAYAR *v.* ERAMBAPALLI CHENEN NAYAR **[6 Mad., 411**

2. ——— **Joint property.**—*Acquisitions not disposed of in lifetime.—Family property.—Presumption from position of karanavan.*—By the law of Malabar all acquisitions of any member of a family which he has not disposed of in his lifetime form part of the family property. The acquirer, however, may, during his lifetime, hold, alienate at once, and encumber, his self-acquisitions. A karanavan, in possession of the family funds, is presumed to have made all acquisitions with them and for the benefit of the corporate body. But such presumption is not irrebuttable, and his alienation or charge of such acquisitions made during his lifetime may be valid. KALLATI KUNJU MENON *v.* PALAT ERRACHA MENON . . . . . **2 Mad., 162**

3. ——— **Self-acquired property.**— *Assets for payment of debts of deceased acquirer in hands of tarwad.*—The self-acquired property of a member of a Malabar tarwad, which, not being

**MALABAR LAW—JOINT FAMILY.—Self-acquired property—*continued.***

disposed of at the death of the acquirer, lapses into the property of the tarwad, enures as assets of the deceased for the payment of his debts in the hands of the members of the tarwad. RYRAPPAN NAMBIAR *v.* KELU KURUP . . **I. L. R., 4 Mad., 150**

**4. ——— Property assigned for support of females.**—*Liability of, to attachment in execution of decree against karanavan.*—Property assigned by the males of a Nayar family for the support of their females is still family property, and liable as such to be taken in execution of a judgment against the karanavan. PARRAKEL KONDI MENON *v.* VADAKENTIL KUNNI PENNA . **2 Mad., 41**

**5. ——— Sale of tarwad property.**—*Powers of karanavan.—Assent of members of tarwad, how far necessary.*—There is no rule of Malabar law that the assent of every member of a tarwad is necessary to render valid the alienation of tarwad property. KALLIYANI *v.* NARAYANA **[I. L. R., 9 Mad., 266**

**6. ——— Claim for improvements effected by anandravan in tarwad property.**—An anandravan has no right to the value of the improvements effected by him on tarwad property upon surrender to the karanavan, when such improvements are not made with private funds. URAMKUMARATH KANNAN NAYAR *v.* URAMKUMARATH TENJU NAYAR . . **I. L. R., 5 Mad., 1**

**7. ——— Right of member of tarwad to an account.**—*Right to succeed to management of family property.*—An individual member of a tarwad governed by the Marumakatayam rule has no right to an account from the karanavan. Each member of a tarwad has a right to succeed by seniority to the management of the family property. KUNIGARATU *v.* ARRANGADEN . **2 Mad., 12**

**8. ——— Right to manage illom.**—*Nambudri family.*—The right of the eldest member of a Nambudri family to manage the illom is absolute; and where a junior member has in fact managed it, then this is presumed to have been with the permission of the former, who may at any time take up the actual control. NAMBIATAN NAMBUDIRI *v.* NAMBIATAN NAMBUDIRI . . **2 Mad., 110**

**9. ——— Right to manage tarwad.**—*Right to revoke agency.*—A karanavan who appoints a junior anandravan as his agent to manage part of the tarwad property, can, on behalf of the tarwad family, revoke the authority at any time and take the management into his own hands. GOVINDAN *v.* KANNARAN . . . **I. L. R., 1 Mad., 351**

**10. ——— Power of karanavan to renounce privileges and duties of office.**—*Semble,*—A karanavan cannot part by contract so as to be unable to resume them, with the privileges and duties which attach to his position as karanavan. CHERUKOMEN *alias* GOVINDEN NAIR *v.* ISMALA **[6 Mad., 145**

**11. ——— Alienation of joint family property.**—*Signature of karanavan as indicating consent.*—According to Malabar law, a sale of family

**MALABAR LAW—JOINT FAMILY.—Alienation of joint family property—*continued.***

property is valid when made with the assent, express or implied, of all the members of the tarwad, and when the deed of sale is signed by the karanavan and the senior anandravan if *sui juris.* Such signature is *primâ facie* evidence of the assent of the family, and the burden of proving their dissent lies on those who allege it. KONDI MENON *v.* SRANGINREAGATTA AHAMMADA . . **1 Mad., 248**

**12. ——— *Power of karanavan.—Anandravan.***—The assent of the anandravans is necessary to a sale of tarwad land by a karanavan. The chief anandravan's signature to the instrument of sale is sufficient but not indispensable evidence of such assent. KAIPRETA RAMEN *v.* MAKKHAYIL MUTOREN . . . . . **1 Mad., 359**

**13. ——— *Purchaser, Duty of.—Notice.***—It is the unquestionable law of Malabar that tarwad property is inalienable, except in cases of adequate family necessity. In such cases alienations will be upheld; but it lies upon the purchaser to make out with abundant clearness that the purpose was a proper one. The assent of the senior anandravan is some (but rebuttable) evidence that the purpose was proper. *Semble,*—That, considering the state of Hindu families, a purchaser would be affected with notice by much slighter evidence than a purchaser in other countries. KOYILOTHPUTEN PURAYIL MANOKI KORAN NAYAR *v.* PUTHENPURAYIL MANOKI CHANDA NAYAR . **3 Mad., 294**

**14. ——— *Otti mortgage.—Karanavan, Power of.***—A karanavan singly may make an otti mortgage. EDALHIL ITTI *v.* KOPASHON NAYAR . . . . . **1 Mad., 122**

**15. ——— *Authority of karanavan of tarwad to alienate endowed property.***—The authority of a karanavan to make alienations of the immoveable property of the tarwad stands on a different footing from his power to pledge the credit of the tarwad. The karanavan is not the agent of the family to make alienations, but must have special authority in each case. KOMBI ACHEN *v.* LAKSHMI AHMA **[I. L. R., 5 Mad., 201**

**16. ——— Position of karanavan.**—*Trustee.—Parties.*—A karanavan is not a mere trustee, nor do the rules of Courts of Equity as to the necessity of making *cestui que* trusts parties to suits against trustees by strangers apply to the case of a karanavan and the members of the tarwad. Status of a karanavan discussed. VARANAKOT NARAYANAN NAMBURI *v.* VARANAKOT NARAYANAN NAMBURI **[I. L. R., 2 Mad., 328**

**17. ———** The position of a karanavan is not analogous to that of a mere trustee, officer of a corporation, or the like. The person to whom the karanavan bears the closest resemblance is the father of a Hindu family. He should not be removed from his situation except on the most cogent grounds. The solution of the difficulties which the state of families and property in Malabar

**MALABAR LAW—JOINT FAMILY.—Position of karanavan**—*continued.*

will always create will not be assisted by bringing in the anarchy and insecurity which will always follow upon any attempt to weaken the natural authority of the karanavar. ERAVANNI REVIVARMAN *v.* ITTAPU REVIVARMAN . . . **I. L. R., 1 Mad., 153**

**18. ——— Power of karanavan.**—Incidents of property held by tarwad and by joint Hindu family distinguished. A Court has no power to confer on karanavans larger powers than such as are sanctioned by usage. If such powers are insufficient to secure to tarwads the full enjoyment of their estates, or if they are so limited as to interpose obstacles to the establishment of new industries, the extension of such powers must be sought from the Legislature. PONAMBILATH PARAPRAVAN KUNHAMOD HAJEE *v.* PONAMBILATH PARAPRAVAN KUTTIATH HAJEE. TOD *v.* PONAMBILLATH PARAPRAVAN KUNHAMOD HAJEE . . **I. L. R., 3 Mad., 169**

**19. ——— *Powers restricted by family arrangement.***—The ordinary powers of the karanavan of a Malabar tarwad can be restricted by a family agreement to which he is a party, and if, in breach of such agreement, the karanavan makes an alienation to a stranger who has notice of the agreement, the tarwad is not bound by the alienation. KANNA PISHARODI *v.* KOMBI ACHEN'S **[I. L. R., 8 Mad., 381**

**20. ——— Karanavan, Decree against.** —*Execution against tarwad property.—Sale.—Right of purchaser.—Res judicata—Right of junior member of tarwad not impleaded to contest sales of tarwad property in execution of decree against karanavan sued as such.*—When the karanavan of a Malabar tarwad has not been impleaded as such in a suit, and there is nothing on the face of the proceedings to show that it was intended to implead him in his representative character, tarwad property cannot be attached and sold in execution of the decree, even though it is proved that the decree was obtained for a debt binding on the tarwad. Although the property of a tarwad may be attached and sold in execution of a decree when the karanavan is sued as representative of the tarwad, members of the tarwad who are not parties to the proceedings, and have not been represented in the manner prescribed by the Code of Civil Procedure, are not estopped from showing that the debt for which the decree was passed was not binding on the tarwad. ITTIACHAN *v.* VELAPPAN. KRISHNA *v.* NANU **[I. L. R., 8 Mad., 484**

**21. ——— *Karanavan's authority.—Tarwad bound by bonâ fide acts of.—Procedure.—Suit against tarwad.—Civil Procedure Code, s. 30.***—A landlord having obtained a decree against the karanavan and senior anandravans of a Malabar tarwad, for the recovery of certain lands demised on perpetual lease to the tarwad, on the ground that the tenure was forfeited by the denial of the landlord's title by the karanavan, the junior members of the tarwad sued the parties to that decree to set aside the decree and also the forfeiture of

**MALABAR LAW—JOINT FAMILY.—Karanavan, Decree against**—*continued.*

the tenure, on the ground that the karanavan had acted improperly in denying the title of the landlord. It was found that the karanavan acted *bonâ fide* in denying his landlord's title and in defending the suit. *Held* that the plaintiffs could not succeed. MURINGA MANGALATH GOPALAN NAYAR *v.* VALIA TAMBURATTI . . . **I. L. R., 7 Mad., 87**

**22. ——— *—Binding effect on tarwad,***—The karanavan of a Malabar tarwad having sued to redeem certain land belonging to the tarwad, which had been demised on kanam, consented to abide by the oath of the mortgagee as to the genuineness of the kanam. The mortgagee having taken the prescribed oath, the suit was dismissed. *Held* that the junior members of the tarwad were not estopped by the decree in such suit from redeeming the land. Where fraud or breach of duty by a karanavan is proved, his act must be treated as a fraud upon his power, and will not bind the tarwad. THENJU *v.* CHIMMU **[I. L. R., 7 Mad., 413**

**23. ——— *Suit by anandravans to set aside a sale in execution of decree against their karanavan, when maintainable.***—The lands sued for being the jenm of a devasam were sold in execution of a decree obtained by defendant No. 1 against the uralans. Plaintiffs, being the anandravans of the uralans, sued to set aside the sale, alleging that the debt was not contracted for devasam purposes and that the decree was collusive. *Held* that the decree was binding on the plaintiffs, unless it had been obtained by fraud and collusion. KELU *v.* PAIDEL . . . **I. L. R., 9 Mad., 473**

**24. ——— *Suit to set aside decree and recover lands sold under it.***—In suits by a branch karanavan of a Malabar tarwad to recover certain lands belonging to his branch tarwad, which had been mortgaged by a former branch karanavan, the plea was that the plaintiff had no right to sue without the authority of the senior member of the family, the velia kaimal. Upon an issue sent down (in special appeal) by the High Court, it was found by the Civil Judge that there was no binding and peculiar custom in the family depriving the senior member of all management of the property, and vesting it in the branch karanavans. Upon the final hearing it was contended that the contrary had been so irrevocably fixed by judicial decision as to prevent the matter from being open to question, and that this finding was bad in law, as being opposed to binding decrees of competent Courts. *Held*, by HOLLOWAY, *J.*—(1) that there was nothing compelling the Court to decide, contrary to the plain rules of law, that this delegation was irrevocable; that perhaps it was not so even by the delegator, and still less was it so by his successors; (2) that the fact of the setting apart of santam property, if it was set apart, can make no difference, and as little can the circumstance of the income reserved; (3) that there was nothing to prevent the Court from deciding that the Civil Judge was right in saying that this was an ordinary Malabar tarwad; and (4) that the renun-

**MALABAR LAW—JOINT FAMILY.—Karanavan, Decree against—*continued.***

ciation before the Sudder Court was not even irrevocable as against him who made it, and certainly could not have the effect of depriving the senior member, for all future time, of the rights which the law of the country conferred upon him, with the correlative duties upon his becoming senior. By SCOTLAND, *C. J.*—That the Court was not constrained to hold that the irrevocability of the arrangement effected in 966 by the former head of the family, as to the apportionment of the family property between two taverais, and the management of each taverai's allotment by its senior member, was a matter conclusively adjudicated in the course of the litigation, of which there was proof in the records; that such arrangement operated only as a personal renunciation and delegation of the rights of management possessed by the then head of the tarwad; and that assuming it to have been irrevocable by him, it was not binding on the third defendant, admittedly the head of the family by right of seniority. APPUNI *alias* AYAMPALLI RAMAN KUMARAN *v.* AYANEPALLI EKANATHA THAVAI VARIKARNAVAN SHANGUNI

[6 Mad., 401

25. ——— **Removal of karanavan from office.**—*Ground for removal.*—When a karanavan was found to have made perpetual grants of certain lands belonging to his tarwad for other than family purposes, and to have made demises of certain other lands belonging to his tarwad for unusual periods on no justifiable ground,—*Held* that this did not constitute sufficient ground for removal of the karanavan from his office, his conduct not having been such as to show that he could not be retained in his position without serious risk to the interests of the family. ERAVANNI REVIVARMAN *v.* ITTAPU REVIVARMAN . . . I. L. R., 1 Mad., 153

26. ——— *Grounds for removal.—Tarwad property.—Powers of karanavan.*—The grant of a very improvident lease following on a course of conduct pursued for some years, in which the interests of the tarwad were persistently disregarded, is sufficient ground for removing a karanavan from the management of the tarwad property. *Eravanni Revivarman* v. *Ittapu Revivarman, I. L. R., 1 Mad., 153,* approved. PONOMBILATH PARAPRAVAN KUNHAMOD HAJEE *v.* PONAMBILATH PARAPRAVAN KUTTIATH HAJEE. TOD *v.* PONAMBILATH PARAPRAVAN KUNHAMOD HAJEE

[I. L. R., 3 Mad., 169

**MALABAR LAW—MAINTENANCE.**

1. ——— **Right to maintenance.**—*Anandravan.—Semble,*—An anandravan's right to maintenance is merely a right to be maintained in the family-house. KUNIGARATU *v.* ARRANGADEN

[2 Mad., 12

2. ——— *Anandravan.*—Though the general rule is that an anandravan cannot have separate maintenance, there are exceptions to that rule. PERU NAYAR *v.* AYYAPPAN NAYAR

[I. L. R., 2 Mad., 282

**MALABAR LAW—MAINTENANCE.—Right to maintenance—*continued.***

3. ——— *Anandravan.—Misbehaviour.*—A karanavan (manager) of a Malabar tarwad (family) is not justified in excluding an anandravan (junior member) from participation in the income of the family property on the ground of misbehaviour or because the anandravan has other property of his own. PUTANVITIL TEYAN NAIR *v.* PUTANVITIL RAGAVAN NAIR

[I. L. R., 4 Mad., 171

4. ——— *Suit by member of tarwad residing in family house.—Remedy.*—A member of a Malabar tarwad living in the tarwad house cannot bring a suit against the karanavan for a monthly allowance in money on the ground that the karanavan does not make sufficient provision for his or her maintenance. KUNHAMMATHA *v.* KUNHI KUTTI ALI . . . . I. L. R., 7 Mad., 233

5. ——— *Karanavan.—Practice of allowing karanavan half the net income disapproved.*—In suits for maintenance against the karanavan of a Malabar tarwad, the practice of awarding one moiety of the net income of the tarwad to the karanavan is not authorized by law. NARAYANI *v.* GOVINDA . . . I. L. R., 7 Mad., 352

6. ——— *Member of tarwad with private means.*—The fact that a member of a Malabar tarwad has private means does not affect his right to subsistence where the income of the tarwad is sufficient to provide for all a suitable subsistence; but when the income is insufficient for this purpose, the karanavan must take into consideration the private means of each member. *Putanvitil Teyan Nair* v. *Putanvitil Ragavan Nair, I. L. R., 4 Mad., 171,* distinguished. THAYU KUNJIAMA *v.* SHUNGUNNI VALIA KYMAL . . I. L. R., 5 Mad., 71

7. ——— *Member of tarwad.—Taverai.*—A member of a tarwad divided into "taverais" with separate dwelling-houses may claim to be maintained by the karanavan in the house of the "taverai" to which he or she belongs. CHALAYIL KANDOTHA NALLAKANDIYIL PARVADI *v.* CHALAYIL KANDOTHA CHATHU NAMBIAR

[I. L. R., 4 Mad., 169

8. ——— *Maintenance of families of male members by tarwad.*—In North Malabar the male members of a Nayar tarwad are by custom entitled to receive from the karanavan an allowance for the maintenance of their consorts and children while living in the tarwad house. VARIKARA VADAKA VITTIL VALIA PARVATTHI *v.* VARIKARA VADAKA VITTIL KAMARAN NAYAR

[I. L. R., 6 Mad., 341

9. ——— *Mapillas.—Separate maintenance.—Marriage.*—The junior male members of a Mapilla tarwad governed by the Marumakatayam law are entitled to maintenance from the tarwad when living in the houses of their consorts and also to a higher rate of maintenance when living with their consorts than when living as single men. CHOWAKARAN ORKATARI BAPPAN *v.* CHOWAKARAN CHERIA ORKATAN MAKKI

[I. L. R., 6 Mad., 259

## MALABAR LAW—MORTGAGE.

1. ——— **Kanam mortgage.**—The question whether a kanam is to be regarded as a lease or a mortgage depends upon the object for which the tenure was created. Where a kanam is granted as a security for the repayment of money advanced to the jenmi, the law of limitation applicable to mortgages must be applied. NELLAYA VARIYATH SILAPANI *v.* VADAKIPAT MANAKEL ASHTAMURTI NAMBUDRI [I. L. R., 3 Mad., 382

2. ——— *Failure to give possession.—Right of suit for money advanced on it.*—When the demisor of land under a kanam agreement is unable to give possession, the demisee may repudiate the contract and recover the amount advanced. VAYALIL PUDIA MADATHEMMIL MOIDIN KUTTIAYISSA *v.* UDAYA VARMAVALIA RAJAH [2 Mad., 315

3. ——— *Suit for redemption.—Express agreement*—Although the right to hold for twelve years is inherent in every kanam according to the custom of the country, it is competent to the jenmi to exclude this right by express agreement. SHEKHARA PANIKER *v.* RARU NAYAR [I. L. R., 2 Mad., 193

4. ——— *Right to hold for twelve years.*—A kanam-holder who denies his jenmi's title forfeits his right to hold for twelve years. RAMEN NAYAR *v.* KANDAPUNI NAYAR [1 Mad., 445

5. ——— *Right to hold for twelve years.*—A kanamdar's right to hold for twelve years depends on his acting conformably to usage and the jenmi's interest, and is lost if he repudiates the jenmi's title. It makes no difference when this is first done in his answer. MAYAVANJARI CHUMAREN *v.* NIMINI MAYURAN . 2 Mad., 109

6. ——— *Right of redemption.—Denial of jenmi's title.*—Where a first kanam-holder in his answer to a redemption suit by a second kanam-holder, for the first time denied his own kanam, and alleged an independent jenmam right,—*Held* that he had not thereby forfeited his right to rely upon the option to make a further advance, to which as kanam-holder he was entitled, though the denial and allegation were false, and though his documents in support of such allegation were forged. PAIDAL KIDAVU *v.* PARAKAL IMBICHUNI KIDAVU . . . 1 Mad., 13

7. ——— *Right of tenure.*—A kanam mortgagee does not forfeit his right to hold for twelve years from the date of the kanam by allowing the porapad to fall into arrear. RAUTAN *v.* KADANGOT SHUPAN . . . 1 Mad., 112

*See* also KUNJU VELAN *v.* MANAVIKRAMA ZAMORIN. KRISHNA MANNADI *v.* SHANKARA MANAVAN . . . 1 Mad., 113, note

8. ——— *Ejectment before expiration of time.*—A mel-kanamdar cannot eject a kanamdar or his assignee before the expiration of twelve years from the date of the kanam. PRAMATAN TUPEN NAMBUDRIPAD *v.* MADATIL RAMEN [1 Mad., 296

## MALABAR LAW — MORTGAGE.—Kanam Mortgage—*continued.*

9. ——— *Right to redeem, and make further advances.*—The holder of a mel-kanam may recover the land from the kanam-holder, after the expiry of the term of the kanam, on payment of the sum advanced by the latter and of the value of improvements. The jenmi is not bound to give the kanam-holder the option of making further advances before demising to another tenant on kanam. MARAKAR *v.* MUNHORULI PARAMESWARAN NAMBUDRI . . . I. L. R., 6 Mad., 140

10. ——— *Tenant's right to improvements prior to demise sued on.—Presumption.—Usage.*—There is no universal usage in Malabar, nor any presumption that a tenant is not entitled to compensation for improvements effected prior to the date of the kanam under which he holds, and not specially reserved to him by the kanam deed. MUPANAGARI NARAYANAN NAYAR *v.* VIRUPATCHAN NAMBUDRIPAD . . I. L. R., 4 Mad., 287

11. ——— *Redemption of kanam.—Amount to be ascertained before decree.—Value of improvements to be ascertained before decree.—Jenmi.—Right to deduct arrears of rent due from sum payable.*—When a decree is passed for recovery of land demised on kanam on payment of the amount received as renewal fee, the amount must be ascertained at the trial and inserted in the decree. On taking an account between the jenmi (mortgagor) and kanam-holder (mortgagee), the former, on redemption, has by custom a right to deduct all arrears of rent due to him from the sum which he has to pay to the latter, before recovering possession of the land. KANNA PISHARODI *v.* KOMBI ACHEN [I. L. R., 8 Mad., 381

12. ——— *Right to set off arrears of rent against claim for improvements.—Mortgage of right of kanamdar, how affected.*—A Malabar jenmi (mortgagor) being entitled, on redemption of the land, to set off a claim for arrears of rent due to him by the kanam-holder (mortgagee) against the claim of the latter for compensation for improvements, a pledge of his rights to a third party by the kanam-holder will not prejudice the right of the jenmi to set off his claim for arrears of rent against the sum found due to the kanam-holder for improvements. ACHUTA *v.* KALI [I. L. R., 7 Mad., 545

13. ——— *Time for redemption.*—Where a deed was described as a kanam deed and contained stipulations as to compensation for improvements, a clause to the effect that the land was to be surrendered "whenever the amount advanced is ready" will not entitle the mortgagor to redeem before the customary twelve years' term has expired, but must be construed as referring to a period subsequent to the term of twelve years. KANARA *v.* GOVINDAN . . . I. L. R., 5 Mad., 310

14. ——— *Improvements.—Trees of spontaneous growth.—Redemption suit.—Costs of ascertaining value of improvements.*—According to Malabar custom, kanams (mortgages) must, on the expiry of the term, either be discharged

**MALABAR LAW — MORTGAGE. — Kanam mortgage**—*continued.*

or renewed. On redemption of a kanam, the kanam-holder (mortgagee) is not entitled to claim under the head of improvements the value of trees of spontaneous growth. In suits to redeem land demised on kanam tenure, on payment of the value of improvements, the costs of the adjudication necessitated by the refusal of either party to accept the terms of compensation offered or demanded by his opponent should, when those terms are reasonable, be charged on the party refusing. NARAYANA *v.* NARAYANA
[I. L. R., 8 Mad., 284

15. ——————— *Redemption on terms of admitted demise.—Improvements.—Local custom.—Jenmi's right to a moiety.—Arrears of rent.—Jenmi's right to deduct from amount payable by him.*—In a suit brought against *A.* and *B.* for redemption of land alleged to have been demised to *A.* on kanam tenure in 1874, and to be held by *B.* under *A.*, it was found that the demise of 1874 was invalid because it had been executed fraudulently; but inasmuch as *B.* admitted that he was in possession under a similar demise of 1855, it was held that the plaintiff was entitled to redeem on the terms of the demise admitted by *B.* *Kunhi Kutti Nair* v. *Kutti Maracoar, 4 Mad., 359,* followed. Local usage of Ernad, by which the jenmi on redemption of a kanam takes credit for one half of the value of improvements effected by the kanamdar, upheld. The right of a jenmi to deduct arrears of rent from the amount payable by him on redemption of a kanam, being a customary incident of the tenure, is not affected by the three years' period of limitation for recovery of arrears of rent. UNNIAN *v.* RAMA
[I. L. R., 8 Mad., 415

16. ——— **Kanam and otti tenures.**—*Time for redemption.—Per curiam.*—It is settled law that in the case of kanam and otti mortgages it is not competent to the mortgagors to redeem before the arrival of the appointed time. *Per* INNES, *J.*, dissenting from *Mashook Ameen Suzzada* v. *Marem Reddy, 8 Mad., 31,* if in the case of any mortgage the period for redemption is postponed to a fixed date by a special agreement, effect should be given to such agreement. KESHAVA *v.* KESHAVA
[I. L. R., 2 Mad., 45

17. ——————— *Prior right of tenant to make further advances.—Right to redeem.*—The prior right of an ottidar to make further advances is established by authorities, but there is no authority to support a kanamdar's claim to a similar privilege. An ottidar may redeem a prior kanam. KUNHAMU *v.* KESHAVAN NAMBUDRI
[I. L. R., 3 Mad., 246

18. ——— **Otti mortgage.**—*Denial of title.—Forfeiture of right.*—An otti-holder, like a kanamdar, forfeits his right to hold for twelve years by denying the jenmi's title. KELLU ERADI *v.* PUAPALLI . . . . . 2 Mad., 161

19. ——————— *Redemption of mortgage.*—An otti, like a kanam mortgage, cannot

**MALABAR LAW — MORTGAGE. — Otti mortgage**—*continued.*

be redeemed before the lapse of twelve years from its date. EDATHIL ITTI *v.* KOPASHON NAYAR
[1 Mad., 122

KUMINI AMA *v.* PARKAM KOLUSHERI
[1 Mad., 261

20. ——————— *Distinction between otti and kanam mortgage.*—An otti differs from a kanam mortgage, first, in respect of the right of pre-emption which the otti-holder possesses; secondly, in being of so large a sum that practically the jenmi's right is merely to receive a peppercorn rent. KUMINI AMA *v.* PARKAM KOLUSHERI
[1 Mad., 261

21. ——————— *Right of jenmi—Right of a second mortgagee.*—During the continuance of a first otti mortgage, the jenmi is in the same position as regards his right to make a second otti mortgage to a stranger after, as he was before, the lapse of twelve years from the date of the first mortgage. Where a jenmi made an otti mortgage, and more than twelve years after made a second otti mortgage to a stranger, without having given notice to the first mortgagees, so as to admit of the exercise of their option to advance the further sum required by the jenmi,—*Held* that the second mortgagee could not redeem the lands comprised in the first mortgage. ALI HUSAIN *v.* NILLAKANDEN NAMBUDIRI . . . . . 1 Mad., 356

22. ——————— *Kaividu otti tenure.*—According to Malabar law, land demised on the tenure called kaividu otti is redeemable. KUNDU *v.* IMPICHI . . . I. L. R., 7 Mad., 442

23. ——————— *Right to make further advance.—Second mortgage to stranger without notice to otti-holder invalid.*—*R.* having conveyed certain land to *P.* on otti tenure (mortgage) in 1852, executed a deed of further charge (ottikampuram) in 1873 to *P.'s* widow, and in 1879 conveyed the jenm (equity of redemption) to her. Between 1873 and 1879 *R.* mortgaged the same land to *A.* by jenm panayam deed. In a suit by *A.* to enforce his mortgage,—*Held* that inasmuch as *R.* had not given notice to the otti-holder, nor given her the option of making the further advance made by *A.*, *A.* had no claim against the land. AMBU *v.* RAMAN
[I. L. R., 9 Mad., 371

24. ——————— *Forfeiture of right of pre-emption.*—An otti-holder does not forfeit his right by endeavouring to set up further charges in answer to a suit for redemption and failing to prove them, or by denying that an assignment of his jenmi's title is valid because it was made without his consent in writing and in defeasance of his right of pre-emption without previous offer to him. KANNOTH TULUVAN PARAMBAN KUNHALI *v.* VANNATHAN VITTIL KINATHE . . . . I. L. R., 3 Mad., 74

25. ——————— *Sale of jenmi's rights at Court sale.*—An otti mortgagee, if he avails himself of his right of pre-emption, must pay whatever sum is *bonâ fide* offered to the jenmi for his

**MALABAR LAW — MORTGAGE. — Otti mortgage**—*continued.*

equity of redemption; but the otti-holder is entitled to be fully informed as to the circumstances and amount of the offer before electing to buy. Public notice of, and the option of bidding at, a Court sale of the jenmi's rights, do not constitute a valid offer of pre-emption so as to deprive the otti-holder of his right of pre-emption, if he does not purchase the jenmi's rights. CHERIA KRISHNAN *v.* VISHNU NAMBUDRI . . . I. L. R., 5 Mad., 198

26. ——— *Right of pre-emption.—Further charge created by jenmi.—Auction sale of jenmi's rights subject to further charge.—Cause of action.—Remedy of veppu-holder.*—A jenmi (mortgagor) having conveyed certain land upon a veppu tenure (mortgage, of which the right of pre-emption and the option of making further advances are incidents), created a further charge on the land, without giving the veppu-holder the option of making the advance required. In execution of a decree against the jenmi, a judgment-creditor brought to sale the right of the jenmi in the land subject to the further charge. In a suit brought by the veppu-holder to set aside the auction sale on the ground that his right of pre-emption was injured thereby,—*Held* that the suit would not lie. VASUDEVAN *v.* KESHAVAN . . . I. L. R., 7 Mad., 309

27. ——— **Peruarthum mortgage.**—*Local law of Malabar.—Redemption.*—In the case of a mortgage of the kind prevailing in a certain part of Malabar called a "peruarthum" mortgage, when the mortgagor redeems, the mortgagee is entitled (before restoration of the mortgaged land) to be paid its market value at the time of redemption, not the amount for which the land was mortgaged. SHEKARI VARMA VALIA RAJAH *v.* MANGALOM AMUGAR [I. L. R., 1 Mad., 57

**MALICE.**

*See* ARREST—CIVIL ARREST.
[I. L. R., 4 Calc., 583
1 N. W., Pt. II, p. 32: Ed. 1873, 91

*See* CHAMPERTY . I. L. R., 2 Calc., 233
[13 B. L. R., 530

1. ——— **Proof of malice.**—*Suit for damages for wrongful attachment.—Reasonable and probable cause, Absence of.*—Proof of malice is essential to support a suit for damages for the wrongful suing out of mesne process. By malice in its legal sense something less is meant than malevolence or vindictive feeling. Acts done vexatiously for the purpose of annoyance, acts done wrongfully and without reasonable and probable cause, acts done wantonly and without the exercise of any caution in investigating the necessity for them, have been held to be malicious. At the same time, to make an act malicious, it must be shown that it was done with a wrongful intention. Acts done in good faith and without any wrongful intention, though they may be such as a cautious person would have abstained from, are not necessarily malicious. From proof of the absence of such cause as would influence a man of ordinary caution, malice may be presumed; but this is an in-

**MALICE.—Proof of malice**—*continued.*

ference which it is optional with the Court, and not compulsory on it, to draw, and it may be rebutted by proof of good faith. When the persons against whom malice is to be proved are not themselves present, but act through agents at a distance, the inference of malice should not be drawn from the mere proof of the absence of reasonable cause. GOUTIERE *v.* ROBERT . . 2 N. W., 353

2. ——— **Suit for damages for malicious attachment.**—*Reasonable and probable cause.*—In an action for damages for a malicious attachment, it must be shown that the defendant has acted with malice as well as without reasonable and probable cause. The circumstances that the facts stated in an application for attachment were true, and that nothing was concealed which the Court ought to have known, is evidence that the applicant had reasonable cause upon those facts for the application. CHOUDHAREE SHEORAJ SINGH *v.* DWARKA DOSS . . . . . 4 N. W., 42

**MALICIOUS PROSECUTION.**

*See* JURISDICTION—CAUSES OF JURISDICTION—CAUSE OF ACTION—MALICIOUS PROSECUTION . . 6 B. L. R., 141

*See* LIMITATION ACT, 1877, ART. 23 (1859, S. 1, CL. 2) . 1 B. L. R., S. N., 17
[8 W. R., 443

1. ——— **Right to sue.**—*Previous criminal prosecutions.—Offence under s. 211, Penal Code.—Compounding offence.*—A criminal prosecution for an offence under section 211, Penal Code (false charge), is not a condition precedent to the right to sue for damages. The bringing of a civil suit imports no corrupt agreement or compounding of the offence in such a case. *Shama Churn Bose v. Bhola Nath Dutt, 6 W. R., Civ. Ref., 9,* followed. VIRANNA *v.* NAGAYYAH . . . I. L. R., 3 Mad., 6

2. ——— *Reasonable and probable cause.—Effect of order of discharge of a person accused of an offence before a Magistrate.—Presidency Magistrates' Act, IV of 1877, s. 87.*—The discharge of an accused person by a Presidency Magistrate, under section 87 of the Presidency Magistrates' Act, IV of 1877, is such a termination of the prosecution as entitles the accused to maintain an action for malicious prosecution. VENU *v.* COORYA NARAYAN . I. L. R., 6 Bom., 376

3. ——— *Liability for mere bonâ fide criminal prosecution.*—A complainant who put the criminal law in motion against a person by whom he had been aggrieved, such prosecution not being malicious or groundless, should not be held civilly responsible for any injury or loss thereby sustained by the person prosecuted. KISHOREE LALL *v.* ENAETH HOSSEIN KHAN. ENAETH HOSSEIN KHAN *v.* KISHOREE LALL
[1 N. W., Pt. II, p. 11: Ed. 1873, 71

4. ——— **Necessary evidence.**—*Reasonable cause, Proof of want of.*—In a suit for damages on account of a charge brought by defendant in a Cri-

**MALICIOUS PROSECUTION.—Necessary evidence—*continued.***

minal Court, which charge was ultimately dismissed, plaintiff must prove in the Civil Court that there was no reasonable cause for bringing the accusation: the proceedings in the Criminal Court are not evidence in the Civil Court. AGHORENATH ROY *v.* RADHIKA PERSHAD BOSE . . **14 W. R., 339**

5. ——————— *Reasonable and probable cause, Want of.*—In an action for damages for a malicious prosecution, it is not sufficient to prove merely the dismissal of the charge. It must be proved that the prosecution was without reasonable and probable cause. GUNNESH DUTT SINGH *v.* MUGNEERAM CHOWDHRY **[11 B. L. R., P. C., 321: 17 W. R., 283**

Affirming decision of lower Court in MUGNEERAM CHOWDHRY *v.* GUNESH DUTT SINGH **[5 W. R., 134**

6. ——————— *Requisites for action for malicious prosecution.*—To sustain an action for malicious prosecution, the prosecution must be proved to have been malicious and without reasonable or probable cause. SVAMI NAYAUDU *v.* SUBRAMANIA MUDALI . . . . . **2 Mad., 158**

7. ——————— *Proof of malice or want of reasonable cause.—Costs.—Held* that there being no proof that the defendant acted maliciously or without probable cause, the suit was not maintainable; and under the circumstances the defendant was entitled to his costs. DUNNE *v.* LEGGE **[1 Agra, 38**

8. ——————— *Omission to allege malice and want of reasonable and probable cause.*—Where a plaint alleges the cause of action to be the prosecution of a false charge of forgery, and the statement of the subject-matter imports that the charge was false to the knowledge of the defendant, the omission to allege expressly malice and the absence of reasonable and probable cause is no good ground of objection to the hearing of the suit. RAMASAMI AYYAN *v.* RAMU MUPAN **[3 Mad., 372**

9. ——————— *Malice. — Want of reasonable and probable cause.*—An action for damages for malicious prosecution can succeed only if the plaintiff shows both malice and the absence of reasonable and probable cause. MOONEE UMMAH *v.* MUNICIPAL COMMISSIONERS FOR THE TOWN OF MADRAS . . . . . **8 Mad., 151**

10. ——— **Onus probandi.**—*Proof of malice and want of reasonable or probable cause.*—In an action for malicious prosecution, it is for the plaintiff to prove the existence of malice and want of reasonable or probable cause, before the defendant can be called upon to show that he acted *bonâ fide* and upon reasonable grounds, believing that the charge which he instituted was a valid one. GAUR HARI DAS ADHIKARI *v.* HAYAGRIB DAS **[6 B. L. R., 371**

**MALICIOUS PROSECUTION.—Onus probandi—*continued.***

S. C. GOUR HUREE DOSS *v.* HYAGRIB DOSS **[14 W. R., 425**

NOWCOUREE CHUNDER SURMAH *v.* BIRMOMOYEE DABEA . . . . . **2 W. R., 169**

11. ——————— *Action for damages.*—In an action for damages for malicious prosecution, where it is found that the charge was made not maliciously, but with good and reasonable cause, the onus is on the plaintiff, though the charge against him was dismissed, to prove malice on the part of the defendant. Malice is not to be inferred merely from the acquittal of the plaintiff. ROSHAN SIRKAR *v.* NABIN CHANDRA GHATAK **[6 B. L. R., 377, note: 12 W. R., 402**

12. ——————— *Proof of reasonable and probable cause.*—But if the charge were found to be false, the onus would be on the defendant to show that he had reasonable and sufficient cause for making the charge; and on his failure to show any such cause, malice may be inferred. BISWANATH RAKHIT *v.* RAMDHAN SIRKAR **[6 B. L. R., 375, note**

S. C. BISHONATH RUKHIT *v.* RAM DHONE SIRCAR **[11 W. R., 42**

13. ——————— *Proof of want of reasonable cause.—Inference of malice.*—In a suit for a malicious prosecution, the plaintiff is entitled and bound to show that the prosecution was malicious and without reasonable and probable cause; and if want of reasonable and probable cause be shown, malice may generally be inferred. VENGAMA NAIKAR *v.* RAGHAVA CHARY . . **2 Mad., 291**

14. ——————— *Want of reasonable cause.—Inference of malice.*—In a suit for damages on the ground that the defendant made a false charge of defamation against the plaintiff and had him arrested and taken before the Magistrate, who dismissed the charge,—*Held* that the essence of the case lay in the question whether or not the complainant had reasonable ground for complaining before the Magistrate that the plaintiff had defamed him. Malice would be inferred from the absence of reasonable cause. GUNGA PERSHAD *v.* RAMPHAL SAHOO **[20 W. R., 177**

15. ——————— *Acquittal, Effect of.—Good and reasonable cause.*—In a suit for damages for malicious prosecution, where it was proved that plaintiff, a man of property and respectability, had been charged by defendant with theft, and that he had been convicted before the Magistrate, but acquitted by the Sessions Judge,—*Held* that the mere fact of acquittal did not prove that the charge was malicious; that property having been found in plaintiff's house which defendant claimed as his stolen property, plaintiff could not recover damages, unless it was certain that the property in question was not stolen but his own; and that it was for plaintiff to show that there was no ground or reasonable cause for bringing the charge. DOONGRUSSEE BYDE *v.* GRIDHAREE MULL DOOGUR . . **10 W. R., 439**

**MALICIOUS PROSECUTION**—*continued.*

**16. ——— Evidence of reasonable and probable cause.**—*Conviction by Magistrate and acquittal in Sessions Court.*—In a suit to recover damages for a malicious prosecution, it was proved that the case for the prosecution having been that the plaintiffs had dishonestly broken open the defendant's grain-pit, and the defence that it was done under a claim of right, the Joint Magistrate convicted the accused, but that his sentence was reversed by the Court of Session,—*Held* that, in the absence of any special circumstances to rebut it, the judgment of one competent tribunal against the plaintiffs afforded very strong evidence of reasonable and probable cause. PARIMI BAPURAZU *v.* BELLAMKONDA CHINNA VENKAYYA . . . **3 Mad., 238**

**17. ——— *Conviction by Criminal Court.***—In a suit for damages for defamation of character by maliciously bringing a false charge against the plaintiff, it is important, in determining the same, to see how the charge has been treated by the criminal authorities; and when it was found that the plaintiff had actually been convicted by one Court, that might well be regarded as a weighty circumstance to show that the defendant acted from some adequate cause and not maliciously. GUNGA RAM *v.* HOOLASEE . . . **2 N. W., 88**

**18. ——— *Malice.—Negligence, Inference from.***—The defendant had charged the plaintiff with cheating by personation in falsely pretending that his (plaintiff's) wife had been delivered of a son, and procuring a child and passing him off as the son so born. The case was dismissed by the Magistrate, and the plaintiff brought the present suit for malicious prosecution. The defendant alleged reasonable and probable cause and the absence of malice. The Civil Judge awarded R50,000 damages to the plaintiff. Upon appeal, it was contended that the charge was not malicious, though the facts upon which it was based were allowed to be false. *Held* that this depended upon the question of the absence of reasonable and probable cause, and in case of the absence, upon the cogency of the inference derivable from it. The test which has received the most approbation is partly abstract and partly concrete. Was it reasonable and probable cause for any discreet man? Was it so to the maker of the charge? Upon the facts of this case,—*Held* that if defendant's conduct was mere negligence, it was *dissoluta negligentia:* that the facts alleged in support of the charge were such as, if believed at all, could only be believed and acted upon through such negligence that the inference of malice was irresistible. GODAY NARRAIN GAJPATHI RAU *v.* ANKITAM VENKATA NARSING RAU . . . . . **6 Mad., 85**

**19. ——— *Guilty knowledge.—Criminal intention.—Proof of malice.***—It is not to be presumed, as a matter of course, from the existence of an overcharge in an account, although the error may be an important error, that the tradesman delivering the account intentionally inserted it with a view to defraud. There should generally be something more than the entry of the overcharge to justify the presumption that it was made with a guilty knowledge and criminal intention. *W.* manufactured and delivered to *D.* a punkha with iron supports. In the bill delivered to *D.* the iron-work was entered and charged as weighing four maunds. *D.* paid a certain sum on account, promising to pay the balance if he was satisfied that the charge for the iron-work was not exorbitant. *W.* sued *D.* in the Small Cause Court for the balance due on account of the punkha. It then appeared that the iron-work only weighed a little over two maunds. The Small Cause Court Judge dismissed the claim in respect of the punkha and iron-work, on the ground that the payment already made was sufficient. On 3rd February *D.* applied to the Judge for sanction to prosecute *W.* for making a false claim. On the next day, without making any inquiry or asking *W.* for an explanation, and without awaiting the result of the investigation by the Small Cause Court Judge, which would have satisfied him that there was no sufficient ground for imputing a criminal intention to *W.*, he instituted a charge of cheating against *W.* in the Magistrate's Court. When the Judge of the Small Cause Court closed his investigation and refused sanction, *D.* did not withdraw from the prosecution of the charge in the Magistrate's Court, which was subsequently dismissed. It was proved at the investigation in the Small Cause Court that four maunds of iron had been delivered to the workmen of *W.* and entered by his storekeeper as expended. In a suit by *W.* against *D.* to recover damages for a malicious prosecution,—*Held* that the institution of the charge in the Magistrate's Court, after the defendant had brought the matter before the Judge of the Small Cause Court, and knew it was under the Judge's consideration, and his persistence in the charge in the Magistrate's Court when, after investigation, sanction had been refused by the Small Cause Court Judge, was sufficient proof of malice, and that on the facts there was no reasonable cause for criminal proceedings. WEATHERALL *v.* DILLON **[6 N. W., 200**

**20. ——— Measure of damages.**—*Substantial damages.*—Where a charge has been made against a person of having given false evidence in a judicial proceeding and the circumstances of the case show no reasonable suspicion, the Court will, on suit brought, award substantial damages. ANUNDLOLL DOSS *v.* JOINTEE CHUNDER SEN **[1 Ind. Jur., N. S., 93**

**21. ——— Assessment of damages.**—*Fees for counsel.*—In a suit for malicious prosecution, the expense of counsel is not a proper element in the calculation of damages awardable to a successful plaintiff. GODAY NARRAIN GAJPATHI RAU *v.* ANKITAM VENKATA NARSING RAU . **6 Mad., 85**

**22. ——— *Fees paid to vakeel for defence before Criminal Court.***—In a suit for damages on account of malicious prosecution, the fee paid by the plaintiff to his vakeel for the purpose of his defence before the Criminal Court is an element to be considered in assessing the damages

**MALICIOUS PROSECUTION.—Assessment of damages—*continued.***

suffered. *Dictum* of HOLLOWAY, *J.*, in *Gajpathi Rau* v. *Narsing Rau, 6 Mad., 85*, explained. SUBBA RAU *v.* VIRAPPA . . I. L. R., 5 Mad., 162

23. ——————— *Costs in Criminal Court.*—In a suit for damages for malicious prosecution, the plaintiff is entitled to recover the costs necessarily incurred by him in defending himself on the criminal charge. BUNNOMALI NUNDI *v.* HURRYDASS BYRAGI

[I. L. R., 8 Calc., 710 : 11 C. L. R., 265

**MALIKANA.**

*See* ATTACHMENT—SUBJECTS OF ATTACHMENT — PROPERTY AND INTEREST IN PROPERTY OF VARIOUS KINDS.

[I. L. R., 3 Calc., 414

*See* OUDH ESTATES ACT, 1869.

[I. L. R., 4 Calc., 839

——————— **Suit for—**

*See* BENGAL REGULATION VIII OF 1793, s. 46 . . 4 B. L. R., A. C., 29

*See* LIMITATION ACT, 1877, ART. 132.

[4 B. L. R., A. C., 29
2 W. R., 162
6 W. R., 151
7 W. R., 336
9 W. R., 102
12 W. R., 498
13 W. R., 465
19 W. R., 94
21 W. R., 88
22 W. R., 520, 551

*See* SPECIAL APPEAL—SMALL CAUSE COURT SUITS—DAMAGES . 3 B. L. R., Ap., 96

**MAMLATDAR, JURISDICTION OF—**

——————— *Bombay Act V of 1864.—Possession.—Right of way.—Held* that an order passed by a Mamlatdar under Act V of 1864 (Bombay), directing the accused to keep open a right of way to a privy, being in reality an injunction to refrain from disturbing the possession of the parties, was, therefore, within the jurisdiction of the Mamlatdar. REG. *v.* KRISHNASHET BIN NARAYANSHET

[5 Bom., Cr., 46

**MAMLATDAR, ORDER BY—**

*See* BOMBAY LAND REVENUE ACT, V OF 1879, s. 87 . I. L. R., 8 Bom., 188

*See* HIGH COURT, JURISDICTION OF—HIGH COURT, BOMBAY—CIVIL . 9 Bom., 249

*See* POSSESSION—EVIDENCE OF POSSESSION . . I. L. R., 5 Bom., 387

**MAMLATDAR'S COURT.**

*See* EXECUTION OF DECREE—MODE OF EXECUTION—GENERALLY AND POWERS OF OFFICERS, &c. . 5 Bom., A. C., 158

**MAMLATDAR'S COURT—*continued.***

*See* JURISDICTION OF REVENUE COURT—BOMBAY REGULATIONS AND ACTS.

[I. L. R., 1 Bom., 624

*See* PENAL CODE, s. 188 . 3 Bom., Cr., 53
[5 Bom., Cr., 21

*See* SANCTION TO PROSECUTION—WHERE SANCTION IS NECESSARY.

[I. L. R., 5 Bom., 137

**MAMLATDARS' COURTS ACT, BOMBAY, III OF 1876—**

——————— *"Houses."—"Premises."*—The intention of Bombay Act III of 1876, as stated in the preamble, was not to abolish the old Mamlatdars' Courts and create new Courts under the same name, but was to bring into one consolidating and amending Act so much of the old law and such new law as appeared necessary for the continued regulation of the existing Courts. The High Court is, therefore, not deprived of the powers of superintendence and revision which it exercised over the Mamlatdars' Courts previously to the passing of that Act. *Per* PINHEY and F. D. MELVILL, *JJ.*—Under Bombay Act III of 1876 the Court of a Mamlatdar has, for purposes of the Act, jurisdiction in a town or city situated within the ordinary limits of his talooka. The word "premises" used in section 4 of the Act includes "houses;" and the jurisdiction of the Mamlatdar's Court, consequently, extends over a house for purposes of the Act. It being not denied that the city of Ahmedabad is within the limits of the Daskroi talooka, the jurisdiction of the Court of the Daskroi Mamlatdar extends over a house in the city of Ahmedabad. BAI JAMNA *v* BAI JADAV

[I. L. R., 4 Bom., 168

——————— **s. 4, cl. 2.**—*Jurisdiction of Mamlatdar.—Removal of earth from field.—Profit of land.*—The removal of earth from a field is a taking of a portion of the substance, not merely of a profit, of the land; and the Mamlatdar has no jurisdiction, under section 4 of Bombay Act III of 1876, to entertain an application for an injunction to restrain the defendant from obstructing the plaintiff in the exercise of her right to take earth from the defendant's land. FAKI ISMAIL *v.* UMABAI BIVALKAR

[I. L. R., 7 Bom., 425

——————— **s. 15, cl. (c).**—*Mamlatdar's power to try subsequent suit in respect of the same subject-matter.—Practice.—Parties.*—The applicant had been dispossessed of certain land, in execution of a decree obtained by the opponent in the Court of the Mamlatdar of Karad, under clause (*c*) of section 15 of the Mamlatdars' Act, III of 1876, to which he (the applicant) was not a party. The applicant thereupon brought the present suit against the opponent to recover possession. The Mamlatdar, relying on a Government circular, dismissed the suit as *res judicata.* The applicant applied to the High Court under its extraordinary jurisdiction. *Held* that the decree made by the Mamlatdar in the former suit, under clause (*c*) of section 15 of the Mamlatdars' Courts Act, III of 1876, was no bar to the exercise by him of jurisdiction in the present suit, the present plaintiff

**MAMLATDARS' COURTS ACT, BOMBAY, III OF 1876, s. 15, cl. (c)**—*continued.*

(applicant) not having been a party to the former proceedings; and that it was irregular for the Mamlatdar to refer to a Resolution of Government for the purpose of determining the effect to be given to his former decree. The order of the Mamlatdar was reversed, and the case directed to be heard. GOVINDA BABAJI *v.* NAIKU JOTI . **I. L. R., 10 Bom., 78**

**MANAGER.**

*See* ACT XL OF 1858, s. 18.
**[I. L. R., 4 Calc., 929**

**——— Appointment of, by Court of Wards.**

*See* RIGHT OF SUIT—INTEREST TO SUPPORT RIGHT . . **13 B. L. R., Ap., 14**

**MANAGER OF ATTACHED PROPERTY.**

*See* ACT XI OF 1859, s. 5.
**[12 B. L. R., 297**

1. **——— Appointment of manager.**—*Discretion of Court.—Civil Procedure Code, 1882, s. 503 (1859, s. 243).*—It is discretionary with the Court to appoint a manager under this section. BROJENDER NARAIN ROY *v.* KASSESSUR ROY
**[1 W. R., Mis., 15**

OOTTUM SINGH *v.* RAM SURUN LALL
**[23 W. R., 287**

2. ——— *Consent of decree-holder.—Civil Procedure Code, 1859, s. 243.*—A manager may be appointed by the Court under Act VIII of 1859, section 243, without the consent of the decree-holder. THAKOOR CHUNDER *v.* CHOWDRY CHOTEE SINGH . **Marsh., 261: 2 Hay, 112**

3. ——— *Civil Procedure Code, 1859, s. 243.*—In appointing a manager under section 243, Act VIII of 1859, a Court must exercise a reasonable discretion; and the sole reason for such appointment ought to be that, whilst the debts would be equally satisfied in that manner, and as surely as in any other, the arrangement would at the same time save the debtor from great prospective loss. ZUHOORUN *v.* NUJEEBOODDEEN . **11 W. R., 505**

4. ——— *Lease or mortgage of attached property.—Civil Procedure Code, 1859, s. 243.*—Section 243, Act VIII of 1859, gives no authority to a Court to give a lease or mortgage of attached property, but only to give time to the judgment-debtor to mortgage or let his land, or sell part of it when he can satisfy the Court that there is reasonable ground to believe that the amount of the decree will be raised thereby. LUCHMEEPUT DOOGUR *v.* JUGUT INDUR TEWAREE . . **W. R., 1864, Mis., 5**

5. ——— *Civil Procedure Code, 1859, s. 243.—Ground for allowing time to pay decree.*—A Judge is not bound, under section 243, Act VIII of 1859, to allow a judgment-debtor a year's time to pay his decree, without the debtor assigning some good or sufficient reason for the delay, —*e.g.*, that the money due to the judgment-creditor could be raised equally well in some other way than by immediate sale, and that the creditor would not by that arrangement be put to loss. RAM RUTTUN NEOGY *v.* LAND MORTGAGE BANK OF INDIA
**[17 W. R., 193**

**MANAGER OF ATTACHED PROPERTY.—Appointment of manager**—*continued.*

6. ——— *Ground for allowing time to pay decree.—Civil Procedure Code, 1859, s. 243.*—There should be a reasonable probability of the debt being discharged by the profits of the estate within a reasonably short period. SUHUJ NARAIN SAHEE *v.* RAM PERSHAD MISSER
**[21 W. R., 146**

7. ——— *Inquiry as to value of property.—Rules of High Court, 11th July 1871.*—Where property of a judgment-debtor is already in charge of a manager duly appointed, and it is proposed to put other properties belonging to the debtor also under his charge, an attachment of the property is necessary before appointing the manager to take charge of them. The rule of Court of 11th July 1871 does not limit the time for which a manager should be appointed to two years. The Judge as to that should exercise a proper discretion. BANWARI LAL SAHU *v.* GIRDHARI SINGH
**[8 B. L. R., Ap., 23: 16 W. R., 275**

AJOODHYA DOSS *v.* DOORGA DUTT SINGH
**[17 W. R., 101**

8. ——— *Time in which debt could be paid off.*—A Court executing a decree was held to have been justified in refusing to appoint a manager for attached property belonging to the judgment-debtor where it would have taken twenty years to pay off the debt from the profits of the property. But the High Court saw no objection to the appointment of a manager to dispose of portions of the property by sale, mortgage, and otherwise, under section 243, Code of Civil Procedure, if the debt could thereby be cleared off in six months. MOHINEE MOHUN DOSS *v.* RAM KANT CHOWDRY
**[15 W. R., 322**

9. ——— *Distribution of estate under manager.—Priority of creditors.*—After *A.*, a judgment-creditor, had attached property of his debtor under the decree, the Court, at the instance of the Collector of the district, ordered that, instead of selling the estate, a manager should be appointed, and the rents and profits applied in liquidation of the claim of *A.* and other decree-holders. *Held* that *A.* was entitled, as he would have been under section 270, to some priority over the other creditors. The Court, finding that *A.'s* debt might be paid out of the proceeds of the estate in two years, and at the same time funds be left for the reduction of the other debts, ordered that it should be so. PEAREE DEBEA *v.* BOYDONAUTH BAUGH
**[Marsh., 413: 2 Hay, 537**

10. ——— *Causing delay in giving satisfaction of decrees.*—Numerous decrees had been obtained against the defendants, part of

**MANAGER OF ATTACHED PROPERTY.—Appointment of manager—*continued.***

whose property consisted of a village which was attached in 1859. The village was under the management of the Collector, whom the Courts below treated as a manager put in under section 243 of the Code of Civil Procedure. The decree-holders received rateable shares in the nett income of the village in liquidation of their respective decrees. It appeared that it would take fifteen years to pay off the various decree-holders. The petitioner applied to the Civil Court for an attachment of the village in execution of his decree. The application was refused on the ground that the village was already under attachment in satisfaction of other decrees. Upon appeal the High Court ordered a sale of the village, the sale-proceeds to be dealt with in accordance with the proper provisions of the Code, on the ground that it could never have been intended to give the Civil Courts for an indefinite length of time the management of the encumbered estates of the country, or to compel decree-holders to submit to such an unreasonable delay as fifteen or twenty years before obtaining satisfaction of their decree. *Quære,*—Whether section 243 was intended to be applied to the case of more than a single decree-holder. REDNUM ATCHUTARAMAYYA *v.* MAHOMED AMIN KHAN *alias* DADA SAHIB . . . . . **5 Mad., 272**

**11.** ——————— *Power of Court to appoint manager.—Decree on specially-registered bond.—Registration Act, 1866, s. 55.*—Where the lower Appellate Court passed a decree on a specially-registered bond, setting aside an arrangement made by the first Court as to payment by instalments and its order about interest,—*Held* that section 55 of the Registration Act applied to the case, and that the High Court was competent, in subsequent execution proceedings, to make an order under section 243, Code of Civil Procedure, appointing a receiver, or giving opportunity to the judgment-debtor to pay off the decree by mortgage of the estate. KISHEN COOMAREE BIBEE *v.* GOLAB COOMAREE BIBEE **[15 W. R., 477**

**12.** ——————— *Ground for rejecting application.—Civil Procedure Code, 1859, s. 243.*—The fact of the judgment-debtor's possessing properties other than the one attached, is no ground for rejecting an application under section 243, Act VIII of 1859, for the appointment of a manager. DEBKUMARI BIBEE *v.* RAM LAL MOOKERJEE . **3 B. L. R., Ap., 107 ; 12 W. R., 66**

**13.** ——————— *Circumstances necessary for proof of necessity for order.—Civil Procedure Code, 1859, s. 243.*—Where a judgment-debtor asks that a manager be appointed under Act VIII of 1859, section 243, he must show that the circumstances are such that the order for which he applies would be a reasonable and proper one. He should not only show what is the income of the particular property and the amount due under the decree, but he should also show whether that income is unincumbered, and if incumbered, to what extent. He cannot ask the Court to make an order under this section with respect to one single property before disclosing the whole state of his affairs, the extent of his liabilities, and the means he has of meeting them. DINOBUNDHOO SINGH *v.* MACNAGHTEN . . . . . **2 C. L. R., 185**

**14.** ——————— *Civil Procedure Code, 1859, s. 243.—Order staying sale of property.*—Section 243 of the Civil Procedure Code does not authorise an order in the execution department having the effect of staying the sale of certain property for one year. FYZ-OOD-DEEN *v.* GIRAUDH SINGH **[2 N. W., 1**

**15.** ——————— *Civil Procedure Code, 1859, s. 243.—Decree on mortgage.*—Section 243, Act VIII of 1859, does not apply to a decree on a mortgage, when the decree declares that certain property is to be sold in satisfaction of the mortgage-debt. A manager, therefore, cannot be appointed under section 243 in such a case. WOMDA KHANUM *v.* RAJROOP KOAR **[I. L. R., 3 Calc., 335 : 1 C. L. R., 295**

**16.** ——————— *Power of Court to order payment out of proceeds of sale.*—The Court has no power to order that the manager should, out of the proceeds of the estate, satisfy the claims of persons other than decree-holders. THAKOOR CHUNDER *v.* CHOWDHRY CHOTEE SINGH **[Marsh., 261 : 2 Hay, 112**

**17.** ——————— *Civil Procedure Code, 1859, s. 243.—Power of Courts in mofussil to appoint manager pending suit or administration.—Held, per* PHEAR, *J.*, that section 243, Act VIII of 1859, does not give the Court authority to appoint a manager to carry on a judgment-debtor's business pending execution proceedings, and to invest him with power to raise money for that purpose. *Quære,*—Whether the Civil Courts in the mofussil have the power possessed by the Court of Chancery in England and by the High Court in Calcutta of managing the property of parties to a cause pending suit or administration. But however this may be, the Court's manager, under such circumstances, only acquires a right to charge his costs and expenditure against the parties to the suit or persons who have knowingly placed themselves in a like position relative to his management, and even then he can only do so in respect of such expenditure as has been expressly sanctioned by the Court. MORAR *v.* MITTU BIBEE **[I. L. R., 2 Calc., 58**

**18.** ——————— *Civil Procedure Code, 1859, s. 243.—Effect on attachment of appointing manager.*—An estate does not cease to be under attachment merely by the appointment of a manager under section 243, Act VIII of 1859. MOHABEER PERSHAD SINGH *v.* COLLECTOR OF TIRHOOT **[13 W. R., 423**

**19.** ——————— *Power of Court to deal with property under manager.*—The fact of a manager having been appointed to realise the profits of a property with a view to satisfy certain decrees (even though the appointment should have been

**MANAGER OF ATTACHED PROPERTY.—Appointment of manager—*continued.***

confirmed by the High Court) is no bar to a Judge, on the application of another decree-holder, inquiring into the state of the property, and passing proper orders; and, should he find that the proceeds are insufficient to satisfy all the decrees within a reasonable time, causing the decree to be executed in the usual way. DIN DYAL LALL *v.* RAM RUTTUN NEOGHEE . . . . . 16 W. R., 46

20. ——————— *Power of manager.—Officer of Court.*—A manager appointed under Act VIII of 1859, section 243, so far as he is an officer of the Court, is at most the hand of the Court for the purpose of gathering in, on behalf of the judgment-debtor, the moneys due to him, in order that they may be immediately applied to the satisfaction of the decree. If he does more than this and deals with the subject of the property itself, he must do so as the agent of the judgment-debtor, and not properly as an officer of Court. IN THE MATTER OF THE PETITION OF TEIL & CO. TEIL & CO. *v.* ABDOOL HYE . . 19 W. R., 37

21. ——————— *Power of manager under Act VIII of 1859, s. 243.—Notice of enhancement.—Civil Procedure Code (Act X of 1877), s. 503.*—A manager appointed under section 243 of Act VIII of 1859 is appointed merely to collect rent and other receipts and profits of the land, to carry on the existing state of affairs as the proprietor himself had been doing, and he has no power to issue notice of enhancement. KHETTER MOHUN DUTT *v.* WELLS [I. L. R., 8 Calc., 719: 11 C. L. R., 13

22. ——— Removal of manager.—*Omission to file accounts.*—Where a manager had not filed accounts and the Judge found that the management could not be continued with any prospect of the debt being paid within three years, he was held to have done right in removing the manager and ordering the property to be sold. HUREE SUNKUR MOOKERJEE *v.* JOGENDRO COOMAR MOOKERJEE [22 W. R., 220

23. ——————— *Summary removal at request of decree-holder.*—Where a manager had been appointed under section 243, Act VIII of 1859, after hearing arguments on both sides, the Judge was held not to be justified in removing him summarily at the request of the decree-holder. His order was accordingly set aside by the High Court, as well as a subsequent order allowing the sale of other properties attached, which properties were placed along with the others in the hands of the manager. HUREE SUNKUR MOOKERJEE *v.* JOGENDRO COOMAR MOOKERJEE . . . . . 19 W. R., 66

24. ——— Death of manager.—*Discretion of Court as to renewing managership.*—Where a Judge, on the death of a manager appointed under Act VIII of 1859, section 243, reviewed the progress made, and finding that, under such management, the decree was not likely to be satisfied for a very long time, directed execution to proceed against the estate,—*Held* that his discretion had been properly exercised. DOORGA DUTT SINGH *v.* BUNWAREE LALL SAHOO . . . . 25 W. R., 33

**MANAGER OF ESTATE OF LUNATICS, SECURITY BY—**

*See* SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE—IRREGULARITY. [10 B. L. R., 214

**MANAGER OF JOINT ESTATE.**

*See* BENGAL REGULATION V OF 1812, S. 26. [B. L. R., Sup. Vol., 655

**MANAGER OF JOINT HINDU FAMILY.**

*See* CASES UNDER HINDU LAW—JOINT FAMILY—POWERS OF ALIENATION BY MEMBERS—MANAGER.

*See* LIMITATION ACT, 1877, S. 19 (1871, S. 20)—ACKNOWLEDGMENT OF DEBTS. [I. L. R., 1 Mad., 385
I. L. R., 5 Mad., 169

**MANAGER OF TWO ESTATES, SUIT FOR BALANCE OF ACCOUNT BY ZEMINDAR AGAINST—**

*See* JURISDICTION—CAUSES OF JURISDICTION—CAUSE OF ACTION—BALANCE OF ACCOUNT, SUIT FOR— [7 B. L. R., Ap., 35

**MANAGER UNDER REGULATION V OF 1812, ORDER APPOINTING—**

*See* APPEAL—REGULATIONS. [12 B. L. R., 366

**MANDAMUS.**

*See* CALCUTTA MUNICIPAL ACT, 1863, S. 151. [8 B. L. R., 433

*See* RULES OF HIGH COURT, CALCUTTA. [8 B. L. R., 433

——— Order absolute for—

*See* LETTERS PATENT, HIGH COURT, CL. 15. [8 B. L. R., 433

——— Power of High Court to issue—

*See* TRANSFER OF CRIMINAL CASE—GENERAL CASES . I. L. R., 2 Calc., 278

1. ——— Ground for issue of writ.—*Criminal charge in respect of civil suit pending.—Duty of Magistrate.*—A mandamus will not issue to compel a Maigstrate to proceed with a criminal charge in respect of any matter involved in, or affecting the merits of, a civil suit still pending. The proper course for a Magistrate to pursue in such a case is not to dismiss the summons, but to adjourn the hearing pending the decision of the Court in the civil action. QUEEN *v.* CLARKE [1 Ind. Jur., O. S., 137

2. ——————— *Discretion of Magistrate to refuse to proceed with criminal charge pending civil suit.*—Where a Magistrate has, in the exercise of his discretion, refused to proceed with a criminal charge pending a civil action in

**MANDAMUS.—Ground for issue of writ —*continued.***

respect of the matter out of which the charge arose, a mandamus will not be granted to compel the hearing of the charge. EX PARTE VARADARAJULU NAYUDU . . . . . **1 Mad., 66**

**3.** ——————— *Magistrate finding evidence does not amount to offence charged.—Error of law.*—A charge was made against the accused of using criminal force under section 141 of the Penal Code. The Police Magistrate heard the evidence for the prosecution, and, without disbelieving it, decided it did not amount to the offence charged. *Held* that, assuming that an error of law had been committed, the High Court had no power to issue a mandamus to the Magistrate to commit the accused. It was not a case where the Magistrate had declined jurisdiction: he had exercised his jurisdiction and heard the case. IN THE MATTER OF EMPRESS ON THE PROSECUTION OF MALCOLM *v.* GASPER **[I. L. R., 2 Calc., 278**

**4.** ——————— *Beng. Act VI of 1863, s. 180.—Duties of Justices of Peace for Town of Calcutta.—Supplying tanks for water.*—Under section 18 of Bengal Act VI of 1863, the Justices of the Peace are required to keep up and maintain the existing tanks, reservoirs, &c., vested in them; or to substitute a new tank, reservoir, &c., for any existing tank, reservoir, &c.,—*i.e.*, new works of a like kind, each for each, in place of the old. Therefore, where the Justices had closed a tank for the purpose of constructing in its place a different means of water-supply, a mandamus was issued directing the Justices to maintain the tank and supply it with water, or to substitute another tank in its place and supply that with water. QUEEN *v.* JUSTICES OF THE PEACE FOR TOWN OF CALCUTTA . . . **2 Ind. Jur., N. S., 182**

**5.** ——————— *Matter concerning revenue.—License to sell liquor.—Jurisdiction of High Court.—Act XI of 1849, s. 9.—Beng. Act III of 1873, s. 1.—21 Geo. III, c. 70, s. 8.*—Under Act XI of 1849, section 9, as amended by Bengal Act III of 1873, section 1, whenever a license is granted for the retail sale of intoxicating liquors, the Collector is authorised to demand "such fee, tax, or duty as may from time to time be fixed with the sanction of the Board of Revenue, or a fee, tax, or duty, adjusted or regulated in such manner and in accordance with such rules as the Board of Revenue may prescribe." The Board of Revenue having notified that liquor licenses for the year ending March 31st, 1874, would be put up to public auction, certain licensed liquor vendors moved the High Court for a mandamus to compel the Board of Revenue to issue rules prescribing the fee payable for licenses. *Held* that the matter wholly related to the revenue, and, therefore, by 21 George III, Cap. 70, section 8, the High Court had no jurisdiction. IN THE MATTER OF AUDHUR CHUNDRA SHAW. IN THE MATTER OF ACT XI OF 1849 AS AMENDED BY BENGAL ACT III OF 1873 **[11 B. L. R., 250**

**6.** ——————— *Company. — Enforcement of director's right.—Power of High Court.*

**MANDAMUS.—Ground for issue of writ —*continued.***

—The High Court has jurisdiction to enfore by mandamus the right of persons duly elected directors of a joint-stock company to exercise the functions of director of such company, if such rights are interfered with by the company acting through its other directors. *Semble,*—That the Court will not refuse to interfere by mandamus in such a case merely because the office of a director is not a permanent office, or because a director can be removed from his office by a special resolution of the shareholders, but, in a proper case, will restore him to his legal position. Meaning of the words "casual vacancy" considered. IN RE THE ALBERT MILLS COMPANY. NASARVANJI ASPANDIARJI *v.* SHIVJI MANIKBHAI . **9 Bom., 438**

**7.** ——————— *Refusal by company to register transfer of shares.—Transfer signed by Judge of High Court.—Civil Procedure Code, 1859, s. 267.*—Where a company refused to register a transfer of shares purchased by an execution-creditor, on the ground that no share certificate had been produced, but the sale had been confirmed, and transfer signed by a Judge of the High Court under Act VIII of 1859, section 267, a writ of mandamus was directed to issue out of the Court, ordering the company to register the transfer of such shares, and to issue fresh share certificates in respect of them. QUEEN *v.* EAST INDIAN RAILWAY COMPANY **[Bourke, O. C., 395 : 1 Ind. Jur., N. S., 258**

**8.** ——————— *Writ to compel registrar to register transfer of ship.*—A mandamus will lie to compel the registrar to register the transfer of a ship sold in execution of decree; but where the form of transfer was not as it should have been, but quite irregular, having reference to the Merchant Shipping Act, the Court refused to issue a mandamus. IN THE MATTER OF THE SHIP "SHAH CALLANDER" . . . **1 Ind. Jur., N. S., 263**

**9.** ——————— *Small Cause Court, Calcutta.*—A mandamus lies from the High Court to the Small Cause Court to compel it to act in accordance with law. IN RE TOOLSEE DOSS SEAL **[2 Ind. Jur., N. S., 133 : 7 W. R., 228**

**10.** ——————— *Power of High Court over Small Cause Court.*—The High Court has no jurisdiction to compel a Court of Small Causes to re-hear a suit dismissed by the latter Court on the ground of *res judicata.* BROMMO ROOP GOSSAIN *v.* ANUND MOYEE DEBIA . . . **7 W. R., 316**

**11.** ——— **Return to writ.**—*Sufficiency of.—Land Acquisition Act, VI of 1857.*—By Act VI of 1857, section 2 (for the acquisition of land for public purposes), it is enacted that, "wherever it appears to the Local Government that any land is required to be taken by Government at the public expense for a public purpose, a declaration shall be made to that effect, under the signature of a Secretary to the Government, or of some officer duly authorised to certify the orders of Government," &c. Therefore where the Justices of the Peace for the Town of Calcutta were called upon by a writ of mandamus issued

**MANDAMUS.—Return to writ—*continued.***

out of the High Court at Calcutta to "continue and maintain the existing Wellington Square tank as a public tank and to cause the same to be supplied with water, or forthwith to substitute another such public tank," &c., and they returned that, by a notification published in the *Calcutta Gazette* on the 5th day of March instant, under the provisions of Act VI of 1857 of the Legislative Council of India, it was notified that "whereas it appeared to the Honourable the Lieutenant-Governor of Bengal that land was required to be taken by Government for a public purpose, *viz.*, for the Calcutta Water-Works, it was thereby declared that for the above purpose a public tank and square known as Wellington Square, &c., was required," and proceeded to justify under this notification, &c.,—*Held* that the return was bad. REG. *v.* JUSTICES OF THE PEACE FOR THE TOWN OF CALCUTTA . . . **2 Ind. Jur., N. S., 24**

12. ——————— *Pleading.*—*Demurrer.*—The prosecutor could not, in India, both plead and demur to a return to a writ of mandamus, without first obtaining leave of the Court. REG. ON THE PROSECUTION OF TOOLSEEDAS NUNDY *v.* EAST INDIAN RAILWAY COMPANY **[1 Ind. Jur., N. S., 244**

**MANORIAL DUES.**

*See* CUSTOM . **I. L. R., 1 All., 440**

**MAPILLAS.**

*See* MALABAR LAW—MAINTENANCE. **[I. L. R., 6 Mad., 259**

——————— *Adoption of Hindu law.—Presumption as to joint property.*—Although Mapillas in Malabar ordinarily follow the Hindu custom of holding family property undivided, yet, as they are not subject to the same personal law as the Hindus, their claims cannot be governed by the legal presumption of joint ownership. AMMUTTI *v.* KUNJI KEYI **[I. L. R., 8 Mad., 452**

**MAPS.**

*See* EVIDENCE—CIVIL CASES—MAPS.

——————— **Inspection of—**

*See* CHUR LANDS . . **6 B. L. R., 677**

**MARKET RATE.**

*See* EVIDENCE—CIVIL CASES—MISCELLANEOUS DOCUMENTS—MARKET-RATE. **[I. L. R., 10 Calc., 565**

**MARRIAGE.**

*See* CONSIDERATION . . **2 Mad., 128**

*See* HINDU LAW—MARRIAGE.

*See* INJUNCTION—UNDER CIVIL PROCEDURE CODES . **I. L. R., 1 Calc., 74**

*See* MAHOMEDAN LAW—MARRIAGE.

——————— **Authority of caste to declare, void.**

*See* BIGAMY . **I. L. R., 1 Bom., 347**

**MARRIAGE—*continued.***

——————— **Buddhist laws of, in Burma.**

*See* BURMA CIVIL COURTS ACT, 1875, s. 4. **[I. L. R., 10 Calc., 777**

——————— **Contract to give in—**

*See* SPECIFIC PERFORMANCE—SPECIFIC PERFORMANCE NOT ALLOWED. **[I. L. R., 1 Calc., 74**

——————— **Contract in consideration of—**

*See* CONTRACT ACT, s. 23—ILLEGAL CONTRACTS—AGAINST PUBLIC POLICY. **[25 W. R., 32**
**I. L. R., 10 Calc., 1054**

——————— **Contract to invalidate—**

*See* CONTRACT ACT, s. 23—ILLEGAL CONTRACTS—AGAINST PUBLIC POLICY. **[11 B. L. R., 129**

——————— **Declaration of nullity of—**

*See* DIVORCE ACT, ss. 4 AND 18. **[13 B. L. R., 109**

——————— **injunction to restrain, pending suit.**

*See* HINDU LAW—MARRIAGE—RESTRAINT ON, OR DISSOLUTION OF, MARRIAGE. **[I. L. R., 1 All., 549**

——————— **Lawful polygamous—**

*See* SUCCESSION ACT, s. 56. **[I. L. R., 1 Calc., 148**

——————— **Proof of—**

*See* CASES UNDER ADULTERY.

*See* CASES UNDER BIGAMY.

——————— **presumption of—**

*See* CASES UNDER MAHOMEDAN LAW—ACKNOWLEDGMENT.

*See* PENAL CODE, s. 498. **[8 B. L. R., Ap., 63**

——————— **Promise to give in—**

*See* JURISDICTION OF CIVIL COURT—MARRIAGES . . . **5 B. L. R., 395**

——————— **Suit to enforce contract of—**

*See* JURISDICTION OF CIVIL COURT—MARRIAGES . . . **24 W. R., 380**

——————— **Suit to have Hindu marriage declared invalid.**

*See* JURISDICTION OF CIVIL COURT—MARRIAGES. **[6 B. L. R., 243, 244, note**

1. ——————— **Validity of marriage.**—*Adoption by Christians of Mahomedan religion for purpose of marriage.—Bigamy.—Quære,*—Whether a marriage, according to Mahomedan rites, between

**MARRIAGE.—Validity of marriage—*continued.***

a married Christian man and a Christian woman, both of whom became Mahomedans in order to effect the marriage, is valid. SKINNER *v.* ORDE
[10 B. L. R., 125: 14 Moore's I. A., 309: 17 W. R., 77

2. ——————— *Law of domicile.—Law of place of celebration.—Semble,*—A marriage celebrated in accordance with the law of the domicile of the parties may be valid, although it would be invalid by the law of the place where the marriage was celebrated. GASPER (falsely called GONSALVES) *v.* GONSALVES . . . . . 13 B. L. R., 109

3. ——————— *Marriage with deceased wife's sister.—Statute 5 & 6 Wm. IV, c. 54.*—The marriage of an East Indian, domiciled in Calcutta, with the sister of his deceased wife, is not void under 5 and 6 William IV, Cap. 54. DAS MERCES *v.* CONES . . . . . 2 Hyde, 65

4. ——————— *Marriages of Native Christian converts.*—The question as to the validity of the marriage of Native Christian converts does not depend on the presence or otherwise of an ordained minister of religion. KRISTO MOHUN CHRISTIAN *v.* ANUNDA . . . 16 W. R., 249

5. ——————— *Prohibited degrees.—Roman Catholics.—East Indians.—Customary law.—Dispensation, Proof of.—Presumption.—Divorce Act (IV of 1869), ss. 19 and 53.—Deceased wife's sister, Marriage with.*—In a suit for restitution of conjugal rights the parties were East Indians, and at the time of the marriage, on 22nd July 1877, were domiciled in British India, resident within the limits of Calcutta, and members of the Roman Catholic religion. The defence to the suit was that a previous marriage had, on 6th December 1871, been performed between the respondent and the petitioner's sister, and the respondent prayed that the second marriage might be declared a nullity. The ceremony of 6th December 1871 had taken place while the petitioner's sister was on her death-bed and *in extremis*, and had been celebrated in accordance with the rites of the Roman Catholic Church, and it was held both by the original Court and on appeal to be a valid marriage. The first Court (CUNNINGHAM, *J.*) held that the second marriage was null and void, on the ground that the parties were within the prohibited degrees. *Held*, on appeal (by GARTH, *C. J.*, and WILSON, *J.*, while referring to a Full Bench the question "whether the second marriage was a valid marriage, or, on the other hand, was either void or voidable"), that it was competent to the Court, in a suit for restitution of conjugal rights, to make a declaration of nullity of marriage if the respondent showed himself entitled to such relief. *Held* by the Full Bench.—The prohibited degrees mentioned in section 19 of the Indian Divorce Act do not necessarily mean the degrees prohibited by the law of England. All that was known in respect of the parties to the marriage being that they were Roman Catholic subjects with Portuguese names, and it not having been found whether they were of English or any other European descent, or of native or mixed

**MARRIAGE.—Validity of marriage—*continued.***

parentage,—*Held* that the prohibited degrees for the parties to the marriage were not the degrees prohibited by the law of England, but those prohibited by the customary law of the class to which they belonged,—that is to say, the law of the Roman Catholic Church as applied in this country. *Held* by the Division Bench (GARTH, *C. J.*, and WILSON, *J.*), on the case being returned to it.—Where a man and a woman intend to become husband and wife, and a ceremony of marriage is performed between them by a clergyman competent to perform a valid marriage, the presumption in favour of everything necessary to give validity to such marriage is one of very exceptional strength, and, unless rebutted by evidence strong, distinct, satisfactory and conclusive, must prevail. *Piers* v. *Piers, 2 H. L. C., 331*, followed. According to the rule of the Church of Rome, a dispensation from the proper ecclesiastical authority is necessary to give validity to a marriage between a man and the sister of his deceased wife. In this case the parties were Roman Catholics and intended to become husband and wife, and a ceremony of marriage was performed between them by a clergyman competent to perform a valid marriage. *Held* that the Court was bound to presume that a dispensation necessary to remove the obstacle to the marriage on the ground of affinity had been obtained. LOPEZ *v.* LOPEZ
[I. L. R., 12 Calc., 706

**MARRIAGE ACT (CHRISTIAN), V OF 1865, s. 56.**

——————— *Offence of solemnising illegal marriage.—Celebration of marriage in Hindu form by Hindu priest where one party is a Christian convert.*—A Hindu priest was charged with knowingly and wilfully solemnising a marriage between two persons, one of whom professed the Christian religion, the said priest not being duly authorised under section 6 of Act V of 1865, an offence punishable under section 56 of the same Act. The Sessions Judge discharged the accused without trial on the ground that the enactment in question was inapplicable to the celebration of a marriage according to the Hindu form by a Hindu priest, though one of the contracting parties was a Christian convert. *Held* that this view of the law was erroneous, and that the accused was *primâ facie* liable under section 56 of the Act. ANONYMOUS CASE
[6 Mad., Ap., 20

**MARRIAGE PRESENTS, SUIT TO RECOVER—**

*See* CONTRACT—ALTERATION OF CONTRACTS—ALTERATION BY THE COURT.
[13 B. L. R., Ap., 34

**MARRIAGE SETTLEMENT.**

*See* HUSBAND AND WIFE.
[I. L. R., 10 Calc., 951

*See* WILL—CONSTRUCTION.
[I. L. R., 4 Calc., 514

**MARRIAGE SETTLEMENT**—*continued.*

——— **Order as to—**

*See* DIVORCE ACT, s. 40.
[14 B. L. R., Ap., 6

——— *Construction of settlement.—Trust funds.*—*S.* being entitled to personal estate by a settlement executed upon her marriage with *R.*, vested it in trustees on terms which conferred upon her an estate for her separate use for life, with remainder, in case she should die in the lifetime of her husband, to her children, share and share alike. The settlement did not contain a power to invest in the purchase of real estate. *R.* died in the lifetime of *S.*, and a portion of the trust fund was invested by the trustees in the purchase from *S.* of real estate vested in her as representative of *R.* *S.* afterwards married *P.*; and during her second coverture a further portion of the trust fund was, with the consent of *S.*, invested in the purchase of real estate. *S.* survived *P.* and died intestate, leaving a son and daughter and the children of another daughter her next of kin. *Held*, first, that the events contemplated by the settlement not having arisen, the trust fund became the absolute property of *S.*; and, second, that the devolution of the trust fund was to be governed by the state of its investment at the time of her death, and that therefore so much of it as was invested as above must descend as real estate. *Held*, also, the parties being neither Mahomedans nor Hindus, and though not, strictly speaking, all of them European British subjects, yet having all of them adopted the law which affects European British subjects in India, the real estate, whether situated within or without the local limits of the jurisdiction of the Court, would descend to the heir-at-law. RIGORDY *v.* SMITH
[1 Ind. Jur., N. S., 290

**MARRIED WOMAN, ENTICING AWAY—**

*See* COMPOUNDING OFFENCE.
[I. L. R., 1 Mad., 191

*See* PENAL CODE, s. 498.
[8 B. L. R., Ap., 63

**MARRIED WOMAN, LIABILITY OF—**

*See* SUCCESSION ACT, s. 4.
[13 B. L. R., 383

**MARRIED WOMAN'S PROPERTY ACT.**

*See* SUCCESSION ACT, s. 4.
[13 B. L. R., 383

——— **ss. 4, 7, & 8.**

*See* HUSBAND AND WIFE.
[I. L. R., 4 Calc., 140

——— **ss. 7 & 8.**

*See* HUSBAND AND WIFE.
[I. L. R., 1 Calc., 285

——— **s. 8.**

*See* PARTIES—PARTIES TO SUITS—HUSBAND AND WIFE . 10 C. L. R., 536

**MARRIED WOMAN'S PROPERTY ACT**—*continued.*

——— **ss. 8, 9.**—*Restraint on anticipation.—Transfer of Property Act (IV of 1882), s. 10.*—Section 8 of Act III of 1874 extends to the separate property of a married woman subject to a restraint upon anticipation. Section 10 of the Transfer of Property Act merely excepts from the general rule laid down in that section, the particular case of a married woman, and does not give to a restraint upon anticipation any greater force than it had before the passing of the Act, but merely preserves to it the effect it had previously, leaving the Married Woman's Property Act of 1874 and the decisions upon it untouched. HIPPOLITE *v.* STUART . I. L. R., 12 Calc., 522

**MASSES, BEQUEST FOR PERFORMANCE OF—**

*See* WILL—CONSTRUCTION.
[2 B. L. R., O. C., 148
5 B. L. R., 433

**MASTER, LIABILITY OF—**

*See* BILL OF LADING . 13 B. L. R., 394

*See* CHARTER PARTY . 8 B. L. R., 340
[I. L. R., 7 Bom., 51

**MASTER, LIEN OF, FOR WAGES AND DISBURSEMENTS.**

*See* BOTTOMRY-BOND . 5 B. L. R., 258
[6 B. L. R., 323

**MASTER AND SERVANT.**

*See* CHARGE—FORM OF CHARGE—SPECIAL CASES—MASTER AND SERVANT.
[3 Bom., Ap., 1

*See* JUDGE—QUALIFICATIONS AND DISQUALIFICATIONS.
[I. L. R., 9 Bom., 172

*See* LIMITATION ACT, 1877, s. 10 (1859, s. 2 . . 1 B. L. R., S. N., 11

*See* MAGISTRATE—DUTY OF—
[I. L. R., 9 Bom., 172

1. ——— **Liability of master for acts of servant.**—*Acts within scope of servant's duty.*—A master is responsible for the acts of his servants done within the scope of his duties, and for the master's benefit. ANUNT DASS *v.* KELLY
[1 N. W., Part 7, p. 107: Ed. 1873, 194

2. ——— *Trespass.*—The appellant having obtained a decree for khas possession of a share in a zemindari, had refused to recognise the ryots whom the farmers under her co-sharers had settled in the estate; and her servants cut and carried off the crops of those ryots. *Held* by GLOVER, *J.*, that the appellant was liable for the acts of her servants, which were done in furtherance of her known wishes and for her benefit. *Held* by LOCH, *J.*, that those acts were beyond the ordinary scope of the servants' duty; and that, unless it could be shown that the appellant ordered or ratified the acts, she was not liable. In the present case,

**MASTER AND SERVANT.—Liability of master for acts of servant—*continued.***

the circumstances gave rise to a strong presumption that the acts were done with her knowledge, which presumption had not been rebutted, and therefore she was liable. SHAMASUNDARI DEBI *v.* DUKHU MANDAL . . . **2 B. L. R., A. C., 227**

S. C. SHAMA SOONDUREE DEBIA *v.* MALLYUT MUNDUL . . . . **11 W. R., 101**

3. ——————— *Master of ship.—Damage done to person by subordinate officer or crew.*—Where a servant in the course of his employment, and in doing what he believed to be for the interests of his master, acts carelessly, recklessly, wantonly, or improperly, the master is liable. But where the act of the servant is done by him to forward some purpose of his own, the master would not be responsible. The master, not the owners, of a merchant ship is primarily responsible for damage done in the course of his employment by one of his subordinate officers or crew to the person who is injured. ANONYMOUS . **Bourke, A. O. C., 144**

4. ——————— A boat which *S.* let to *G. A. & Co.*, for unloading the ship *B.*, was lost in consequence of the negligence of the mate. *S.* sued the captain for the damage sustained, and the lower Court dismissed the suit with costs, on the ground that *G. A. & Co.*, the ship's agents, who had hired the boat, and not the captain, were liable. *Held* on appeal, reversing the judgment of the lower Court, but without costs, that the captain was not absolved from liability because the injury was caused by the negligence of the crew, although they acted contrary to his orders: that it was the duty of the captain to deliver the cargo to the consignees, and the loading of the cargo-boats was a part of that duty: and that the fact of the owners of the ship having agents in Calcutta did not alter the relations between the captain and the public. SUTHERLAND *v.* SHAW . **Bourke, A. O. C., 92**

5. ——————— *Negligence of servant.—Bailor and bailee.—Proprietor and driver of public conveyance.—Bombay Act VI of 1863.*—The plaintiffs sued the proprietor of a buggy for damages sustained by them by reason of the negligence of the driver of the buggy. It was proved that the arrangement between the defendant and the driver was that the driver should be entrusted with the buggy and the use of two horses for the day to be used entirely at the driver's discretion for the purpose of plying for hire. The driver was to pay three rupees a day for the use of the buggy and horses. All that he made above that sum was his perquisite for his labour, and any deficiency he had to make good. *Held* that the relation between the proprietor and driver of the buggy was that of master and servant, and that the proprietor was liable for the driver's negligence. The relation between the proprietor and driver of a public conveyance established by Bombay Act VI of 1863 is similar to that existing in England under the English Acts. BOMBAY TRAMWAY COMPANY *v.* KHAIRAJ TEJPALL **[I. L. R., 7 Bom., 119**

**MASTER AND SERVANT.—Liability of master for acts of servant—*continued.***

6. ——————— *Trespass.—Ratification.—Damages.*—The plaintiff let a cargo-boat to *U. C.*, who had been employed by the defendants to land certain goods. During the landing of the goods a dispute as to the terms of hirfng arose, and *U. C.* refusing to pay what was alleged by the plaintiff to be due to him for hire of his boat, the plaintiff refused to give up 53 bales then remaining unlanded from his boat. *U. C.* communicated the circumstances to an assistant in defendant's firm, who afterwards went with *U. C.* and forcibly took the goods from the plaintiff's boat, without satisfying the plaintiff's lien thereon, and the defendants received them into their godowns. It was proved that *U. C.* and the assistants acted without the knowledge or authority of the defendants, and that the defendants received the goods without any knowledge of how they had been obtained. *Held* that, in the absence of such knowledge on their part, the receipt of the goods by them did not amount to a ratification of the wrongful act of their assistant and *U. C.* so as to render them liable in an action by the plaintiff for damages for the same. GIRISH CHANDRA DASS *v.* GILLANDERS, ARBUTHNOT, & Co. . . . . **2 B. L. R., O. C., 140**

7. ——— **Liability of master for criminal acts of servant.**—*Express authorisation.*—A master is not criminally responsible for the wrongful act of a servant, unless he can be shown to have expressly authorised it. SUFFER ALI KHAN *v.* GOLAM HYDER KHAN . **6 W. R., Cr., 60**

8. ——————— *Abetment or instigation by master.*—To make a master criminally responsible for an offence committed by his servants, it must be shown that there has been some act or illegal omission on the part of the master whereby he abetted the offence or some prior instigation or conspiracy. QUEEN *v.* SHAMSUNDER **[1 N. W., Ed. 1873, 310**

9. ——————— *Indian Ports Act (XII of 1875), s. 22.*—The servants of a contractor who had engaged to discharge ballast from a ship lying in the port of Calcutta, threw the ballast into the river within the limits of the port, and thus committed an offence under section 22 of the Indian Ports Act (Act XII of 1875). It did not appear that the contractor had abetted the offence. *Held* that he was not, in the absence of proof of abetment, liable for the acts of his servants. CHUNDI CHURN MOOKERJEE *v.* EMPRESS **[I. L. R., 9 Calc., 849 : 12 C. L. R., 508**

10. ——— **Liability of Secretary of State for acts of public servants.**—*Acts done within scope of his authority.*—The Secretary of State is only responsible for the acts of public servants done within the scope of his authority. SETH DHUNRAJ *v.* SECRETARY OF STATE FOR INDIA **[1 N. W., 118 : Ed. 1873, 204**

11. ——— **Liability of Secretary of State for damages occasioned by negligence of Government servants.**—*Negligence which*

**MASTER AND SERVANT.—Liability of Secretary of State for damages occasioned by negligence of Government servants —*continued.***

*would render ordinary employer liable.*—The Secretary of State in Council for India is liable for the damages occasioned by the negligence of servants in the service of Government, if the negligence is such as would render an ordinary employer liable. PENINSULAR AND ORIENTAL STEAM CO. *v.* SECRETARY OF STATE FOR INDIA

**[Bourke, A. O. C., 166 : 5 Bom., Ap., 1**

**12. ——— Action for harbouring or sheltering the servant of another.**—*Notice of contract of service.*—An action will not lie for the mere harbouring or sheltering a person who is under a contract of service to another, even with notice of such contract of service. *Blake* v. *Lanyon, 6 T. R., 221,* distinguished. BRUKOWSKY *v.* THACKER, SPINK, & CO. . . . . **6 B. L. R., 107**

**13. ——— Wrongful dismissal, Suit for.**—*Claim for wages.—Damages.*—Every master and employer has an undoubted right to dismiss his servant or agent at any time for justifiable cause. After the dismissal, whether wrongful or not, the servant cannot claim wages. The remedy for wrongful dismissal is by action for the damages sustained by the servant in consequence of the breach of the master's contract to employ him. USMUT KOONWAR *v.* TAYLER . . . **2 W. R., 307**

ISSUR CHUNDER MOOKERJEE *v.* PUDDO LOCHUN GOOPTO . . . **5 W. R., Mis., 18**

**14. ——— *Misconduct.***—Mere venial faults are not sufficient, but there must be something gross in the acts or breaches of duty committed to warrant a summary dismissal. HAM *v.* EASTERN BENGAL RAILWAY CO. . **2 Hyde, 228**

**15. ——— *Unskilfulness.—Insolence.—Justifiable dismissal.***—Unskilfulness in a servant is no ground for dismissal unless it amounts to absolute incompetence. A solitary instance of insolence is not sufficient to justify a master in dismissing a skilled servant. Where no time was specified for a day's work in a contract, whereby a company (the defendants) engaged the plaintiff, a skilled mechanic, in the capacity of an engineer, and "to make himself generally useful," any work within his capacity was held to form part of his duty. Superintendence of gas-pipes is within it. By refusing when directed to work more than eight hours a day without extra pay, plaintiff disobeyed reasonable orders, and defendants were justified in dismissing him. WILLIAMS *v.* GREAT EASTERN HOTEL CO. . . . . **Cor., 76 : 2 Hyde, 166**

**16. ——— *Probability of similar employment.—Disobedience of orders.—Intemperate language.***—If a firm brings out persons to a distant country and undertakes to give a return passage, and does not stipulate for putting an end to the contract on either side by specified notice, either party is entitled to the full benefit of the contract in the event of its being put an end to by the other before the expiration of the term of the engagement

**MASTER AND SERVANT.—Wrongful dismissal, Suit for—*continued.***

without regard to the probabilities of his obtaining similar employment. The dismissal of a servant is justified by refusal to disobey lawful orders, and acts of insubordination by the use of intemperate language to his employers. REID *v.* SCOTT THOMSON & CO.

**[2 Hyde, 172**

**17. ——— *Misconduct of servant.—Right to portion of pay due at end of month.***—A servant is not liable for his misconduct to forfeit such portion of his arrears of pay as had become due to him at the expiration of a month's service. The servant's misconduct may have justified his discharge in the middle of a month: if so, he is entitled to no pay for any portion of such month. BROJO MOHUN MYTEE *v.* SWAYNE. SWAYNE *v.* BROJO MOHUN ROY . . . . . **1 Hay, 297**

**18. ——— Wrongful dismissal, Suit against Government for.**—*Contract of service. —Public servant.—Payment of monthly wages.*—A suit for wrongful dismissal by one of its servants will lie against the Government. In a suit by a subordinate officer in the Public Works Department for wrongful dismissal against the Government, in which it was admitted that there was no time of service fixed, and in which the plaintiff put in a memorandum of agreement between himself and the Government, stipulating that he should give six months' notice of his intention to leave the service of the Government,—*Held* that the hiring was indefinite; and that although the plaintiff had bound himself to give six months' notice prior to leaving their service, there was no corresponding obligation on the Government to give notice before dismissing him. The Government, however, would not be allowed to exercise this power capriciously, or to the damage of the servant. An indefinite hiring in India does not mean a hiring for a year. The mere payment of wages monthly is not enough to show that a hiring is a monthly hiring. HUGHES *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL . . **7 B. L. R., 688**

**19. ——— Wrongful dismissal, Suit for. —*Acquiescence in reduced rate of wages and stoppage of wages.***—On the 4th of July 1860 *C.* engaged to come to India as engine-driver for the East Indian Railway Company on a progressive salary of R152-11-7 per month for the first year, commencing July 4th, 1860; R174-8-8 for the second; R196-5-9 for the third; R218-2-10 for the fourth, with a free passage home; and the Company might at any time determine the engagement by a six months' notice. The Company gave this notice in September 1861. When the six months' notice expired the plaintiff was driving ballast trains, receiving (under his agreement) R174-8-8 per month. He continued to be so employed, and to receive pay at the same rate, without interruption or objection, until the beginning of 1864, when he was employed to drive passenger trains for the defendants, who thereupon increased his salary. The plaintiff did not assent to the increase, but claimed the balance of salary due to him, as on the footing of his whole service having been service under the original agreement. His demand not being acceded to,

**MASTER AND SERVANT.—Wrongful dismissal, Suit for**—*continued.*

he sued the Company to enforce it, and also for his passage-money home. He also sued for his salary for May 1861, during which month he had been suspended, and his pay had been withheld; but he had not previously claimed the pay so withheld. In 1862 he had applied to be restored to his position under his original agreement, and was refused. The Court below gave *C.* a decree for the amount claimed, minus the passage-money. *Held* on appeal, reversing the decision of the Court below, that a legal notice of dismissal having been given, continuance in the service on a reduced salary is evidence of acquiescence by the servant in his dismissal; that in such a case the servant serves under a fresh contract, not at the rate of wages previously received by him, but at the rate he is actually receiving; that a servant whose wages have for one month been stopped during suspension for alleged misconduct, and who, continuing in the service, has not claimed them for several years, has acquiesced in the stoppage. CAMPBELL *v.* EAST INDIAN RAILWAY COMPANY . **Bourke, A. O. C., 56**

**20.** ——————— *Incompetence.—Rendering true and just accounts.*—The plaintiff, having obtained recommendations as a tea assistant in the defendant company's garden in Assam, came out to Calcutta, and, after some interviews with the defendants' agents there, entered into an agreement with the defendants to enter into their service as assistant in their tea gardens for a period of three years. The agreement stipulated that the plaintiff should, "when required to do so, render just and true accounts, and give every other particular and information of all moneys, &c., entrusted to him, or that may come into his possession, power, or custody, or under his control;" and it was also agreed that the defendants should "be at liberty to annul this agreement at any time for wilful misconduct of the plaintiff in not fulfilling the terms and conditions to be observed by him, or if he shall be prevented by reason of continued illness from attending to, or be hindered thereby in the performance of, his duties, or by reason of the bankruptcy, insolvency, or dissolution of the defendant company," and in those cases the salary was to cease, and the plaintiff be discharged from the defendant company's service. The plaintiff proceeded to Assam, worked for a short period in the defendants' garden, and was then dismissed from the company's service, on the ground of his incompetence. In an action brought for damages for wrongful dismissal, the Judge of the Small Cause Court was of opinion that, under the circumstances, there was no implied warranty on the part of the plaintiff of his competence, and the grounds for dismissal having been expressly stated in the agreement, the defendants were not justified in dismissing him on another ground, and therefore should not be allowed to give evidence of his incompetence. *Held*, on reference to the High Court, that the plaintiff, having expressly undertaken to render true and just accounts, his incompetence to do so would, if proved, be an answer to the action, and therefore the defendants ought to have been allowed to give evidence that he was incompetent. "True and just accounts" meant such accounts as an inexperienced assistant in a tea

**MASTER AND SERVANT.—Wrongful dismissal, Suit for**—*continued.*

garden might reasonably be asked to render, and were not to be interpreted merely as an undertaking that the plaintiff would act honestly by his employers. *Held*, also, that the agreement expressly stating the grounds of dismissal did not preclude the defendants from dismissing the plaintiff for incompetence. MACGILLIVRAY *v.* JOKAI ASSAM TEA COMPANY **[I. L. R., 2 Calc., 33**

**21.** ——————— *Justification, Plea of.—Misconduct.—Issues.—Cross-examination.*—In a suit for wrongful dismissal in which the defendants pleaded justification by reason of the plaintiff's misconduct,—*Held* (1) that the defendants at the hearing could not give evidence of a transaction involving instances of misconduct not set forth in their written statement: they should either have filed a supplemental written statement before the hearing, or have furnished the plaintiff with particulars of the misconduct in question, and intimated to him their intention of relying on the transaction as going to establish the general allegation of misconduct; (2) that although the transaction in question could not be made the subject-matter of an ancillary issue, and evidence of it, as such, could not be received, yet that questions relating to it might be put to the plaintiff in cross-examination for the purpose of affecting his credit. MUNCHERSHAW *v.* NEW DHURUMSEY SPINING AND WEAVING COMPANY **[I. L. R., 4 Bom., 576**

**22.** ——————— *Right to wages for broken period.*—A dismissed servant is entitled to wages for any broken period during which he may have served, at the rate he was earning when dismissed. RUGHOONATH DASS *v.* HALLE . **16 W. R., 60**

**23.** ——————— *Justification.—Dishonest and fraudulent conduct.*—A master cannot plead, in justification of the summary dismissal of his servant, a cause the existence of which was unknown to him at the time of such dismissal. At the same time subsequent knowledge that the servant had all along in his service been guilty of dishonest or fraudulent conduct might be pleaded as a good reason why a servant should not be allowed any more than his wages up to the day of dismissal. DEBARSEE *v.* JOUGUET . . **6 N. W., 130**

**24.** ——— **Wages, Suit for.**—*Subsequent misconduct.—Forfeiture of wages.*—A finding of fact that an employé is entitled to his wages notwithstanding subsequent misconduct, is not wrong in law. KALEE CHURN RAWANEE *v.* BENGAL COAL COMPANY **[21 W. R., 405**

**25.** ——— **Admission by servant after illegal dismissal.**—*Dismissal without notice.*—A manager's authority to make any admission which can be binding on his employers, is withdrawn when he is dismissed, whether the dismissal is or is not upon such a notice as the manager has a right to demand. KALEE CHURN RAWANEE *v.* BENGAL COAL COMPANY . . . . **21 W. R., 405**

**MASTER AND SERVANT**—*continued.*

**26. ——— Servant leaving after due notice, Right of.**—*Right to wages.—Custom of office.*—Where a servant leaves his service after giving due notice he is entitled to receive at once all pay then due to him, without reference to the custom of the office or master he serves. THOMAS *v.* MANAGER OF THE PIONEER PRESS [2 Agra, Mis., 1

**27. ——— Monthly servant leaving without notice.**—*Forfeiture of wages.*—Where a servant who was engaged by the month, served from the 1st November to the 3rd December 1872, and left his master's service on the 4th December without giving notice, it was held that the servant was entitled to be paid his wages up to the end of November, but forfeited the wages payable to him in respect of his December services. RAMJI MANAR *v.* LITTLE [10 Bom., 57

**28. ——— *Monthly service.—Wrongful leaving of employment, Consequence of.—Right to wages.***—When a monthly servant leaves his employment wrongfully in the course of the then current month, he loses all rights to wages for the time he had actually served during that month. DHUMEE BEHARA *v.* SEVENOAKS [I. L. R., 13 Calc., 80

**MAURASI TENURE.**

*See* ENHANCEMENT OF RENT—LIABILITY TO ENHANCEMENT—CONSTRUCTION OF DOCUMENTS AS TO LIABILITY, &c. [2 B. L. R., A. C., 68, note
3 W. R., Act X, 144
5 W. R., Act X, 80

*See* TITLE—EVIDENCE AND PROOF OF TITLE —GENERALLY . . 7 B. L. R., 211

**MAXIMS.**

*See* CASES UNDER HINDU LAW—ADOPTION —DOCTRINE OF "FACTUM VALET" AS REGARDS ADOPTION.

——— **"Actus curiæ neminem gravabit."**

——— The maxim "*Actus curiæ neminem gravabit*" observed upon as requiring qualification. KAMBINAYANI JAVAJI SUBBARAJULU NAYANI VARU *v.* UDDIGHIRI VENKATARAYA CHETTY [2 Mad., 268

——— **"Audi alteram partem."**

*See* CLUB . . I. L. R., 7 Mad., 319

——— **"Contra non valentem agere non-currit præscriptio."**

*See* LIMITATION ACT, 1877, ART. 144—ADVERSE POSSESSION. [I. L. R., 8 Bom., 585

——— **"Debitum et contractus sunt nullius loci."**

*See* JURISDICTION—CAUSES OF JURISDICTION—CAUSE OF ACTION—NEGOTIABLE INSTRUMENTS . . 1 Mad., 436

**MAXIMS**—*continued.*

——— **"Expressio unius est exclusio alterius."**

*See* DEED—CONSTRUCTION. [10 Bom., 51

——— **"Ignorantia legis neminem excusat."**—*Suit to set aside illegal adoption.*—A suit to set aside the adoption of a second son must be made within twelve years from cause of action. The maxim "*Ignorantia legis neminem excusat*" applies to questions of the Hindu law of inheritance and adoption, as well as to other laws. RADHAKISSEN MAHAPATER *v.* SREEKISSEN MAHAPATER [1 W. R., 62

*See* as to this maxim, SADHO SINGH *v.* KISHNEE [3 N. W., 318

*See contra,* SOORBUHNOMONEE DABIA *v.* PETUMBER DOBEY . Marsh., 221: 1 Hay, 497

——— **"In pari delicto potior est conditio possidentis."**

*See* CONTRACT—WAGERING CONTRACTS. [I. L. R., 9 Bom., 358

*See* ESTOPPEL—ESTOPPEL BY DEEDS AND OTHER DOCUMENTS. [I. L. R., 1 All., 403

——— **"No one can be Judge in his own cause."**

*See* CONTRACT—CONDITIONS PRECEDENT. [I. L. R., 5 Mad., 173

**1. ——— "Nullum tempus occurrit regi."**—*Hindu law.*—This maxim is a rule of Hindu and Mahomedan as well as English law. VYAKUNTA BAPUJI *v.* GOVERNMENT OF BOMBAY [12 Bom., Ap., 1

**2. ——— *Legislation in Bombay Presidency.***—The extent to which the maxim *nullum tempus occurrit regi* has been restrained by legislation in the Presidency of Bombay considered. VYAKUNTA BAPUJI *v.* GOVERNMENT OF BOMBAY [12 Bom., Ap., 1

GOVERNMENT OF BOMBAY *v.* HARIBHAI MONBHAI . . . . 12 Bom., Ap., 225

——— **"Omnia præsumuntur contra spoliatorem."**

*See* ESTOPPEL—ESTOPPEL BY DEEDS AND OTHER DOCUMENTS. [3 Bom., A. C., 116

*See* SALT, ACTS AND REGULATIONS RELATING TO—, BOMBAY. [7 Bom., A. C., 89

——— **"Omnia præsumuntur rite esse acta."**

*See* ABSCONDING OFFENDER. [I. L. R., 7 Mad., 436

**MAXIMS**—*continued.*

*See* APPELLATE COURT—OBJECTION TAKEN FOR FIRST TIME ON APPEAL—SPECIAL CASES—GUARDIAN. [2 N. W., 89

*See* EXECUTION OF DECREE—NOTICE OF EXECUTION . . . 22 W. R., 5

*See* INFORMATION OF COMMISSION OF OFFENCE . I. L. R., 7 Mad., 436

1. ——— **"Omnia præsumuntur rite esse acta."**—*Proceedings of public officer.*—The proceedings of a public officer must be presumed to be regular; and if they took place long ago (*e.g.*, twenty years previously), it is not just to require proof of such circumstances as due service of notice. KHAN *v.* BAMA SOONDUREE DOSSEE . 25 W. R., 62

2. ——— *Revenue cases.*—As in civil suits so in revenue cases all things must be presumed to have been correctly done. It is not necessary to inquire into the instructions which revenue agents receive, and until the contrary is shown the parties must be held to have been properly represented and to be bound by the decisions. AHSANOLLAH *v.* JUSODA . . . 23 W. R., 79

3. ——— *Sale in execution for arrears of rent.*—Where a tenure is sold in execution of a decree for arrears of rent, and a certificate of sale is granted by the Collector, it must be presumed that all the ordinary proceedings relating to the payment of the purchase-money have been fulfilled. FYAZOODDEEN BHOOYA *v.* SHUMSUNNISSA BIBEE . . . . 12 W. R., 508

*See* RAM RUKHA ROY JEMADAR *v.* GOBIND DOSS BYRAGEE . . . . 15 W. R., 291

4. ——— *Transfer of case not recorded.*—Where an estate which was subject to a mortgage was attached in execution, but was leased out to fresh tenants and under-tenants between the attachment and the sale; and the case was transferred from the jurisdiction of one Court to that of another, in some way which was not apparent on the record; and the lower Court ruled that the transfer was irregular and that the sale was void against the new lessees and under-lessees,—*Held* that the lower Court should have assumed that the sale transfer was regular and the sale good, and that all proceedings after the attachment were of no avail against the judgment-creditors. HOSSEINA *v.* JHAMUN SINGH . . . . . 25 W. R., 323

5. ——— *Irregularities in proceedings.*—Where irregularities had clearly occurred in proceedings, the Court refused to presume a person had been made a party and was therefore bound by them. CHOWDHRY MAHOMED ZUHOORUL HUQ *v.* MAHOMED YAKOOB . 23 W. R., 367

——— **"Optimus interpres rerum usus."**

*See* LANDLORD AND TENANT—EJECTMENT—GENERALLY . 13 B. L. R., 41

**MAXIMS**—*continued.*

——— **"Quod fieri non debet, factum valet."**

*See* CASES UNDER HINDU LAW—ADOPTION—DOCTRINE OF "FACTUM VALET" AS REGARDS ADOPTION.

*See* MADRAS TOWNS IMPROVEMENT ACT, III OF 1871, ss. 61, 62. [I. L. R., 7 Mad., 65

## MEASUREMENT OF LANDS.

*See* APPEAL—MEASUREMENT OF LANDS.

*See* RES JUDICATA—ESTOPPEL BY JUDGMENT . . I. L. R., 3 Calc., 271 [3 C. L. R., 74

*See* RES JUDICATA—COMPETENT COURT—REVENUE COURTS. [I. L. R., 10 Calc., 507

1. ——— **"Jurisdiction."**—*Valuation of suit.—Beng. Rent Act, 1869, s. 37.*—The word "jurisdiction" in Bengal Act VIII of 1869, section 37, refers not merely to local jurisdiction, but also to jurisdiction as to value. PEAREE MOHUN MOOKERJEE *v.* RAJ KRISTO MOOKERJEE . 20 W. R., 385

2. ——— *Suit to measure land.—Beng. Rent Act, 1869, s. 37.*—A suit to establish a zemindar's right to measure land must be brought in the Court which would have had jurisdiction in a suit to recover such land. SHURO SOONDUREE DEBIA *v.* BULORAM GOOHO [24 W. R., 423

3. ——— **Right to measure.**—*Proprietor of estate.—Beng. Rent Act, 1869, s. 37 (Beng. Act VI of 1862, s. 9).—Held* by the majority of the Court (SETON-KARR, *J.*, *dubitante*) that a proprietor of an estate is entitled, under section 9, Bengal Act VI of 1862, to measure the lands of any subordinate tenure within the limits of his estates, whatever the character or size of the tenure or the amount of rent paid in respect of it. RUN BAHADOOR SINGH *v.* MULOORUM TEWAREE [8 W. R., 149

4. ——— *Zemindar.—Beng. Rent Act, 1869, s. 37 (Beng. Act VI of 1862, s. 9).*—There must be some express restriction before a zemindar can be precluded from the benefit given him by section 9, Bengal Act VI of 1862, of measuring the lands in the possession of his ryots. OOMA CHURN BISWAS *v.* SHIBNATH BAGCHEE [8 W. R., 14

5. ——— *Proprietor in possession.—Beng. Rent Act, 1869, s. 27 (Beng. Act VI of 1862, s. 9).*—Under section 9, Bengal Act VI of 1862, the proprietor who can claim to measure must be a proprietor in possession, and not a proprietor out of possession, although he may be able to prove his title. The only question which the Collector has to try under that section is, which person is in possession, and his decision is final only as to possession and not as to title. The unsuccessful party has a right to sue in the Civil Court for a

**MEASUREMENT OF LANDS.—Right to measure—*continued.***

declaration of his right. KALEE DASS NUNDEE *v.* RAMGUTTEE DUTT . . **6 W. R., Act X, 10**

6. ——— *Right of proprietor to survey and measure.—Beng. Rent Act, 1869, s. 37.*—A proprietor of an estate or tenure has a right to make a general survey and measurement of the lands comprised in his estate, under the provisions of section 37 of the Rent Act, without proving that he is in receipt of the rents, there being nothing in law which prevents him from making such a survey or measurement as is contemplated by sections 26 and 37 merely because his estate happens to be sub-let to a number of tenure-holders. The only excepted case is where there is a special agreement to the contrary. BROJENDRO COOMAR ROY *v.* KRISHNA COOMAR GHOSE **[I. L. R., 7 Calc., 684: 9 C. L. R., 444**

7. ——— *Person in receipt of rents.—Jurisdiction of Collector.—Beng. Rent Act, 1869, s. 37 (Beng. Act VI of 1862, s. 9).*—A Collector's jurisdiction to allow a measurement where the proprietary right to the land is contested is not barred by sections 9 and 10, Bengal Act VI of 1862, if he is satisfied that the party seeking his assistance to measure is in receipt of the rents. If the Collector disallows the measurement on the ground that the applicant is not in receipt of the rents, the party aggrieved may appeal to the Civil Court. SMITH *v.* NUNDUN LALL . . . **6 W. R., Act X, 13**

In the same case on review of judgment the order of the High Court was amended, and the case remanded to the Judge to determine, according to sections 9 and 10 of the above Act, which party was in receipt of the rents, and under which of these sections the application for measurement had been made, and to decide accordingly. NUNDUN LALL *v.* SMITH **[7 W. R., 188**

8. ——— *Proprietor in receipt of rents.—Beng. Rent Act, 1869, s. 37 (Beng. Act VI of 1862, s. 9).*—Under section 9, Bengal Act VI of 1862, only a proprietor who is in receipt of the rents of an estate or tenure has a right to make a general survey and measurement of the land comprised in such estate or tenure. WISE *v.* RAM CHUNDER BYSACK . . . **7 W. R., 415**

AHSANOOLLAH *v.* KADIR . . **25 W. R., 92**

9. ——— *Proprietor in receipt of rents.—Proof of possession of land.*—A proprietor of land need only show that he is in undoubted possession of the property to entitle him to ask the assistance of the Court to enable him to measure his land. RAJ CHUNDER ROY *v.* KISHEN CHUNDER **[4 W. R., Act X, 16**

10. ——— *Proprietor in receipt of rents.—Beng. Rent Act, 1869, s. 37 (Beng. Act VI of 1862, s. 9).—Lease to third party.*—A proprietor of an estate is not barred from measurement by the fact of its being leased to a third party; nor is a proprietor bound, under section 9, Bengal Act VI of 1862, to show that he is in actual receipt

**MEASUREMENT OF LANDS.—Right to measure—*continued.***

of the rents at the time when he applies to measure the land. KRISHTO MOTEE DEBIA *v.* RAM NIDHEE SIRCAR . . . . . **9 W. R., 331**

11. ——— *Neighbouring zemindar.—Beng. Rent Act, 1869, ss. 37, 38 (Beng. Act VI of 1862, ss. 9 and 10).*—Sections 9 and 10 of Act VI do not embrace the case of a neighbouring zemindar alleging to be wronged by the act of the Collector or the measuring zemindar. His remedy is in a separate civil action. PERMESSUREE PERSHAD NARAIN SINGH *v.* NUBEE BUKSH **[2 W. R., Act X, 101**

12. ——— *Restraining of right of measurement.—Abandonment of rights of measurement to grantee.*—The abandonment to a grantee of all rights of measurement as against the ryots, with a view to resumption of lands within the talook, does not apply to a measurement of the talook itself as against the grantee, and does not amount to a restraint of the right of measurement under Bengal Act VI of 1862. KEBUL KISHEN DOSS *v.* JAMINEE . . . . **5 W. R., Act X, 47**

13. ——— *Lessee under Court of Wards.—Beng. Rent Act, 1869, s. 37 (Beng. Act VI of 1862, s. 9).*—A lessee under the Court of Wards is competent, under section 9, Bengal Act VI of 1862, to make a general survey of the lands comprised in his lease. WATSON & Co. *v.* BHOONYA KOONWAR NARAIN SINGH **[W. R., 1864, Act X, 105**

14. ——— *Person not in receipt of rents.—Disputed title.—Title.—Possession.—Receipt of rent.*—Where a person sues to have the assistance of the Collector to measure lands, of which he alleges himself to be the proprietor by purchase, he is not entitled to have such assistance if his title is disputed, and if he is found not to have been in possession or in the receipt of rents from the date of his purchase. DURGA CHARAN MAZUMDAR *v.* MAHOMED ABBAS BHUYA . . **6 B. L. R., 361**

S. C. DOORGA CHURN DOSS *v.* MAHOMED ABBAS BHOOYAN . . . . **14 W. R., 399**

Upholding on appeal under the Letters Patent the decision of GLOVER, J., in DOORGA CHUNDER DOSS *v.* MAHOMED ABBAS BHOOYAN . **14 W. R., 121**

15. ——— *Beng. Rent Act, 1869, s. 37 (Beng. Act VI of 1862, s. 9).—Lakhiraj land.*—Section 9, Act VI of 1862, gives no authority to proprietors to survey or measure lakhiraj land. GOLAM KHEJUR *v.* ERSKINE & Co. **[11 W. R., 445**

16. ——— *Right of zemindar.—Lakhiraj.—Beng. Rent Act, 1869, s. 37 (Beng. Act VI of 1862, s. 9).*—A zemindar is not entitled to measure the lands of a lakhirajdar holding a rent-free tenure within the limits of his estate. RANGLAL SAHU *v.* SIALI DHAR DAS **[3 B. L. R., Ap., 27: 11 W. R., 293**

**MEASUREMENT OF LANDS.—Right to measure—*continued.***

**17.** ——————— *Beng. Rent Act, 1869, s. 37 (Beng. Act VI of 1862, s. 9).—Lakhiraj land.*—The defendant held land within the plaintiff's putni, paying rent to the plaintiff, and also certain lakhiraj lands. The plaintiff applied to the Collector for permission to make a survey and measurement of the lands of the putni. He was opposed by the defendant, who objected to any survey being made of the lakhiraj land. *Held*, under Bengal Act VI of 1862, sections 9 and 10, the plaintiff was not entitled to survey and measure the lakhiraj lands. PRASANNAMAYI DEBI *v.* CHANDRANATH CHOWDHRY
**[2 B. L. R., S. N., 5 : 10 W. R., 361**

**18.** ——————— *Beng. Rent Act, 1869, ss. 37 and 38.—Right of co-sharers of joint undivided estate to measurement of land.*—A shareholder in a joint undivided estate cannot bring a suit under section 37 of Bengal Act VIII of 1869 for the measurement of his share. SANTIRAM PANJA *v.* BYKUNT PANJAH
**[10 B. L. R., 397 : 19 W. R., 280**

Nor under Bengal Act VI of 1862, section 10, and Bengal Act VIII of 1869, section 38. MOOLOOK CHAND MUNDUL *v.* MODHOOSOODUN BACHASPUTTY
**[10 B. L. R., 398, note : 16 W. R., 526**

MAHOMED BAHADUR MOZOOMDAR *v.* RAJ KISHEN SINGH
**[10 B. L. R., 401, note : 15 W. R., 522**

SHORENDRO MOHUN ROY *v.* BHUGGOBUTTY CHURN GUNGOPADHYA
**[10 B. L. R., 403, note : 18 W. R., 332**

BADA CHOWDHRY *v.* ABEDOODDEEN MAHOMED
**[I. L. R., 7 Calc., 69**

S. C. RUPENNESSA BIBI CHOWDRANI *v.* ABEDUDDIN MAHOMED . . **8 C. L. R., 73**

PEAREE MOHUN MOOKERJEE *v.* RAJ KRISTO MOOKERJEE . . . **20 W. R., 385**

**19.** ——————— *Beng. Rent Act, 1869, ss. 37 and 38.—Measurement of lands.—Co-sharers.—Notice of intended measurement.*—The words "the person claiming the right to measure" in section 37 of Bengal Act VIII of 1869, must be read as implying the sole proprietor or whole body of proprietors of the land for the measurement of which application is made. Where, therefore, there are joint proprietors, the notice of an intended measurement of the lands must be a notice of all the joint proprietors. It is not sufficient that one co-sharer should give notice, and make his co-sharers parties to the suit. See *Santi Ram Panjah* v. *Bykunt Panjah, 10 B. L. R., 397 : 19 W. R., 280; Pearee Mohun Mookerjee* v. *Raj Kisto Mookerjee, 20 W. R., 385;* and *Moolook Chand Mundul* v. *Modhoosoodun Bachusputty, 16 W. R., 126 : 10 B. L. R., 398, note.* ISHAN CHUNDER ROY *v.* BUSARUDDIN
**[5 C. L. R., 132**

**20.** ——————— *Beng. Rent Act, 1869, s. 38.—Fractional proprietor.—Parties.*—A part-proprietor of an estate is competent, under Bengal Act VIII of 1869, to apply for measurement of its lands after making the remaining proprietors parties to the proceedings. ABDOOL HOSSEIN *v.* LALL CHAND MOHTAN DASS
**[I. L. R., 10 Calc., 36 : 13 C. L. R., 323**

**21.** ——————— *Shareholder.—Proprietor.*—An applicant under section 10 of Bengal Act VI of 1862 must be the proprietor of the estate, and not merely a shareholder in the proprietary body. *Moolook Chund Mundul* v. *Modhoo Soodun Bachusputty, 10 B. L. R., 398, note; Mahomed Bahadur Mozoomdar* v. *Raj Kishen Singh, 10 B. L. R., 401, note; Shorendro Mohun Roy* v. *Bhuggobutty Churn Gungopadhya, 10 B. L. R., 403, note,* followed. BADA CHOWDHRY *v.* ABEDOODDEEN MAHOMED . . . **I. L. R., 7 Calc., 69**

S. C. RUPENNESSA BIBI CHOWDRANI *v.* ABEDUDDIN MAHOMED . . **8 C. L. R., 73**

**22.** ——— **Liability to measurement.** —*Beng. Rent Act, 1869, s. 37 (Beng. Act VI of 1862, s. 9).—Suit against different defendants.*—A single suit simply to measure lands may be brought under section 9, Bengal Act VI of 1862, against several defendants, although their rights and tenures are different. SHUSHEE BHOOSUN BANERJEE *v.* NUBOOOOMAR CHATTERJEE
**[8 W. R., 94**

**23.** ——————— *Beng. Rent Act, 1869, s. 37 (Beng. Act VI of 1862, s. 9).—Purchaser of subordinate tenure.*—The purchaser of a subordinate tenure who did not enter his name in the taloukdar's serishta, and whose tenure, therefore, was not wholly disconnected from the estate to which it had been joined, is liable to have his lands measured under section 9, Bengal Act VI of 1862. TWEEDIE *v.* RAM NARAIN DOSS . **9 W. R., 151**

**24.** ——— **Application for measurement.**—*Beng. Rent Act, 1869, s. 38.—Right to measure.*—Without a special application made by the proprietor, under Bengal Act VIII of 1869, section 38, neither Collector nor Judge has any right to ascertain or record tenures or under-tenures of persons interested otherwise than as occupants. KALEE NATH CHUCKERBUTTY *v.* REILY . **24 W. R., 272**

**25.** ——————— *Beng. Rent Act, 1869, s. 38 (Beng. Act VI of 1862, s. 10).*—Section 10, Bengal Act VI of 1862, contemplates the case of a proprietor of an estate who, by reason of inability to ascertain who are the persons liable to pay rent to him, is unable to measure his estate; but not that of a putnidar who knows who is liable to pay rent to him, and whose attempt to get the Collector's assistance in a minute measurement of the lands held by each of the ryots is simply with a view to harass and oppress them. DWARKANATH CHUCKERBUTTY *v.* BHOWANEE KISHORE CHUCKERBUTTY
**[8 W. R., 12**

**26.** ——————— *Beng. Rent Act, 1869, s. 38 (Beng. Act VI of 1862, s. 10).*—A party applying under section 10, Bengal Act VI of 1862, is entitled to measure only such lands as are

**MEASUREMENT OF LANDS.—Application for measurement—*continued.***

comprised in his estate, and for which he is entitled to receive rent; he is not entitled under cover of that section to measure lands not comprised in the estate which he has purchased. KHUGENDRONATH MULLICK *v.* KANTEE RAM PAUL . **14 W. R., 368**

**27.** ——————— *Beng. Rent Act, 1869, s. 38 (Beng. Act VI of 1862, s. 10).*—Section 10, Bengal Act VI of 1862, contemplates possession by the receipts of rents for those lands of which the measurement is applied for. PUREEJAN KHATOON *v.* BYKUNT CHUNDER CHUCKERBUTTY **[7 W. R., 96**

**28.** ——————— *Beng. Rent Act, 1869, s. 38 (Beng. Act VI of 1862, s. 10).—Combination of ryots to withhold information.*—Where ryots combine to withhold from the landlord information requisite to enable him to collect his due rents, one suit may be brought against a number of them, under section 10, Bengal Act VI of 1862, for measurement and ascertainment by the Collector of the details of the tenures of each ryot. SOLANO *v.* SOOBRON ROY . . . **6 W. R., Act X, 4**

**29.** ——————— *Necessary proof.—Beng. Rent Act, 1869, s. 38 (Beng. Act VI of 1862, s. 10).*—An applicant under section 10, Bengal Act VI of 1862, must first prove what steps he has taken to obtain the knowledge of the tenures in his estate, and that he is unable to measure because he is unable to ascertain them. If his averments are objected to, and the Collector proceeds without inquiry, the proceedings are invalid and without jurisdiction. An applicant under the above section must be the proprietor of the estate, and not a shareholder only in the proprietary body. MAHOMED BAHADOOR MOJOOMDAR *v.* RAJ KISHEN SING **[15 W. R., 522: 10 B. L. R., 401, note**

**30.** ——————— *Beng. Rent Act, 1869, s. 38 (Beng. Act VI of 1862, s. 10).—Enhancement of rent and resumption of rent-free lands.*—Section 10, Bengal Act VI of 1862, was intended to assist a proprietor to measure the lands comprised in his estate when he cannot ascertain who the ryots are, what lands are in their occupation, and what rents they have to pay; but not to enable him to enhance the rents of the ryots; or resume rent-free lands by throwing the onus on the lakhirajdar to prove his rent-free holding. SHARODA PERSHAD GANGOOLY *v.* RAJ MOHUN ROY . **18 W. R., 165**

**31.** ——————— *Necessary evidence.—Beng. Act VIII of 1869, s. 38.*—Before a proprietor in possession as a ticcadar or proprietor for the time being, standing in the shoes of the proprietor, can apply under Bengal Act VIII of 1869, section 38, to have his estate measured, he must show that he is in need of the help which the section proposes should be granted, and that he cannot ascertain who are the persons liable to pay rent to him or the nature of their holdings. Proceedings taken without inquiry as to the existence of the state of facts required under section 38 are invalid, whether taken

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by the Collector or by the Civil Court. JAMALOODDEEN HOSSEIN *v.* RAMADHIN MISSER **[24 W. R., 331**

Affirmed on appeal under the Letters Patent **[25 W. R., 136**

**32.** ——————— *Right of auction-purchaser to measure.—Beng. Act VIII of 1869, s. 38.*—Where an auction-purchaser at a sale for arrears of Government revenue applied, under Bengal Act VIII of 1869, section 38, for measurement of the purchased estate, and no objection was made in the first instance on the score of ability to measure by the ryots,—*Held* that the applicant's right to measure was undoubted. *Per* GLOVER, *J.*—A zemindar cannot insist upon a measurement simply by alleging inability to measure, but must, in ordinary circumstances, prove such inability. ABDOOL BAREE *v.* NITTYANUND KOONDOO . . **21 W. R., 103**

**33.** ——————— *Beng. Rent Act, 1869, s. 38 (Beng. Act VI of 1862, s. 10).—Power of revenue officers.*—Section 10, Bengal Act VI of 1862, merely empowers revenue officers to decide what rate of rent the tenant of a particular parcel of land has been paying, and does not empower them to declare that rent at a certain rate shall be paid simply because rent at that rate has been paid by the tenants of neighbouring lands. ANUNT MANJHEE *v.* JOY CHUNDER CHOWDHRY . . **12 W. R., 371**

SREE MISSER *v.* CROWDY . . **15 W. R., 243**

**34.** ——————— *Beng. Rent Act, 1869, s. 38 (Beng. Act VI of 1862, s. 10).—Duty of Collector.—Rate of rent, Determination of.*—The Collector's duty under Bengal Act VI of 1862, section 10, is to ascertain the actually existing rates of rent payable by the ryot to the zemindar: he has no jurisdiction to assess the rent at enhanced rates. CROWDY *v.* OMRAO SINGH . . **22 W. R., 476**

RUTTOO SINGH *v.* CROWDY **[22 W. R., 477, note**

NEEM CHAND SAHOO *v.* RAM GHOLAM SINGH **[24 W. R., 424**

**35.** ——————— *Beng. Rent Act, 1869, s. 38 (Beng. Act VI of 1862, s. 10).—Power of Collector.—Question of title.*—On an application to measure the lands of a particular estate, the Collector is not empowered by Bengal Act VI of 1862 to determine summarily the character of every holding upon that estate, but only to inquire how and by whom every portion of land therein is held, and what rent is payable in respect of such land. In the event of a Collector recording that particular tenants claimed to hold as mokurraridars, a Civil Court would have jurisdiction to determine a title on which a cloud had been cast by his proceedings. WISE *v.* LAKHOO KHAN . . . . **16 W. R., 50**

**36.** ——————— *Power of Collector.—Assessment of rents.—Beng. Rent Act, 1869, s. 38 (Beng. Act VI of 1862, s. 10).*—Under the above section, the Collector is not entitled to

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assess the rents at what he considers to be fair and reasonable rates from the rents prevailing in the neighbouring properties, but is only authorised to ascertain for the landlord what the existing condition of his estate is, what are the measurements, what the names of his tenants, and what the rents they are paying. *Anunt Manjhee* v. *Joy Chunder Chowdhry, 12 W. R., 371,* followed. In a suit for rent by one co-sharer, the plaintiff claimed that the rent should be calculated at the rate fixed by the Collector, in a proceeding held by him under section 10 of Bengal Act VI of 1862. It appeared that the defendants had not had notice of the proceeding, and that the Collector had ascertained the rate from the rents paid in the neighbouring properties. *Held* that the proceedings of the Collector were irregular, as he had acted without jurisdiction, and that they were not binding on the defendants for the purpose of showing the rate at which rent was payable by them. BABA CHOWDHRY *v.* ABEDOODDEEN MAHOMED . . . . . **I. L. R., 7 Calc., 69**

S. C. RUPENNESSA BIBI CHOWDRANI *v.* ABEDUDDIN MAHOMED . . **8 C. L. R., 73**

**37. ——— Fixing rates of rent.**—*Duty of Collector.—Beng. Act VIII of 1869, s. 38.—Finality of proceedings.*—In a suit in which defendant had admitted his tenancy but had disputed the amount of the rent claimed by plaintiff, and plaintiff had not made a special application to the Collector, under section 38, Act VIII of 1869, for the determination and record of tenures, under-tenures, and rates of rent in the land in suit,—*Held* that, in the absence of any special order of the Collector fixing the rates of rent, there was no legal order which could be considered final, and the matter was open to the Civil Court. JAMALOODDEEN HOSSEIN *v.* RAMADHEEN MISSER . . . . . **25 W. R., 136**

Affirming on appeal under the Letters Patent, S. C. **[24 W. R., 331**

**38. ——— *Duty of Collector.—Beng. Rent Act, 1869, s. 38.—Delegation of powers by Collector to Ameen.***—In a suit under section 38, the Collector cannot delegate his powers to an Ameen or accept absolutely without reservation the whole report of that officer, and order assessment in accordance with the rates found by him; such report being only a part of the evidence to be taken into consideration. SHETUL SHAIKH *v.* HILLS **[24 W. R., 184**

**39. ——— *Ameen deputed to measure, Duty of.—Beng. Rent Act, 1869, s. 38 (Beng. Act VI of 1862, s. 10).***—An Ameen deputed to make a measurement under the provisions of section 10, Bengal Act VI of 1862, is bound to record the state of things as actually existing, and has no business to record what he thinks ought to be the rates. If, however, the Ameen, or the Collector superintending his proceedings, does any act not in conformity with this section, the remedy for any party dissatisfied is to appeal to the Civil Court within the time and in the manner prescribed by Act X of 1859. BALA THAKOOR *v.* MEGHBURN SINGH . **14 W. R., 269**

**MEASUREMENT OF LANDS.—Fixing rates of rent—*continued.***

**40. ——— *Beng. Act VIII of 1869, s. 38.—Power of Collector.***—Where an application is made to a Collector under Bengal Act VIII of 1869, section 38, for the measurement of certain lands without any "special application" to him to determine the rates of rent, any proceedings regarding the rates of rent are inadmissible. CROWDY *v.* POORUN SINGH . . . **22 W. R., 480**

**41. ——— Resistance to measurement.** —*Right to intervene.—Intermediate tenant.—Beng. Rent Act, 1869, s. 38 (Beng. Act VI of 1862, s. 10).*—The fact of a measurement and jummabundi having been effected under the provisions of Bengal Act VI of 1862, section 10, cannot deprive an intermediate tenant of the right of intervening under Act X of 1859, section 77, nor is the intervenor deprived of that protection, even though Act X no longer exists. MUDHOO SOODUN SHAHA *v.* GOPAL SHAIKH **[22 W. R., 508**

**42. ——— *Interference by third party.—Duty of Collector.—Beng. Rent Act, 1869, s. 38 (Beng. Act VI of 1862, s. 10).***—Where the progress of a measurement under section 10, Bengal Act VI of 1862, is interfered with by a third party claiming the land, the proper course for the Collector is to hold his hand, leaving it to the parties to seek their remedy in the Civil Court. He cannot, however, make any order which will prevent the intervenor coming in under section 77, Act X of 1859. WISE *v.* BANSEE SHAHA . . . . **16 W. R., 51**

**43. ——— Objections to measurement.** —*Beng. Rent Act, 1869, s. 38.—Power of Collector in dealing with objections to measurement.—Quære,*—After having commenced proceedings under section 38 of Bengal Act VIII of 1869, has a Collector power to refer some of the objections taken to one Deputy Collector and some to another? OMED ALI *v.* NITTYANUND ROY . . . **24 W. R., 171**

**44. ——— *Beng. Rent Act, 1869, s. 38 (Beng. Act VI of 1862, s. 10).—Objections to measurement proceedings.***—Where a measurement under Bengal Act VI of 1862 was completed without any objections having been made to it by the ryots while in progress, it was held that it was not competent for the Judge in appeal to set aside the proceedings on objections made subsequently. GOLUCK KISHORE ACHARJEE *v.* KESHA MAJHEE **[15 W. R., 23**

**45. ——— *Measurement of chur lands according to agreement.—Effect of error as distinguished from fraud.—Omission to object to measurement at time it was taken.***—A superior owner of chur land, and his tenants, who held it in "howladari" tenure, agreed, with reference to alluvion and diluvion, that the chur should be measured from time to time, on notice, and that unless the tenants should give a separate "daul kabuliat" for the land found to be accreted, the superior owner should take possession of it. A measurement by the superior owner was made on notice to the tenants, and *bonâ fide;* but it was incorrectly made,—the tenants, however, raising

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no objection at the time. They, afterwards, when a suit was brought against them by the superior owner for possession of alleged accreted lands, set up the defence that the measurement had been made in their absence and was incorrect. *Held* by the Privy Council that the tenants could not defeat the suit merely on the ground of the incorrectness of the measurement, there being no fraud; but that they were not entitled to ask the Court to decide what the amount of the property was which the plaintiff was entitled to recover. ALIMUDDI *v.* KALI KRISHNA TAGORE [I. L. R., 10 Calc., 895

46. ——— **Measurement of waste lands.**—*Beng. Rent. Act, 1869, s. 38.—Beng. Civil Courts Act (VI of 1871), s. 22.—Appeal.*—An application for the measurement of a whole estate under section 38 of Bengal Act VIII of 1869 cannot be granted where waste lands in that estate have been brought into cultivation by various ryots, and the landlord is unable to ascertain which of the ryots have appropriated such waste lands as part of their jotes. Before a measurement can be ordered under that section, it is necessary to establish by evidence the facts set out in the petition for measurement; and to show that the lands sought to be measured are known, but that the tenants liable to pay rent in respect of such lands are unknown. LALLA CHEDI LAL *v.* RAMDHUNI GOPE [I. L. R., 13 Calc., 57

47. ——— **Measurement of chur lands.**—*Accretion to tenure.—Measurement made in absence of tenants.—Notice.*—Where a kabuliat stipulated that on the accretion to a certain howla of any new cultivable chur, a fresh measurement should be made of the chur and howla, and that excess rent should be paid for the excess land at a stipulated rate up to five drones, and at pergunnah rates for the residue: in default thereof rent to be realised according to law, or service made on the tenants of a notice "requiring them to take a settlement of the excess land, and to file a kabuliat and fixing the time at fifteen days," otherwise the excess land to be settled with others,—the kabuliatdar measured the howla and accreted chur without notice to the tenants and in their absence, then served on the tenants a notice thereof, and of the increased rent demanded, requiring them to appear within fifteen days and file a kabuliat for the said amount and rent, or that he would take khas possession. In a suit, amongst other things, for assessment of rent of the excess land,—*Held* that the tenants were not bound by the measurement made by the kabuliatdar in their absence. RAM COOMAR GHOSE *v.* KALI KRISHNA TAGORE [L. R., 13 I. A., 116 : I. L. R., 14 Calc., 99

48. ——— **Procedure.**—*Inquiry and evidence as to inability to ascertain tenants.—Beng. Act VIII of 1869, ss. 38, 39.—Appeal from order.—Separate appeal.*—The Court to which an application under section 38 of Bengal Act VIII of 1869 is made on the ground that the applicant is unable to ascertain who are the persons liable to pay rent, ought not to make an order in his favour except

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upon inquiry and proof of his alleged inability. Where an order has been passed by the Civil Court under section 38, and the Collector has upon that order made his decision, ryots aggrieved by the decision ought not to appeal jointly, but separately under section 39 of the Act. *Mahomed Bahadoor Mojoomdar v. Rajkishen Singh, 10 B. L. R., 40 (note): 15 W. R., 522,* followed. LALOO SIRKAR *v.* JOGUT KISHORE ACHARJEA . . 13 C. L. R., 203

49. ——— *Proof of conduct of proceedings in accordance with Act.—Beng. Rent Act, 1869, s. 38 (Beng. Act VI of 1862, s. 10).—Proceedings of revenue officers.—Per* JACKSON, *J.*—The High Court will not hold any person bound by the finding specified in Bengal Act VI of 1862, section 10, unless it is shown beyond a doubt that the proceedings of the revenue officers referred to have been conducted in strict accordance with the terms of that section. DINOBUNDHOO CHOWDHRY *v.* DINONATH MOOKERJEE . . 19 W. R., 168

50. ——— *Notice.—Beng. Rent Act, 1869, s. 38.—Ex parte orders.—Proceedings for measurement of land.*—In proceedings under section 38 of the Bengal Rent Law, Act VIII of 1869, the Collector should, as a rule, pass no order *ex parte* without previously giving timely notice to the other party or parties sought to be affected by the order. IN THE MATTER OF THE PETITION OF PROTAP CHUNDER GHOSE. KALLY CHURN DUTT *v.* PROTAP CHUNDER GHOSE [I. L. R., 8 Calc., 848 : 12 C. L. R., 407

51. ——— *Notice.—Measurement of lands in order to enhance.—Notice of enhancement.—Act X of 1859, s. 26.*—An under-tenant or ryot is not bound by a measurement under Act X of 1859, section 26, made in his absence, unless he has received notice. JADUB CHUNDER HALDAR *v.* ETWAREE LUSHKUR . . Marsh., 498

S. C. ETWAREE LUSHKUR *v.* JADUB CHUNDER HALDAR . . . . 2 Hay, 599

52. ——— *Notice.—Khasra or appraisement of land.—Dannabundi tenant.—Presence of tenant.—Notice to tenant of khasra.*—In a suit for rent, where the quantity of land for which rent is claimed is in dispute, and the landlord produces as evidence a khasra or appraisement of the land, it is not necessary for him to show that the estimate was drawn up in presence of the defendant and was acknowledged by him; it will be sufficient if the defendant (a dannabundi tenant) had notice when the khasra was about to be made. HUREE NARAIN SINGH *v.* BELJEET JHA . 24 W. R., 125

53. ——— *Attendance of witnesses.—Inquiry.—Beng. Rent Act, 1869, ss. 38, 40.—Order that tenures have lapsed.*—The Collector, in proceedings for measurement of lands under section 38 of Bengal Act VIII of 1869, cannot be said to have made a "due inquiry," and therefore should not make an order under that section that the tenures have lapsed, until he has made use of all the

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powers given him by section 40 in order to procure the attendance of witnesses. MADHUB DOSS *v.* JOGENDRO NATH ROY [I. L. R., 6 Calc., 673: 8 C. L. R., 39

54. ——————— *Right to appeal.—Beng. Rent Act, 1869, ss. 38, 39.*—According to the procedure prescribed in Bengal Rent Act VIII of 1869, sections 38 and 39, until the Collector has entered upon his inquiry there is but one party concerned, and no proceeding in the shape of a suit or appeal can find place until after the Collector has completed his measurement and record. CROWDY *v.* GOBURDHUN ROY . . . 22 W. R., 491

55. ——————— *Appeal.—Beng. Rent Act, 1869, s. 38 (Beng. Act VI of 1862, s. 10).—Objection to measurement, Time for.*—In order to object to the proceeding of the Collector under section 10 of Act VI of 1862, the proper course for the ryot is to appeal to the District Judge, and not wait until the zemindar brings a suit for arrears of rent on the basis of the rate fixed by the Collector. HURRY SANKUR PATWARI *v.* RADHA CHOWDHOORY [25 W. R., 346

56. ——— **Decision of Collector.**—*Reconsideration of order.—Right of appeal.*—The decision of the Collector referred to in section 39 of Bengal Act VIII of 1869 must be taken to include any order made under the preceding section in the course of proceedings before him, and the provisions in the latter section for obtaining a reconsideration of any order does not deprive any one of the right of appeal. RASHBEHARY GHOSE *v.* BARRODA PROSAD MOOKHOPADHYA . . . . . 7 C. L. R., 380

57. ——— **Standard of measurement.**—*Beng. Rent Act, 1869, s. 41 (Beng. Act VI of 1862, s. 11).*—Under section 11 of Bengal Act VI of 1862, the standard pole of the pergunnah is the standard to be used in the measurement of lands sought to be assessed either under kabuliat or otherwise. MACKINTOSH *v.* WATSON [3 W. R., Act X, 123

58. ——————— *Beng. Rent Act, 1869, s. 41.—Standard pole of measurement.*—The standard pole of measurement alluded to in section 41 must mean a standard officially known,—*i.e.*, known to the Collector. SHETUL SHAIKH *v.* HILLS [24 W. R., 184

59. ——————— *Power of Collector.*—The Collector is the depository of the standard pole of each pergunnah; and it is exclusively within his province to declare what the standard of such pole is. TARUCKNATH MOOKERJEE *v.* MEYDEE BISWAS . . . 5 W. R., Act X, 17

60. ——————— *Power of Collector to determine standard of measurement.—Beng. Rent Act, 1869, s. 41 (Beng. Act VI of 1862, s. 11).*—In an application for assistance to measure the land of a ryot under section 9, Bengal Act VI of 1862, the Collector has no power under section 11 to fix with

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what pole the measurement is to be made, but such questions are to be reserved for after-proceedings, when any action is taken upon the result of such measurement. RAMANATH RAKHIT *v.* MUCHIRAM PARAMANIK . . . 3 B. L. R., Ap., 63

S. C. ROMANATH RAKHEET *v.* DHOOKHEE SHAM BHOOYA . . . . 11 W. R., 510

61. ——————— *Power of Collector.—Beng. Rent Act, 1869, s. 41 (Beng. Act VI of 1862, s. 11).*—The Collector has no jurisdiction in an application by the zemindar under section 9, Bengal Act VI of 1862, for assistance to measure the holding of his ryot, to fix the standard of the pole with which the land is to be measured. *Semble,*—If the application had been under section 10 of the Act, the Collector would have had jurisdiction to declare the length of the standard pole. BRAJA KISHOR SEN *v.* KASIM ALI . . . 3 B. L. R., Ap., 78

S. C. BROJO KISHORE SEIN *v.* KASSIM ALI [11 W. R., 562

62. ——————— *Power of Collector.—Beng. Rent Act, 1869, s. 41 (Beng. Act VI of 1862, s. 11).—Per* KEMP, PHEAR, MITTER, and HOBHOUSE, *JJ.*—When the right of a proprietor to make, under section 9, Bengal Act VI of 1862, a measurement of a tenure, is disputed, solely on the ground that the pole with which the measurement is attempted to be made is not the standard pole of measurement of the pergunnah, as provided in section 11, and the parties are at issue as to what is the length of the standard pole, the Collector has jurisdiction to inquire into and decide as to the true length of the standard pole. COUCH, *C. J.*, and BAYLEY and JACKSON, *JJ.*, *contra.* MANMOHINI CHOWDHRAIN *v.* PREMCHAND ROY [6 B. L. R., 1: 14 W. R., F. B., 4

63. ——————— *Power of Judge on appeal.*—A Judge on appeal has power under section 9, Bengal Act VI of 1862, section 9, to declare by what standard measurements are to be made. MACKINTOSH *v.* KOYLAS CHUNDER CHATTERJEE [W. R., 1864, Act X, 59

64. ——————— *Beng. Rent Act, 1869, s. 41 (Beng. Act VI of 1862, s. 11).—Measuring-rod of tuppah.*—Section 11, Bengal Act VI of 1862, does not preclude the use of the standard measuring-rod of a tuppah. SURBANUND PANDEY *v.* RUCHIA PANDEY . . 4 W. R., Act X, 32

**MEDICAL EXAMINATION.**

*See* HINDU LAW—MARRIAGE—RESTRAINT ON, OR DISSOLUTION OF, MARRIAGE. [I. L. R., 1 All., 549

**MEDICAL OFFICER.**

——————— *Remuneration for professional attendance.*—The amount of remuneration for the professional attendance of a medical officer on the family of a public servant, in the absence of an express agreement, should be determined with reference to the cir-

**MEDICAL OFFICER**—*continued.*

cumstances in each case, and the principle adopted by the Judge in estimating the amount, that reference must be had not only to present means but to prospects, without considering other matters, was not correct. *Held*, under the circumstances of the case, that one fifth of the monthly income of the defendant was the fair amount to which the plaintiff was entitled for his professional attendance for the year. RAWLINS *v.* DANIEL . . **2 Agra, 56**

**MEMORANDUM OF APPEAL, RETURN OF, FOR CORRECTION.**

*See* CIVIL PROCEDURE CODE, 1882, s. 543 (1859, s. 336) . **I. L. R., 1 All., 260**

*See* LIMITATION ACT, 1877, s. 4.
**[I. L. R., 1 All., 260**
**I. L. R., 2 All., 875**

**MEMORANDUM OF ASSOCIATION, MATERIAL VARIANCE IN—**

*See* COMPANY—ARTICLES OF ASSOCIATION AND LIABILITY OF SHAREHOLDERS.
**[I. L. R., 1 Bom., 320**

**MERCHANT SEAMEN'S ACT (ACT I OF 1859), s. 83.**

——— *17 & 18 Vict., c. 104, ss. 243 (cls. 1 and 2), 288.—Merchant Shipping Act, 1854.—43 and 44 Vict., c. 16 s. 10.—Merchant Seamen's (Payment of Wages and Rating) Act, 1880.—Imprisonment for desertion.*—The amendment of clauses 1 and 2 of section 243 of 17 and 18 Victoria, Cap. 104, by 43 and 44 Victoria, Cap. 16, section 10, does not affect the liability of seamen in Calcutta to imprisonment for offences under section 83, clauses 1 and 2 of Act I of 1859. BRUCE *v.* CRONIN . **I. L. R., 12 Calc., 438**

**MERCHANT SHIPPING ACT (17 & 18 Vict., c. 104), ss. 43, 66.**

1. ——— **Non-registration of ship.**—*Letter creating charge on ship.*—A letter, purporting to create a charge on a ship, was not registered as a mortgage under the Merchant Shipping Act. The ship not having a British register, it was held that the letter created a valid charge on the ship. SHIB CHUNDER DOSS *v.* COCHRANE
**[Bourke, O. C., 388**

2. ——— **Attachment.**—*Mortgagee.—Power of sale.*—An attachment on behalf of the rights of the mortgagor of a ship will not debar the mortgagee from his power of sale under the Merchant Shipping Act. AHMED MAHOMED *v.* AUHIN
**[1 Ind. Jur., N. S., 95**

3. ——— **Shipping Master, Power of.**—*Discharge of seamen with consent of captain and men.—Regulations of Board of Trade.*—Where the captain of a ship consents to the discharge of a seaman, who also desires to be discharged, the Shipping Master has no discretion in the matter, but is bound to sanction the discharge of the seaman under the provisions of the Merchant Shipping Acts of 1854 and 1862, and the Regulations of the Board of Trade. REG. *v.* SHIPPING MASTER OF CALCUTTA
**[I Ind. Jur., N. S., 371**

**MERCHANT SHIPPING ACT (17 & 18 Vict., c. 104), ss. 43, 66.—Shipping Master, Power of**—*continued.*

——— **ss. 53, 55.**

*See* SHIP, SALE OF—
**[2 Ind. Jur., N. S., 251**
**1 Ind. Jur., N. S., 363**

——— **s. 207.**—*Discharge of seaman.—Power of Shipping Master, Bombay.*—The Shipping Master of Bombay has a discretion vested in him of refusing to sanction the discharge of a seaman shipped from a foreign port whose articles have not expired, though the seaman consents to such discharge. IN RE LEWIS . . **6 Bom., O. C., 42**

——— **s. 243.**—*Act I of 1859, s. 83, cl. 5.—Disobedience of commands by sailors.*—The Merchant Shipping Act, 1854, 17 and 18 Victoria, Cap. 104, section 243 (*b*), has no application to British India. The Act applicable to cases of continued wilful disobedience of lawful commands by sailors is Act I of 1859, section 83, clause 5 (*c*). IN THE MATTER OF THE PETITION OF REARDON . **8 Mad., 85**

1. ——— **(IV of 1875), ss. 3, 5, 6, 7, & 18.**—*Jurisdiction, Admiralty Courts.—Board of Trade certificates.—Incompetency or misconduct of holder.—Statement of grounds.*—The powers conferred on Courts of Admiralty by section 5 of Act IV of 1875, of investigating charges of incompetency or misconduct against the holders of Board of Trade certificates, is totally distinct from the power of inquiry into wrecks or casualties conferred on tribunals by the same Act. It is not correct to say that all the sections in chapter II of Act IV of 1875 subsequent to section 5 apply only to inquiries under that section; nor that the Courts mentioned in that section are the only Courts that can cancel a Board of Trade certificate, or report so as to enable the Local Government to cancel its own certificate. A special Court inquiring into a casualty under section 3 has power, if all the provisions of the Act are duly complied with, to cancel a Board of Trade certificate, or to make a report to the Local Government, upon which the Government may cancel its own certificate under section 18. In investigating charges of incompetency or misconduct under section 5 of Act IV of 1875, it is not necessary, in order to give the Court jurisdiction, that such incompetency or misconduct should have occurred on or near the coasts of India. What is a sufficient "statement of grounds," within the meaning of sections 6 and 7 of Act IV of 1875? IN RE THE "AVA" AND THE "BRENHILDA." GOVERNMENT OF BENGAL *v.* WHITTARD
**[I. L. R., 5 Calc., 453 : 5 C. L. R., 307**

——— **s. 5.**—*Proof of Board of Trade certificate.*—An investigation under Act IV of 1875, section 5, into charges of incompetency or misconduct, cannot proceed unless the person whose competency or conduct is to be inquired into has been proved to be the holder of a certificate granted by the Board of

**MERCHANT SHIPPING ACT (IV of 1875), s. 5**—*continued.*

Trade. IN THE MATTER OF A COLLISION BETWEEN THE "AVA" AND THE "BRENHILDA"
[I. L. R., 5 Calc., 568: 5 C. L. R., 331

**MERCHANTS, LAW OF—**

*See* ENGLISH LAW . 13 W. R., 420

**MERGER.**

*See* EXECUTION OF DECREE—APPLICATION FOR EXECUTION AND POWERS OF COURT.
[I. L. R., 7 Calc., 82

*See* CASES UNDER MORTGAGE—SALE OF MORTGAGED PROPERTY—PURCHASERS.

1. ——— **Doctrine of merger.**—*Applicability of, to mofussil of India.—Quære,*—Whether the doctrine of merger applies to lands in the mofussil in this country. WOOMESH CHUNDER GOOPTO *v.* RAJNARAIN ROY . . . . . 10 W. R., 15

It does not. SAVI *v.* PUNCHANUN ROY
[25 W. R., 503

2. ——— **Collateral securities.**—*Promissory note.—Mortgage.—Registration Act (XX of 1866), s. 52.*—*B.* executed and delivered to *A.* a promissory note, which was specially registered under section 52 of Bengal Act XX of 1866. On the due date of the note, *A.* renewed the note in consideration of *B.'s* securing the debt by assigning to him, by way of mortgage, his (*B.'s*) interest in certain landed property. *Held* that *A.* could proceed in a summary way upon the note, notwithstanding the mortgage. RAMGOPAL LAW *v.* BLAQUIERE
[1 B. L. R., O. C., 35

3. ——— **Purchase by putnidar of zemindari rights.**—*Cessation of rent as putnidar.*—. The putnidar of a mohal which formed a portion of a zemindari purchased the zemindari rights in the mehal. From the date of his purchase he paid no rent as putnidar. *Held* that he could not set up his title as putnidar against his zemindari co-sharers in a suit brought by them for contribution. PROSUNNO NATH ROY *v.* JOGUT CHUNDER PUNDIT
[3 C. L. R., 159

**MESNE PROFITS.**

Col.
1. RIGHT TO, AND LIABILITY FOR— . 3814
2. ASSESSMENT IN EXECUTION AND SUITS FOR MESNE PROFITS . . . . 3822
3. MODE OF ASSESSMENT AND CALCULATION . . . . . 3832

*See* CASES UNDER DECREE—CONSTRUCTION OF DECREE—MESNE PROFITS.

*See* CASES UNDER DECREE—FORM OF DECREE—MESNE PROFITS.

*See* HINDU LAW—STRIDHAN—DESCRIPTION AND DEVOLUTION OF STRIDHAN.
[3 B. L. R., A. C., 121

*See* CASES UNDER INTEREST—MISCELLANEOUS CASES—MESNE PROFITS.

**MESNE PROFITS**—*continued.*

*See* CASES UNDER LIMITATION ACT, 1877 ART. 109.

*See* RIGHT OF SUIT—MESNE PROFITS.
[1 Ind., Jur., O. S., 83

*See* VENDOR AND PURCHASER—VENDOR, RIGHTS AND LIABILITIES OF—
[7 B. L. R., 113

——— **Suit for—**

*See* RES JUDICATA—CAUSES OF ACTION.
[2 B. L. R., S. N., 16: 10 W. R., 486
Marsh., 93
9 W. R., 594

*See* SMALL CAUSE COURTS, MOFUSSIL—JURISDICTION—MESNE PROFITS . 2 N. W., 18

*See* CASES UNDER SPECIAL APPEAL—SMALL CAUSE COURT SUITS—MESNE PROFITS.

——— **and for ejectment.**

*See* JURISDICTION OF CIVIL COURT—RENT AND REVENUE SUITS, N.-W. P.
[I. L. R., 1 All., 448
1 N. W., 177: Ed. 1873, 256

1. RIGHT TO, AND LIABILITY FOR—

1. ——— **Right to mesne profits.**—*Damages for being kept out of possession.*—Regard being had to the constitution of the Courts of this country, which are Courts of justice, equity, and good conscience, a decree-holder should be reimbursed damages for the time during which he is kept out of possession by the wrongful act of another party, whether his claim for subsequent damages be made in the execution of the first decree or in a regular suit. KASHEE NATH KOOER *v.* DEB KRISTO RAMANOOJ DOSS . . . . . 16 W. R., 240

2. ——— *Period for which suit is pending.*—There is no objection to the award of mesne profits or interest during the whole period for which a suit is pending, however long that period may be. KAKAJI BIN RANOJI *v.* BAPUJI BIN MADHAVRAV . . . 8 Bom., A. C., 205

3. ——— *Legal owner.—Right to sue for mesne profits.*—A party declared by a final judgment to have the legal title and the right to possession, is, so long as the judgment declaring him to be the legal owner remains in force, the only party who is legally competent to sue for mesne profits. KHETTERMONEE DOSSEE *v.* GOPEEMOHUN ROY
[1 Hay, 178

S. C. KHETTURMONEE DOSSEE *v.* GOPEEMOHUN ROY . . . 1 Ind. Jur., O. S., 83

4. ——— *Co-sharer claiming re-partition of his share.*—A co-sharer claiming re-partition of his share is not entitled to mesne profits unless so provided by the wajib-ul-urz. CHUNDER SINGH *v.* NIETO . . . . . 3 Agra, 11

5. ——— *Co-sharers.—Mortgage after foreclosure.*—*A.* obtained a decree declar-

**MESNE PROFITS**—*continued.*

**1. RIGHT TO, AND LIABILITY FOR**—*continued.*

**Right to mesne profits**—*continued.*

ing him entitled to possession under a mortgage of one third of the property in dispute, with mesne profits. *B.* subsequently obtained a decree against *A.* and the other co-sharers for possession of the whole estate, with mesne profits, under another mortgage; but instead of taking full advantage of his decree he received from all the co-sharers the amount due to him on the original transaction, and restored the property to them. *Held* that *A.* was entitled to recover mesne profits due to him under the original decree. BISNOO CHUNDER BISWAS *v.* TOYLUCK NATH BANERJEE . . **6 W. R., Mis., 28**

6. ——————— *Co-sharers.—Excess land.*—Plaintiff and defendant and certain others were co-sharers of an abad. Each agreed to cultivate certain portions, and afterwards to give up any excess land cultivated by him. Defendant cultivated 399 bighas in excess of his share. Plaintiff sued him and got possession of the excess land on payment to the defendant of a compensation for the expense of cultivation, and then brought his suit for mesne profits. *Held* that he was not, under the circumstances, entitled to mesne profits. DEBNARAYAN DEB *v.* KALI DAS MITTER

**[6 B. L. R., Ap., 70 : 14 W. R., 397**

Affirming, on appeal, KALEE DOSS MITTER *v.* DEB NARAIN DEB . . **13 W. R., 412**

7. ——————— *Persons not in actual possession.—Right of suit.—Held* that where the plaintiffs made over the management of their lands to their bankers, but did not part with the property in the lands, even for a temporary period, they were entitled to maintain a suit for mesne profits against the defendants who trespassed on and occupied the lands whilst the estate was under the management of the bankers. RAMBUTTON RAE *v.* DWARKA DOSS . . . . **2 N. W., 193**

8. ——————— *Decree-holder in possession.—Rents due previous to his possession.*—When a decree-holder obtains possession of an estate in execution, he is not at liberty to sue the ryots for rents falling due before the date of his taking possession. His proper course is to sue the late wrongful possessor for mesne profits, including the rents. UMES CHANDRA *v.* SHASTIDHAR MOOKERJEE . . . **3 B. L. R., Ap., 99**

S. C. WOOMESH CHUNDER ROY *v.* MARKUND MOOKERJEE . . . . **12 W. R., 34**

9. ——————— *Mortgagor after redemption.—Period between date of suit and execution of decree.*—A suit for redemption is no bar to a mortgagor afterwards suing the mortgagee, who has been in possession, for mesne profits due between the date of suit and the execution of the decree. GOUR KISHEN SINGH *v.* SAHAY FUKEER CHUND

**[7 W. R., 364**

10. ——————— *Redemption of usufructuary mortgage.—Mortgagee refusing to give up possession.*—An estate was mortgaged for R100; the mortgagee was put in possession, and it was stipulated that he was to enjoy the usufruct in lieu of interest, the mortgagor being entitled to redeem at any time on repayment of the principal. When the mortgagor deposited the principal, the mortgagee set up a false claim upon absolute sale, and forced the plaintiffs into a regular suit, in which possession was decreed to them on payment of the principal. *Held* that they were entitled to mesne profits for such period as was not barred by the statute of limitation. *Held*, also, that plaintiffs were entitled to interest from the date of suit. LULEET SINGH *v.* ALI REZA . . . . **8 W. R., 322**

11. ——————— *Unlawful resumption by Government.*—Property which had been unlawfully resumed by Government was, on appeal, released by decree of the Privy Council. *Held* that the owner was entitled to recover mesne profits from the date of the decree. RAMNARAIN MOOKERJEE *v.* MAHTAB CHUND . . **1 Ind. Jur., O. S., 48**

12. ——————— *Upanchowki or istemrari tenure.—A.* sued *B.* for possession with mesne profits of a share in certain talooks, alleging that he purchased it in execution of a decree. *B.* proved that he held the lands under an upanchowki title. The lower Court, however, awarded to *A.* mesne profits for six years. *Held* that *B.* having proved his upanchowki title, *A.* could only be entitled to a share of the upanchowki jumma, which was not of the nature of mesne profits, but of rent; and, therefore, a suit to recover that could not be brought in the Civil Court. SHIB KUMAR JOTI *v.* KALI PRASAD SEN . . **1 B. L. R., A. C., 167**

13. ——————— **Liability for mesne profits.**—*Person declared to be in wrongful possession.*—A person declared by a decree to be in wrongful possession is liable for mesne profits, which may be recovered from any property in his possession. PEARUN *v.* AHMED ALI KHAN . **4 W. R., Mis., 7**

JEY NARAIN *v.* TORABUN . . **3 Agra, 216**

HERA LALL THAKOOR *v.* GRIDHAREE LALL

**[8 W. R., 450**

14. ——————— *Bona fides.*—Parties in possession are liable for wasilat to the legal owners whom they keep out of possession, even though there was no *mala fides* on their part. BYJNATH PERSHAD *v.* RADHOO SINGH

**[10 W. R., 486**

15. ——————— *Holder of property for another.*—The mere possession by one person of another's land does not render the former liable to account for the profits. For these he is liable only where he has held tortiously, or under an agreement, express or implied, to make them good. MAHAMMAD ALI BAVA LABBI *v.* MOHIADIN NAINAR

**[1 Mad., 107**

MESNE PROFITS—*continued.*

1. RIGHT TO, AND LIABILITY FOR—*continued.*

Liability for mesne profits—*continued.*

16. ——————— *Person preventing ryots from paying rent.*—A lessor who prevents ryots from paying rent to the lessee when the latter comes to take possession is liable for mesne profits, even though he may not himself collect the rents. BHEEKUMBUR SINGH *v.* RAJ CHUNDER GHOSE [15 W. R., 196

17. ——————— *Keeping owner out of possession.*—A party who has been active in wrongfully keeping another out of the possession and enjoyment of property is liable for consequential damages, whether he derived any profit himself from the possession of the land or not. GHOOGLY SAHOO *v.* CHUNDEE PERSHAD MISSER . 21 W. R., 246

They should only be calculated for any period during which the defendant was active in keeping the plaintiff out of possession. INDURJEET SINGH *v.* RADHEY SINGH . . . . 21 W. R., 269

18. ——————— *Person in wrongful possession without knowledge of defect in his title.*—*Held*, dissenting from a ruling of the late Sudder Court, that mesne profits are always recoverable from a person who has enjoyed them, even though he has been in *bonâ fide* possession without knowledge of the defect in his title. He would, if he bought with sufficient inquiry, have a remedy against his vendor. MUGUN CHUNDER CHUTTORAJ *v.* SURDESSUR CHUCKERBUTTY . 8 W. R., 479

19. ——————— *Person in possession apparently of right afterwards legally dispossessed.*—Where a defendant had, with apparent right, occupied newly-formed lands from which the plaintiff ejected him by establishing in a civil suit his superior title, the defendant was held liable to account to the plaintiff for those profits which the defendant had derived from the lands, and which the plaintiff, if he had been in possession, would himself have received. ABDOOL KUREEM BISWAS *v.* CAMPBELL [8 W. R., 172

20. ——————— *Suit by purchaser with notice of defect of title, for reversal of sale.*—Where a purchaser, by the institution of a suit for the reversal of the sale, had full notice of the defect of his title, he was, on the reversal of the sale in that suit, held liable for mesne profits. UMAMOYI BURMONEA *v.* TARINI PRASAD GHOSE [7 W. R., 225

21. ——————— *Vendor and purchaser.—Sale by elder brother during younger brother's minority.*—A sale by an elder brother during a younger brother's minority having been set aside and the vendee ejected, the vendee alone, and not the vendor, whose connection with the property ceased with the sale, was held to be liable for mesne profits received and expended by the vendee whilst in possession. SHURUTCHUNDER DEY SIRCAR *v.* JADUBNARAIN NUNDEE . . . . 1 W. R., 90

22. ——————— *Possession taken by third party after suit.*—About the time that judgment was given in plaintiff's favour for possession with wasilat, a third party, in satisfaction of some other claim against the defendant, attached and got possession of the land in dispute. A question consequently arose in executing plaintiff's decree as to the liability for wasilat of the year in which the defendant was put out of possession by the third party. *Held* that, as under section 223, Code of Civil Procedure, plaintiff might have executed his decree by removal of the party who had got possession under a title created by defendant subsequent to the institution of the suit, he had the means of recovering possession while defendant had not. Under these circumstances defendant could not be held liable for the profits. HARADHUN DUTT *v.* JOYKISTO BANERJEE . . . . 11 W. R., 444

23. ——————— *Obstruction to possession.—Dispossession.*—Obstruction to possession may be the ground of a claim for damages, but it cannot support a claim for wasilat unless there has been dispossession and the claimant has been prevented from enjoying rents and profits. CHURN SINGH *v.* RUNGOO SINGH . 15 W. R., 221

24. ——————— *Joint judgment-debtors.*—As a general rule a suit for wasilat will lie against parties who have been found in a previous suit for recovery of the land to have been in wrongful possession, and against them only. If the plaintiff has recovered a decree against several persons as joint wrong-doers, he is not at liberty to single out one or more of them only as defendants in the suit for wasilat. SUTTYA NUNDO GHOSAUL *v.* SUROOP CHUNDER DOSS . . . 14 W. R., 76

25. ——————— *Joint liability.—Wrong-doers not in possession.*—The plaintiff purchased a house with land attached, and sub-let the property to his vendor, one of the defendants. The defendants having in collusion prevented his enjoying rent, he sued for rent, but on their intervention the suit was dismissed. He then brought a regular suit, and obtained a decree from the Civil Court for khas possession. In a suit to recover wasilat,—*Held* that, although the defendants were not all in possession, yet, as they all continued to oppose the plaintiff's possession, they were jointly liable for the wasilat. SHAMASUNKER CHOWDHRY *v.* SREENATH BANERJEE [12 W. R., 354

26. ——————— *Ijmali property where defendants have divided estate.*—In a suit to recover possession of land from the ijmali enjoyment of which the plaintiff had been excluded by the joint action of all the defendants who had divided the property between themselves,—*Held* that the defendants were all equally responsible for the damage sustained by the plaintiff, and that none of them could restrict their liability for mesne profits to that portion only of which they were in possession. *Held, also*, that the plaintiff was entitled to obtain mesne profits up to such time as he should get real and substantial, and not

MESNE PROFITS—*continued.*

1. RIGHT TO, AND LIABILITY FOR—*continued.*

Liability for mesne profits—*continued.*

merely formal, possession of the property at the hands of the defendants in execution of his decree. JHOONKEE PAUREY *v.* AJOODHYA DOSS. AJOODHYA DOSS *v.* LALLJEE PAUREY . . 19 W. R., 218

27. ——— *Actual occupier and lessor.*—Where lands are wrongfully withheld from the rightful owner, not only the actual occupiers, but also the person who has leased the land to the actual occupiers, may be held to have committed a joint trespass, and to be jointly liable for the damages caused by such trespass. *Doe* v. *Harlow, 12 Ad. and Ell., 40,* followed. MUDUN MOHUN SINGH *v.* RAM DASS CHUCKERBUTTY . 6 C. L. R., 357

28. ——— *Apportionment of liability.*—Where intermediate holders combine wrongfully to keep an auction-purchaser out of possession, they must all be held liable for mesne profits: the Court need not apportion their liability in proportion to the extent of the property respectively held by them. RAM CHUNDER SURMAH *v.* RAM CHUNDER PAL . . . . . 23 W. R., 226

29. ——— *Apportionment of damages between joint tort-feasors.*—In a suit for mesne profits against a number of defendants who have been in possession of distinct portions of a newely-formed chur, and are proved to have no title thereto, it is competent to the Court, having regard to the provisions of the Civil Procedure Code, to apportion the damages payable by the defendants severally in respect of the portions held by them respectively. *Aliter,* where the defendants have jointly taken possession of a particular portion of such land. The reason for treating as joint tort-feasors all persons who have occupied portions of land ultimately found to belong to a neighbouring estate, and for applying the rule of contribution or apportionment between joint tort-feasors, is wanting in the case of a suit for mesne profits against a number of defendants who have taken possession of distinct portions of lands forming parts of a newly-formed chur to which they have no title, and it is fair and equitable in such a case that the defendants should be severally made liable for mesne profits in respect of the parcels occupied by them respectively. KRISHNA MOHUN BASACK *v.* KUNJO BEHARY BASAK . . 9 C. L. R., 1

30. ——— *Assessment of liability for.—Suit for mesne profits with several defendants.*—In a suit for mesne profits where there are several defendants, the liability of the several defendants should be assessed in proportion to the amount of profits which each had derived from his wrongful possession. NAWAB NAZIM OF BENGAL *v.* RAJ COOMAREE DEBEE . . 6 W. R., 113

COLLECTOR OF BOGRAH *v.* SHAMA SUNKUR MOOOMDAR . . . 6 W. R., 230

31. ——— *Representative of debtor until sale of property taken in execution.*—Where execution is ordered to be taken out against the estate of a deceased judgment-debtor, and the property is sold, the representative of the debtor cannot be called to account in execution for the mesne profits of the property while in his hands. MUZHUR ALI *alias* SAT COWREE MEAH *v* NAWAB NAZIM OF BENGAL . . . 7 W. R., 308

32. ——— *Liability of ijaradar under an ijara granted by party in wrongful possession.*—A suit for mesne profits held to lie against a party who took an ijara pending litigation, though the decree for possession with profits was against the ijaradar's landlord. BIDYAMAYI DEBIA CHOWDHRAIN *v.* RAM LAL MISSER [8 B. L. R., Ap., 80: 17 W. R., 148

33. ——— *Dispossession of usufructuary mortgagee.*—The plaintiff for a consideration obtained from the defendant a zur-i-peshgi lease which contained an undertaking that in the event of the plaintiff's possession being interfered with by the defendant, or the defendant's previous ticcadar, the defendant would pay back to the plaintiff his money with interest and profits. The lower Appellate Court, finding that the plaintiff after enjoyment for three years had been turned out of possession by the previous ticcadar, gave the plaintiff a decree for the original money advanced, with interest and mesne profits for the unexpired portion of the lease. *Held* that mesne profits should not have been awarded. KHERODHUR LALL *v.* DOOLEE CHUND [19 W. R., 424

34. ——— *Decree-holder paying debt and taking possession from zur-i-peshgidar.*—Where a decree-holder, finding a zur-i-peshgidar in possession, paid the debt due by his judgment-debtor to the zur-i-peshgidar, and entering into possession himself realised the rents, it was held that he could not demand wasilat from the judgment-debtor for the same period. SHAM SOONDER KOOER *v.* RAJENDER MISSER . . 10 W. R., 390

35. ——— *Beng. Regs. XV of 1793 and I of 1798.*—*A.* granted a zur-i-peshgi lease of certain lands to the defendants for a fixed term, which was to continue after the expiry of the term so long as the money advanced remained unpaid. Shortly afterwards *A.* evicted the defendants and sold the land to *C.* and *D.* The defendants sued *A.*, *C.*, and *D.*, and obtained a decree for possession and mesne profits. They never got possession, but they recovered the mesne profits from *A.* On the expiry of the lease, *C.* and *D.* were held, in a suit brought by them, entitled to redeem. *Held,* the defendants were not liable, under Regulation XV of 1793 or I of 1798, to account for the mesne profits which they had recovered. WUZEEROONNISSA *v.* SAEEDUN [B. L. R., Sup. Vol., 613: 6 W. R., 240

36. ——— *Mortgagee in possession.*—A mortgagee in possession occupies a fiduciary position towards all the persons interested

MESNE PROFITS—*continued.*

1. RIGHT TO, AND LIABILITY FOR—*continued.*

**Liability for mesne profits**—*continued.*

as proprietors in the mortgaged estate, and to all he is answerable for whatever mesne profits he may receive in excess of the amount which he is entitled to receive by law or agreement. And when some of the proprietors assert claims, and assert such claims on behalf of themselves alone, he is entitled to require the claimants to establish the extent of their claims. DEONARAIN SINGH *v.* NAEK PERSHAD [2 N. W., 217

37. ——————— *Liability of mortgagor after decree for foreclosure.*—Where a mortgagee, after obtaining a decree for foreclosure, sued for possession and mesne profits, and the mortgagor did not prove that he had given the plaintiff possession or directed his lessee to pay rent to the plaintiff,—*Held* that the mortgagor (defendant) was liable for wasilat from the date of foreclosure, so far as it was not barred by limitation. SUROOP CHUNDER ROY *v.* MOHENDER CHUNDER ROY [22 W. R., 539

38. ——————— *Vendor and purchaser.—Trustee for person out of possession.*—Where, in a suit for partition, it appeared that the vendor of the portion sued for had kept the vendee out of possession, the vendor, though liable for mesne profits, was not in the position of trustee of the rents for the party kept out of possession. NIL KAMAL LAHURI *v.* GUNOMANI DEBI [7 B. L. R., 113: 15 W. R., P. C., 38

39. ——————— *Ejectment of mortgagees' tenant of sír land by mortgagors.*—Where mortgagors had a right of occupancy in sír land, it was held that they could not be treated as trespassers for ejecting the mortgagees' tenant and taking possession; but inasmuch as, instead of giving notice to the mortgagees of their intention to avail themselves of such rights and to enter on the sír land as tenants, at the same time offering to pay such rent as might, having regard to the provisions of section 7, Act XVIII of 1873, be properly payable by them, they entered on the sír land and ousted mortgagees' tenant, they rendered themselves liable for mesne profits. BAKHAT RAM *v.* WAZIR ALI [I. L. R., 1 All., 448

40. ——————— *Resumption by Government.—Lakhirajdar.—Fraud.*—In a suit for wasilat in respect of mâl lands fraudulently included by the lakhirajdar with lakhiraj lands resumed by Government and afterwards settled with him,—*Held* that the lakhirajdar, and not the Government, was liable; and that as the sum claimed was definite and required no further inquiry to ascertain the amount due, interest had been properly awarded from date of suit. COOMAREE DABEE *v.* MAHTAB CHUND [W. R., 1864, 380

41. ——————— *Assessment of mesne profits.—Land out of jurisdiction.*—Where application was made for execution of a decree for possession with mesne profits of five mouzahs situated within the Court's jurisdiction, and Government revenue was so assessed upon these five mouzahs, and two other mouzahs situated in another district, that the amount paid on account of the five mouzahs and the two mouzahs respectively could not be apportioned, the Court had no jurisdiction to determine and award mesne profits for the two mouzahs not within its jurisdiction, but should have made an apportionment to the best of its ability. Nor ought the Court to have assessed the mesne profits by relying upon certain jummabundi papers made by the Government revenue officers some thirty years ago, without inquiring into the actual rents or proceeds of the estate during the period of dispossession. PURAN CHUNDER ROY *v.* JUGGESSUR MOOKERJEE . . 17 W. R., 298

42. ——————— *Forfeiture of property.—Liability of Government.*—Where property is confiscated by Government, it is only responsible for the profits during the time it is in possession, and to such amount as was actually realised, or such as might and would have been realised but for negligence or fraud on the part of its servants. MOHUN LALL *v.* GOVERNMENT . 2 Agra, Mis., 6

2. ASSESSMENT IN EXECUTION AND SUITS FOR MESNE PROFITS.

43. ——— **Assessment of mesne profits.**—*Power of Court executing decree to assess mesne profits.*—A Court executing a decree has no power to assess mesne profits, unless it is ordered by the decree that the mesne profits are to be assessed in execution; and it is an essential part of a decree which orders mesne profits to be assessed in execution, to fix the period in respect of which such mesne profits are to be assessed. WISE *v.* RAJENDUR COOMAR ROY . . 11 W. R., 200

44. ——————— *Execution of decree.—Decree silent as to date to which mesne profits are to run.—Subsequent mesne profits.*—Where a decree is silent as to the date up to which mesne profits are to run, and merely gives a decree for possession with mesne profits, those mesne profits can only be reckoned, for the purposes of assessment in execution, up to the date of the institution of the suit. RAM MANICKYA DEY *v.* JUGGUNNATH GOPE . . . . I L. R., 5 Calc., 563

HURONATH ROY *v.* INDRO BHOOSUN DEB ROY [6 W. R., Mis., 33

JANOKEE NATH MOOKERJEE *v.* RAJ KISTO SINGH [15 W. R., 292

45. ——————— *Decree for possession.—Civil Procedure Code, 1859, ss. 196, 197.*—A decree for possession was construed to include mesne profits where the High Court was satisfied that such was the intention of the Court which passed the decree. A decree of a Court should, under sections 196 and 197, Act VIII of 1859, state

MESNE PROFITS—*continued.*

2. ASSESSMENT IN EXECUTION AND SUITS FOR MESNE PROFITS—*continued.*

**Assessment of mesne profits**—*continued.*

whether mesne profits are awarded or not; and it should distinctly state, when it reserves any points for subsequent inquiries in execution of the decree, what those points are. RAESOONISSA BEGUM *v.* SHARODA SOONDUREE CHOWDHRAIN [16 W. R., 25

46. ——————— *Court with power to pass decree.*—Although the assessment of mesne profits is reserved for the period of execution of decree, it is an essential part of the decree itself, and not a mere process in execution, and must therefore be made by a Court authorised to pass the decree. MEHER JAN *v.* GERDA . 25 W. R., 270

47. ——————— *Act XXIII of 1861, s. 11.—Profits assessable by Court in execution.*—The mesne profits which, under the provisions of section 11, Act XXIII of 1861, are assessable by the Court executing the decree, are only such as have been by the decree made payable in respect of the subject-matter of the suit between the date of the suit and the date of the execution of the decree. Any question of mesne profits not determined by the Court making the decree is not properly cognisable by the Court executing the decree. RAM LOCHAN *v.* MUNSOOR ALI CHOWDHRY [11 W. R., 339

48. ——————— *Act XXIII of 1861, s. 11.—Suit for mesne profits.*—Where no liability to mesne profits is imposed by a decree, section 11 of Act XXIII of 1861 does not give a power to extend the relief granted by the decree in respect of the right to mesne profits, but only to determine questions regarding the amount thereof when the right thereto has been ascertained by the decree. SUBBA VENKATARA MAIYAN *v.* SUBRAYA AIYAN . . . . . 4 Mad., 257

49. ——————— *Decree silent as to mesne profits.—Power of Court executing decree.*—Plaintiff sued for possession of certain lands and for mesne profits. He obtained a decree for possession, but the decree was silent as to mesne profits. *Held* that the Court executing the decree was not competent to entertain a claim for mesne profits made by the decree-holder. CHUNDER COOMAR ROY *v.* GONESH CHUNDER DASS [I. L. R., 13 Calc., 283

50. ——— **Suit for mesne profits.**—*Act XXIII of 1861, s. 11.—Civil Procedure Code, ss. 196 and 197.*—Mesne profits are in themselves simply damages which do not exist as an obligation to be discharged until they have been awarded by a Court competent to do so. Therefore, according to section 11, Act XXIII of 1861, mesne profits payable at the time of execution must mean mesne profits which have been at that time directed to be paid by a decree of Court. *A.* obtained a decree against *B.* for recovery of possession of certain property, and for mesne profits up to the date of the suit; but the decree was silent as to mesne profits after that time. *Held, A.* was not barred by the provisions of section 11 of Act XXIII of 1861 from bringing a suit against *B.* for mesne profits during the time that *A.* was kept out of possession after the decree. HARAMOHINI CHOWDHRAIN *v.* DHANMANI CHOWDHRAIN [1 B. L. R., A. C., 138: 10 W. R., 62

HURCHURUN LAL *v.* TOORAB KHAN [2 N. W., 176

SHUM SHEER SINGH *v.* RAMJEEAWUN RAE [2 N. W., 416

ISSUR DUTT SINGH *v.* ALLUCK MISSER [7 W. R., 429

SHUMDHO MOHUN ROY *v.* TIRPOORA SUNKUR ROY [12 W. R., 126

51. ——————— *Act XXIII of 1861, s. 11.—Execution of decree.—Decree for possession.*—Where, in a suit for land, the Court decreed to the plaintiff possession of the land, but made no decree in respect of mesne profits,—*Held*, the plaintiff could not, under section 11 of Act XXIII of 1861, obtain an order from the Court executing his decree declaring him entitled to any or what amount of mesne profits. Under section 11 the question must relate to something comprised in the decree. EKOWRI SINGH *v.* BIJAYNATH CHATTAPADHYA [4 B. L. R., A. C., 111: 13 W. R., 11

AMEER AHMUD *v.* ZAMEER AHMUD [18 W. R., 122

RAM ROOP SINGH *v.* SHEO GOLAM SINGH [25 W. R., 327

52. ——————— *Decree for possession.—Act XXIII of 1861, s. 11.—A.*, in execution of a decree of the lower Court against *B.*, obtained possession of certain land therein mentioned. On appeal by *B.*, the High Court reversed the decree of the lower Court, and ordered restitution of the property to *B.*; but no mention of mesne profits was made in the decree. *B.* then sued for recovery of mesne profits for the period during which *A.* had been in possession. *Held* that such a suit would not lie. The question of mesne profits ought to have been decided in execution under section 11 of Act XXIII of 1861. SHIB NARAYAN POHRAJ *v.* KISHOR NARAYAN POHRAJ . . 1 B. L. R., A. C., 146 [10 W. R., 131

53. ——————— *Suit for possession.—Civil Procedure Code, ss. 2, 7, and 196.—Act XXIII of 1861, s. 11.*—The plaintiff brought a suit for possession of land with mesne profits. The suit was dismissed. He appealed on the question of possession only, and obtained a decree for possession without any mention of mesne profits; and afterwards, in execution of the decree, he obtained possession of the land. *Held*, the plaintiff could afterwards bring his suit to recover mesne profits from the date of decree for the period of six years next

**MESNE PROFITS**—*continued.*

**2. ASSESSMENT IN EXECUTION AND SUITS FOR MESNE PROFITS**—*continued.*

**Suit for mesne profits**—*continued.*

before the commencement of the suit, exclusive of the period during which the plaintiff was in possession. Sections 2, 7, and 196 of Act VIII of 1859, and section 11 of Act XXIII of 1861, were no bar to such suit. PRATAP CHANDRA BURUA *v.* SWARNAMAYI. SWARNAMAYI *v.* PRATAP CHANDRA BURUA **[4 B. L. R., F. B., 113 : 13 W. R., F. B., 15**

**54.** ——————— *After suit for immoveable property where mesne profits are not mentioned in decree.*—When a suit is brought to recover possession of immoveable property, and the decree does not provide for the mesne profits that accrued during the suit, a separate suit may be maintained for them. Where, however, it can be shown that the omission in the decree to provide for mesne profits was the deliberate act of the Court, the defendant may set that up as a defence in the separate suit. SITARAM AMRUT *v.* BHAGVANT JAGANATH **[6 Bom., A. C., 109**

**55.** ——————— *Profits between filing of plaint and execution of decree.—Act XXIII of 1861, s. 11.*—Where a decree awarding possession of immoveable property is silent as to mesne profits accruing between the filing of the plaint and the execution of the decree, the Court executing the decree has no power to award such profits. The proper course for the plaintiff to adopt, under such circumstances, is to apply to the Court which passed the decree for a review, or else to file a separate suit. *Jiva Patil Rahimna v. Malukji Mani Nathuna, 3 Bom., A. C., 31,* overruled. RADHABAI *v.* RADHABAI **[4 Bom., A. C., 181**

CHOWDHRY IMDAT ALI *v.* BOONYAD ALI **[14 W. R., 92**

**56.** ——————— *Act XXIII of 1861, s. 11.*—A plaintiff in possession under a decree for land and mesne profits, applied for further execution as to mesne profits, and obtained an order from the Court of first instance (the District Munsif's Court). This order was reversed by the Appellate Court (the Civil Court), leaving still open to the Court of first instance to make a further order. Plaintiff, however, instead of applying again for execution, instituted a fresh suit for mesne profits in the Civil Court. The Civil Judge rejected the plaint. *Held* that section 11, Act XXIII of 1861, warranted the rejection of the plaint, on the ground that the mesne profits to which plaintiff laid claim in the suit were payable in respect of the subject-matter of the former suit. LAKSHMI NARASIMHALU *v.* CHATRAZU JAGANNADHAM PANTALU *alias* SRINIVASA RAU. EX PARTE RUDDRAVARPU VISSAM RAZ *alias* KONAMARAZE . . . . . **3 Mad., 287**

**57.** ——————— *Power of Court executing decree to assess mesne profits not decreed.*—Where a decree was silent as to the plaintiff's right to mesne profits after the date of filing the suit, and did not reserve any question of mesne profits for further investigation, the Court which executed the decree was held to have acted *ultra vires* in ordering an investigation into mesne profits which may have accrued due pending the suit and up to the time of execution. BROUGHTON *v.* PERHLAD SEN **[19 W. R., 154**

**58.** ——————— *Act XXIII of 1861, s. 11.—Separate suit.—Question in execution of decree.*—*D.* obtained a decree for an undivided share of certain property, but the defendants having apportioned the entire property amongst themselves and held each his own portion exclusively, *D.* seized in execution a part of the share of one of them, *P.* On appeal the possession was ordered to be given up. *P.* then sued to recover mesne profits for the period of *D.'s* possession. *Held* that the damages in question ought to have been sought in the execution proceedings when the possession itself was recovered, and not by the institution of a new suit; a Court being bound not only to place an aggrieved party back in the original position from which its erroneous action had displaced him, but also to give him compensation for such loss as he had thereby sustained. DULJEET GORAIN *v.* REWUL GORAIN **[22 W. R., 435**

**59.** ——————— *Act XXIII of 1861, s. 11.—Question to be decided in execution of decree.*—Certain decree-holders having been sued successfully for possession by the judgment-debtors in the first Court, appealed to the High Court, who reversed the decision, and whose order was confirmed by the Privy Council. The decree-holders on this applied for execution and for mesne profits for the interval during which they had been kept out of possession. *Held* that they were entitled to what they claimed in execution without bringing a regular suit, as the effect of the High Court's decree was to replace the parties *in statu quo.* UNUNT RAM HAZRAH *v.* KURALEE PERSHAD MISTREE **[23 W. R., 441**

**60.** ——— **Assessment under Privy Council decree.**—*Execution of decree of Privy Council.—Decree for possession.*—When the Privy Council declares an appellant entitled to real property, of which he was out of possession, and directs the High Court to make the inquiry necessary to ascertain what is comprised therein, and to proceed in the suit as upon the result of such inquiry may appear to be just, the High Court, on being applied to for execution, ought, besides giving possession, to ascertain and award mesne profits up to the date of giving possession. LILANUND SINGH *v.* LUCKIMPUR SING . . . . . **5 B. L. R., 605**

S. C. LEELANUND SINGH *v.* LUCHMESSUR SINGH **[14 W. R., P. C., 23 : 13 Moore's I. A., 490**

**61.** ——— **Assessment of mesne profits under Privy Council decree.**—*Power of Court executing decree.*—The judgment of the Privy

MESNE PROFITS—*continued.*

2. ASSESSMENT IN EXECUTION AND SUITS FOR MESNE PROFITS—*continued.*

**Assessment of mesne profits under Privy Council decree**—*continued.*

Council reported in *Leelanund Singh v. Luchmessur Singh, 14 W. R., P. C., 23 : 5 B. L. R., 605,* in no way militates against the Full Bench ruling in *Mosoodun Lall v. Bekaree Singh, B. L. R., Sup. Vol., 602 : 6 W. R., Mis., 109,* which laid it down that under section 11, Act XXIII of 1861, the Court executing a decree is not to determine whether mesne profits are to be awarded or not, but only the amount of such profits. RAMKANYE GHOSE *v.* GOOROO PROSUNNO ROY [16 W. R., 30

62. ——————— *Power of Court as to mesne profits in execution of decree.—Decree of Privy Council executed by Courts in India.*—Where the Privy Council made an order in favour of a plaintiff, decreeing possession of certain property with mesne profits,—*Held* that the intention was to award such a sum as would compensate the plaintiff for his actual loss, and the decree therefore authorised the Courts of this country to consider and deal with the question of mesne profits as fully as a Court could which was charged with the duty of originally determining the merits of such a question between the parties to the suit. The High Court accordingly awarded the amount of actual loss found to have been incurred in respect of each year, with interest thereon from each year to the date of the High Court's order. BUDLUN *v.* FUZLOOR RUHMAN [23 W. R., 449

63. ——— **Mesne profits not given by decree.**—*Execution of decree.—Interest.*—In construing the provisions of section 11, Act XXIII of 1861, notwithstanding certain earlier decisions to a contrary effect, all the Indian High Courts have now recognised it to be settled law that, where the decree is silent touching interest or mesne profits subsequent to the institution of the suit, the Court executing the decree cannot, under the section in question, assess or give execution for such interest or mesne profits, but that the plaintiff is at liberty to assert his rights thereto by a separate suit. The Judicial Committee of the Privy Council, although of opinion that, if the matter had been *res integra,* the provisions of the section might have admitted of a different interpretation, being unwilling to run counter to a long and concurrent course of decisions of the Indian Courts in what is really a mere matter of procedure, accepted this construction of the law as binding. The plaintiff obtained a decree for the possession of certain lands, with mesne profits up to the date of suit. No claim was made in the plaint for mesne profits accruing due after the date of suit, and the decree was silent in respect thereof. An appeal against the decree having been brought by the defendant, execution was, from time to time, stayed by the Court on the defendant giving security, to abide the event of the appeal for the execution of the decree, and for payment of the mesne profits accruing while the plaintiff remained out of possession. The decree having been confirmed on appeal, the plaintiff applied for execution in respect of the interim mesne profits. *Held,* in the Court below, that, as these were not provided for by the decree, they could not, under section 11, Act XXIII of 1861, be awarded in execution, but must be made the subject of a separate suit. *Held* by the Judicial Committee that the proceedings whereby the defendant led the Court to stay execution and continue him in possession, laid him under an obligation to account in the suit for the mesne profits which he engaged to pay; and that this obligation was capable of being enforced by proceedings in execution, notwithstanding the construction given by the Court to section 11; since even if the defendant's liability to account were not to be considered "a question relating to the execution of the decree," within the meaning of the section, he was, in any case, precluded by the ordinary principles of estoppel from contending that the mesne profits in question were not payable under the decree. SADASIVA PILLAI *v.* RAMALINGA PILLAI [15 B. L. R., 383 : 24 W. R., 193 L. R., I. A., 219

S. C. in High Court, RAMALINGA PILLAI *v.* SATTEASIVA PILLAI . . . 7 Mad., 97

CHOWDHREE NAIN SINGH *v.* JAWAHUR SINGH [1 N. W., 167 : Ed. 1873, 246

BHOOBUNESSUREE CHOWDHRAIN *v.* MANSON [22 W. R., 160

ABDOOL ALI *v.* ASHRUFFUN . 25 W. R., 215

64. ——————— *Act XXIII of 1861, s. 11.*—A decree of 1854 for possession and mesne profits having been confirmed on appeal, in February 1855, was duly executed in part up to 1861, when the decree-holder applied for execution as for mesne profits to the extent of R81. Failing in the Court of first instance, the applicant was declared by the Appellate Court, in 1863, entitled to the amount, with interest, by virtue of his decree. The judgment-debtor contested the case in the Civil Court, but his suit was dismissed on the 12th August 1865, and on the 12th July 1866 the decree-holder applied for execution of the decree for R81, the balance of mesne profits. This application was disallowed, on the ground that there was no provision in the original decree awarding mesne profits, and that an agreement to which the decree-holder had referred was not forthcoming. *Held* that, as the original decree of 1854 evidently intended to give mesne profits of some kind, the Courts in 1862 and 1863 had jurisdiction, under section 11, Act XXIII of 1861, to determine what mesne profits were due; and that as the decree-holder was seeking to maintain the order in the Civil Courts in 1864 and 1865, his application of July 1866 was in time, and he was entitled under an order of a competent Court to receive the mesne profits claimed. HURO SOONDERY DOSSEE *v.* NOROODEEN [11 W. R., 325

MESNE PROFITS—*continued.*

2. ASSESSMENT IN EXECUTION AND SUITS FOR MESNE PROFITS—*continued.*

**Mesne profits not given by decree**—*continued.*

65. ——————— *Decree for possession without mesne profits.—Mesne profits afterwards allowed.*—Where an auction-purchaser, who prayed for possession as well as mesne profits, obtained a decree for possession which said nothing about mesne profits, and no reason appeared why mesne profits should be refused, the High Court allowed mesne profits in execution. KALEENATH DOSS *v.* RAJAH MEAH . . **22 W. R., 406**

66. ——— **Question of amount of mesne profits.**—*Decree for possession with mesne profits from date of suit.*—A decree awarding possession with wasilat from the date of suit was held to be rightly construed as awarding mesne profits until the date when delivery of possession should be effected, and reserving the question of the amount for adjustment in execution. BUNSEE SINGH *v.* NAZUF ALI **[22 W. R., 328**

67. ——————— *Mesne profits between decree and possession.—Power of Court executing decree.*—In a suit for possession and wasilat, the first Court awarded wasilat, but the lower Appellate Court, considering that no evidence had been given by the plaintiff of the wasilat which he was entitled to recover, allowed him up to date of suit only the amount which he had paid as Government revenue upon his mehal. *Held* that the Court executing the decree was not prevented from ascertaining the amount of wasilat which had accrued between the date of decree and the date of possession. MAHOMED BUSHEEROOLLAH CHOWDHRY *v.* HEDAET ALI CHOWDHRY . . . . . **8 W. R., 42**

68. ——————— *Act XXIII of 1861, s. 11.—Suit for damages for illegal appropriation of produce.—Suit for mesne profits.*—A suit by a ryot against another for damages on account of illegal appropriation of the produce of the land, including the ryot's profits, by the defendant during certain years, is not a suit for mesne profits, and is therefore unaffected by section 11, Act XXIII of 1861. The question regarding amount cannot be settled in execution, but by separate suit. JOY KISHEN MOOKERJEE *v.* JODOONATH GHOSE **[3 W. R., 1**

69. ——————— *Suit for mesne profits of land taken in excess under decree and restored.*—Where a decree-holder in execution takes possession of more land than is covered by the decree, and on an objection raised, and after inquiry made, the excess land is subsequently relinquished, the question of wasilat, being one which arises between the parties to the suit with reference to the execution of the decree, must, under Act XXIII of 1861, section 11, be determined by the Court executing the decree and not by a separate suit. BAMA SOONDUREE DABEE *v.* TABINEE KANT LAHOOREE **[20 W. R., 415**

MESNE PROFITS—*continued.*

2. ASSESSMENT IN EXECUTION AND SUITS FOR MESNE PROFITS—*continued.*

**Question of amount of mesne profits**—*continued.*

*See* RADHA GOBIND SAHA *v.* BROJENDER COOMAR ROY CHOWDHRY . . **7 W. R., 372**

70. ——————— *Execution of decree for possession, Stay of.—Right to mesne profits.*—Execution of a decree for possession merely of certain land having been stayed, and the defendant, pending an appeal to the Privy Council, continued in possession by the High Court upon his giving security for the "due performance of such order as might be made by the Privy Council," the appeal was subsequently dismissed, no order being made as to mesne profits. *Held*, on the authority of the case of *Sadasiva Pillai v. Ramalinga Pillai, 15 B. L. R., 383 : L. R., 2 I. A., 219 : 24 W. R., 193*, that, under the circumstances, the decree-holder was entitled to mesne profits from the date of the decree until he was put in possession, and that the amount of such profits should be determined by the execution department. See, however, the case of *Forester* v. *Secretary of State, L. R., 4 I. A., 137.* GOGUN CHUNDER SIRKAR *v.* LAIDLAY . . . . . **5 C. L. R., 189**

71. ——— **Decree for mesne profits.**—*Execution of decree made on compromise.—Procedure.—Possession.*—*B.* sued his brother *C.* for possession of certain lands. *B.* and *C.* came to an amicable settlement, one of the terms of which was that *C.* during his life should retain possession of certain of the lands, and that after his death they should pass to *B.* A decree was given in accordance with the terms of the compromise. On *C.'s* death, his widow refused to put *B.* in possession of the lands. *B.* sought to obtain possession of the lands, with mesne profits, by executing the decree under the compromise against *C.'s* widow. *Held* that he ought to proceed by regular suit. TARA MANI DASI *v.* RADHA JIBAN MUSTAFI **[6 B. L. R., Ap., 142 : 14 W. R., 485**

72. ——— **Reversal of decree.**—*Decree for possession.—Mesne profits in execution of decree.*—*N.* obtained a decree against *A.* for certain lands, and was put in possession of them in execution of the decree. On appeal the decree against *A.* was reversed, and the lands were accordingly restored to him, but no provision was made as to the mesne profits received by *N.* when he was in possession of the lands under the decree of the lower Court. In a suit brought by *A.* against *N.* to recover such mesne profits, it was held that the suit would lie, and was not prohibited by section 11 of Act XXIII of 1861. ABHRAM ALLI *v.* NATHA JALLAM **[5 Bom., A. C., 74**

73. ——————— *Decree for possession.—Execution of decree.*—*A.* sued *B.* and obtained possession of certain property under a decree. On appeal this decree was reversed. The judgment and decree of the Appellate Court made no order about mesne profits which had accrued during the time the land was in possession of *A.* *B.* thereupon,

**MESNE PROFITS**—*continued.*

**2. ASSESSMENT IN EXECUTION AND SUITS FOR MESNE PROFITS**—*continued.*

**Reversal of decree**—*continued.*

seeking execution of the Appellate Court's decree, applied to be reinstated in possession, and also for an order awarding her mesne profits for the time during which she was out of possession of the said lands. *Held* that, upon such application, it was competent for the Court to cause restitution to be made of all that the party against whom the erroneous decree had been enforced had been deprived of by such enforcement. LATI KOOER *v.* SOBADRA KOOER [I. L. R., 3 Calc., 720 : 2 C. L. R., 75

**74.** ——— *Decree for possession of immoveable property.—Reversal of decree on appeal.—Appellate decree silent as to mesne profits.—Suit for recovery of mesne profits.—Civil Procedure Code, 1882, s. 244.*—The plaintiff in a suit for possession of immoveable property obtained a decree for possession thereof, and in execution of the decree obtained possession of the property. This decree was subsequently reversed on appeal by the defendant. The decree of the Appellate Court was silent in respect of the mesne profits which the plaintiff had received while in possession. The defendant instituted a suit to recover those profits. *Held, per* PETHERAM, *C. J.*, OLDFIELD, BRODHURST, and DUTHOIT, *JJ.*, that the suit was not barred by section 244 of the Civil Procedure Code, the question raised by such suit, although it might have arisen out of the decree of the Appellate Court, not "relating to the execution, discharge or satisfaction of the decree," within the meaning of that section (because at that time no such question had arisen or was in existence), and therefore not one in respect of which a separate suit is barred by that section. *Pertab Singh* v. *Beni Ram, I. L. R., 2 All., 61,* distinguished by OLDFIELD, *J.* *Per* MAHMOOD, *J.*—That the suit was not barred by section 244, the mesne profits sought to be recovered not having been realised in execution of the decree reversed on appeal. *Per* DUTHOIT, *J.*—The words in clause (*c*) of section 244, "any other questions arising," &c., should be read as "any other questions *directly* arising"; otherwise the most remote inquiries would be possible in the execution department. RAM GHULAM *v.* DWARKA RAI . . . I. L. R., 7 All., 170

**75.** ——— *Decree for possession of immoveable property.—Execution of decree.—Reversal of decree on appeal.—Mesne profits.—Civil Procedure Code, s. 583.*—*G.* obtained a decree against *R.* for possession of a house, and in execution thereof obtained possession. On appeal the decree was set aside by the High Court, whose decree did not direct that the appellant should be restored to possession and was silent as to mesne profits. *Held* that, with reference to section 583 of the Civil Procedure Code, *R.* was entitled to recover possession of the property in execution of the High Court's decree; but that, with reference to the decision of the Full Bench of the Court in *Ram Ghulam* v. *Dwarka Rai, I. L. R., 7 All., 170,* he could not, in execution of that decree, recover mesne profits. GANNU LAL *v.* RAM SAHAI [I. L. R., 7 All., 197

**76.** ——— **Separate suit for mesne profits.**—*Decree-holder kept out of possession.—Act XXIII of 1861, s. 11.*—Mesne profits for the period during which the decree-holder was executing the decree and was kept out of possession by the opposite party may be awarded by the Court under section 11, Act XXIII of 1861. It is not necessary to bring a separate suit. HOOKUM BEBEE *v.* MAHOMED MOOSA KHAN . . 6 W. R., Mis., 13

**77.** ——— *Mesne profits accruing after decree.—Held* that no separate suit would lie for mesne profits accruing during the pendency of the suit and delivery of possession. Section 10, Act VIII of 1859, provides for mesne profits accruing before the suit. OONKUR DASS *v.* HEERA SINGH . . . . . 1 Agra, 141

RAM SHUNKER *v.* LALEE BAEE . 2 Agra, 268

SHUNKER LALL *v.* RAM LALL [1 N. W., 177 : Ed. 1873, 256

**78.** ——— *Act XXIII of 1861, s. 11.—Mesne profits accruing after decree.*—Even with the permission of the Civil Court, a separate suit cannot be brought for mesne profits between the institution of the original suit and the execution of the decree thereon. Act XXIII of 1861, section 11, commented on. CHENNAPA NAYUDU *v.* PITCHI REDDI . . . 1 Mad., 453

NARAYANA AIYAN *v.* SRINIVASA AIYAN [2 Mad., 435

**79.** ——— *Prior suit for possession without mesne profits.*—A party can bring a suit for mesne profits after he has obtained a decree for possession in a prior suit, in which no provision had been made in the valuation of the suit for mesne profits. SHIVASUNDARI DEBI *v.* RAMSHAMAYAT KURMI . . 1 B. L. R., S. N., 3

**3. MODE OF ASSESSMENT AND CALCULATION.**

**80.** ——— **Time for ascertaining mesne profits.**—*Execution of decree.*—Where wasilat is decreed, the mode of ascertaining it is rightly reserved for the proceedings in execution. GULE *v.* MAHARANEE SEEEMUTTY . . 15 W. R., 133

**81.** ——— **Ascertainment of mesne profits.**—*Execution before all the mesne profits are ascertained.—Power of Court executing decree.*—Execution may issue with respect to ascertained wasilat, pending inquiry as to unascertained wasilat. In ascertaining and declaring the amount of wasilat due under a decree, the Court executing it has no power to alter the decree in respect to interest awarded. ARFUNNISSA CHOWDHRAIN *v.* ROKIBUNNISSA CHOWDHRAIN . . . 24 W. R., 444

**MESNE PROFITS**—*continued.*

3. MODE OF ASSESSMENT AND CALCULATION—*continued.*

**Ascertainment of mesne profits**—*continued.*

**82.** ——————— *Act XXIII of 1861, s. 11.—Civil Procedure Code, 1859, s. 196.*—A decree for possession and mesne profits must, with reference to section 196, Civil Procedure Code, 1859, be held to mean mesne profits down to the date of delivery of possession. Where the amount of mesne profits is not expressly admitted, the Court is bound to deal with it as if disputed, and either to determine the amount at the trial or to reserve it for assessment in execution. DHURM NARAIN SINGH *v.* BUNDHOO RAM . . . . **12 W. R., 75**

But where everything is ordered to be ascertained in the execution stage, both the period and amount can be assessed. HUREEHUR MOOKERJEE *v.* MOLLAH ABDOOLBUR . . . . **17 W. R., 209**

**83.** ——————— *Power of Court executing decree*—Where the suit is for mesne profits alone, the Court executing the decree is not competent to fix the amount in the course of execution. BHOOBUNNESSUREE CHOWDHRAIN *v.* MANSON **[22 W. R., 160**

**84.** ——————— *Construction of decree.*—Where a decree of the High Court simply directed payment by way of damages of the proceeds of a specified share of certain property,—*Held* that it left nothing to be determined in execution, except the assessment of the rents and profits of the share from which the defendants had wrongfully kept the plaintiff out of possession. DWARKA LALL MUNDUR *v.* NIBUNDRO NARAIN SINGH . **22 W. R., 461**

**85.** ——————— **Mode of calculation of mesne profits.**—*Discretion of Court.*—The sum to be recovered in any case of a suit for mesne profits is of the nature of damages to be assessed by a proper exercise of the judicial discretion of the Court which is charged with the trial of the case on its merits; and it is impossible to lay down a rigid rule according to which those damages should always be calculated. HOGG *v.* DINONATH SREEMANEE . **8 W. R., 447**

**86.** ——————— *Interest.—Damages.*—*Wasilat.*—Interest calculated upon yearly rests of rent may, when claimed by the plaintiff in his plaint, be given as an essential portion of the damages which are recoverable by a person wrongfully kept out of possession of immoveable property. *Protap Chunder Borooah* v. *Surnomoyee, 14 W. R., 151,* followed. The term "mesne profits" does not include interest year by year on those profits. *Hurro Durga Chowdhrani* v. *Surut Sundari Dabi, I. L. R., 8 Calc., 332,* followed. Principles stated on which the calculation of mesne profits should be based. BROJENDRO COOMAR ROY *v.* MADHUB CHUNDER GHOSE . . . **I. L. R., 8 Calc., 343**

*See* RAMDHUL SINGH *v.* PURMESSUREE PERSHAD NARAIN SINGH . . . **7 W. R., 78**

**MESNE PROFITS**—*continued.*

3. MODE OF ASSESSMENT AND CALCULATION—*continued.*

**Mode of calculation of mesne profits**—*continued.*

**87.** ——————— *Interest, Loss of.—Interest on mesne profits year by year.*—The term "mesne profits" means the amount which might have been received from the land, deducting the charges for collection; and does not include damage resulting from their not having been paid as they became due, or loss of interest year by year. HURRO DURGA CHOWDHRANI *v.* SURUT SUNDARI DEBI **[I. L. R., 8 Calc., 332 L. R., 9 I. A., 1**

Reversing, on appeal, the decision of the High Court in HURRO DURGA CHOWDHRANI *v.* SHARRAT SOONDERY DABEA **[I. L. R., 4 Calc., 674: 3 C. L. R., 417**

**88.** ——————— *Profits obtained from land by ordinary diligence.*—Mesne profits mean those profits which the person in actual wrongful possession of the land did actually receive, or might with ordinary and due diligence have received, from that land. DWARKANATH MITTER *v.* RAMDHUN BISWAS . . . . **8 W. R., 103**

DESILVA *v.* TEHERANEE . . **9 W. R., 374**

**89.** ——————— *Collections by wrong-doer in excess of what could have been collected ordinarily.*—A decree-holder is entitled as mesne profits to whatever the wrong-doer has collected, though it be more than the decree-holder himself might have ordinarily collected. CHUNDER COOMAR ROY *v.* KASHEENAUTH ROY CHOWDHRY **[5 W. R., Mis., 37**

**90.** ——————— *Cultivation of lands by person in wrongful possession.*—When a person in wrongful possession of land has himself occupied and cultivated it, the proper principle on which the amount of mesne profits is to be calculated is to ascertain what would have been a fair and reasonable rent for the land if the same had been let to a tenant during the period of the unlawful occupation by the wrong-doer. ASMUT KOOER *v.* INDURJEET KOOER . . **B. L. R., Sup., Vol., 1003**

S. C. ASMED KOOER *v.* INDURJEET KOOER **[9 W. R., 445**

BINDABUN CHUNDER SIRCAR *v.* ROBERTS **[B. L. R., Sup. Vol., 1004, note**

CHARDON *v.* AJEET SINGH . **12 W. R., 52**

TRIPOORA SOONDUREE DEBIA *v.* COOMAR PROMOTHONATH ROY . . . **11 W. R., 533**

BISHESSUREE DEBIA *v.* MOHUN CHUNDER BOSE **[5 W. R., Mis., 35**

**91.** ——————— *Principle on which they should be assessed.—Interest.*—In determining the amount payable to the holder of a decree for mesne profits, a Court is bound to consider, not what has been, or what with good management might have been, realised by the party in wrongful posses-

MESNE PROFITS—*continued.*

3. MODE OF ASSESSMENT AND CALCULATION—*continued.*

**Mode of calculation of mesne profits—** *continued.*

sion, but what the decree-holder would have realised if he had not been wrongfully dispossessed. Under a decree for mesne profits, the decree-holder is entitled to interest on such profits from the time at which they would have come to him if he had not been dispossessed. LUCKHY NARAIN *v.* KALLY PUDDO BANERJEE

[I. L. R., 4 Calc., 882: 4 C. L. R., 60

92. ——— *Principle on which they should be assessed.*—In a case of wrongful dispossession, the principle upon which wasilat should be assessed is to ascertain what the actual rents or proceeds of the estate were, and to make the wrong-doer account for them to the party dispossessed, everything being assumed against the wrong-doer. DOORGA SOONDUREE DEBIA *v.* SHIBESHUREE DEBIA . . . . . 8 W. R., 101

93. ——— *Assets which might have been realised.—Amount actually collected.*—Mesne profits are not limited to the amount actually collected from an estate by the judgment-debtor, but must be calculated according to the assets which might have been realised with due diligence. SMITH *v.* SONA BIBEE . 2 W R., Mis., 10

THAKOOR DOSS ROY CHOWDHRY *v.* NOBIN KRISTO GHOSE . . . . . 22 W. R., 126

94. ——— *Claim in plaint.—Rent not, but which might have been, received.*—When a party is declared entitled to a decree for mesne profits, he is entitled not only to recover as those profits such sums as may have been collected and appropriated by others in wrongful possession, but also such sums as he would have collected had he been in possession, and which he has been prevented from collecting by having been kept wrongfully out of possession. If the plaint in a suit for mesne profits claims only rents and profits collected and received by the defendant, the plaintiff is not entitled to recover in respect of rents not received, but which by the wrongful dispossession he has been prevented from collecting; but if there is an appropriate allegation, he will be entitled to recover in respect of such rents. KOMEERUNNISSA BEGUM *v.* HUNOOMAN DOSS

[Marsh., 122: W. R., F. B., 40
1 Ind. Jur., O. S., 42: 1 Hay, 266

95. ——— *Collection charges.*—The principle on which wasilat should be assessed where defendant has been compelled to relinquish possession is, that he should be made to pay that which plaintiff (decree-holder) would have enjoyed if he had not been kept out of possession by the wrongful act of defendant. ERFOONISSA CHOWDHRAIN *v.* RUKEEBOONISSA . . 9 W. R., 457

MOBARUK ALI *v.* BOISTUB CHURN CHOWDHRY

[11 W. R., 25

MESNE PROFITS—*continued.*

3. MODE OF ASSESSMENT AND CALCULATION—*continued.*

**Mode of calculation of mesne profits—** *continued.*

TELUCK CHAND BABOO *v.* SOUDAMINEE DOSSEE

[23 W. R., 108

96. ——— *Liability on ejectment of ryot.—Loss by dispossession.*—A superior holder who dispossesses a ryot is liable, not merely for the profit which he makes by letting out the land, but to make good the loss which the ryot sustains by being dispossessed. HURUCK LALL SHAHA *v.* SREENIBASH KURMOKAR

[15 W. R., 428

97. ——— *Cultivating ryot jected by zemindar.*—When a cultivating ryot is ejected by his zemindar, the mere rent of the land realised by the zemindar from another tenant is not necessarily the measure of the damage sustained by the ryot and recoverable by him as mesne profits. BHIRO CHANDRA MOZOOMDAR *v.* BAMUNDAS MOOKERJEE . 3 B. L. R., A. C., 88: 11 W. R., 461

98. ——— *Rate of rent.*—In claiming wasilat for the period of wrongful dispossession, the owners are entitled to recover either any profit which the wrong-doer derived from the land or any rate of rent which they were receiving at the time of dispossession. JOY KISHEN DOSS *v.* TURNBULL . . . . . 24 W. R., 137

99. ——— *Held* that the amount of rent actually received, together with that which might with reasonable diligence have been collected, form the amount of mesne profits to which a decree-holder is entitled. Evidence that the land was let for a certain amount is a *primâ facie* proof of the amount of mesne profits, and may be accepted by the Court unless the contrary be proved. RUGHO NATH DOBEY *v.* HUTTEE DOBEY

[1 Agra, Mis., 17

The onus being on the person in wrongful possession to show that the usual rents were not collected. OMAN *v.* RAM GOPAL MOZOOMDAR

[18 W. R., 251

100. ——— *Proof of amount.*—Mesne profits liable in execution of a decree are the rents of an estate, *minus* costs of collection, Government revenue, losses by desertion and death of ryots, by drought, &c. The proper means of ascertaining their amount is to require the party who has held possession, and against whom the decree has passed, to produce his accounts, and, if necessary, to compel him to do so. On him lies the onus of proving the actual amount of mesne profits, and if he fail to produce his accounts he will only have himself to blame if the amount awarded by the Court is larger than the actual mesne profits. DINOBUNDHOO NUNDEE *v.* KESHUB CHUNDER GHOSE

[3 W. R., Mis., 25

RAMNATH CHOWDHRY *v.* DIGUMBER ROY

[3 W. R., Mis., 30

MESNE PROFITS—*continued.*

3. MODE OF ASSESSMENT AND CALCULATION—*continued.*

**Mode of calculation of mesne profits—** *continued.*

**101.** ——————— *Proof of actual collections.*—If a Court finds that a plaintiff has been dispossessed of property, he is *primâ facie* entitled to mesne profits in respect of the period during which he was dispossessed, and it is not necessary for him to prove the actual collections made during his dispossession. It is sufficient to show what is the annual profit which in ordinary years can be collected. Thus it is sufficient to show the profits for the years preceding or subsequent to the period of dispossession. BHAWANEE DEEN SAHOO *v.* MOHUN SAHOO **[1 N. W., 188: Ed. 1873, 273**

**102.** ——————— *Rents not received.—Expenses of collecting rents.*—In estimating mesne profits, not merely the amount of rents actually received by the defendant, but also those which he might have received, and which can no longer be collected, ought to be charged against him. On the other hand, the reasonable expense of collecting the rents may be allowed to him; and if he has paid rent to the zemindar, allowance may be made for such payments. But he cannot be charged with payments of rent made by the plaintiff to the zemindar. BESSUNESSOOREE DABEA *v.* TARASOONDEREE BRAHMINEE. MAHOMED HAJRA *v.* TARASOONDEREE BRAHMINEE . . . **Marsh., 201: 1 Hay, 577**

**103.** ——————— *Failure of decree-holder to prove rate of rent.*—In estimating the amount of mesne profits where a decree-holder could not give satisfactory evidence as to the rates at which he received rents and the collections he made, the judgment-debtor was held liable for the amount stated in the Collector's jummabundi, *minus* the cost of collection, leaving him to recover from Government what he has paid on account of revenue, unless the sums so paid had already been refunded by Government to the decree-holder. PALMER *v.* BAL GOBIND DOSS . . . . **7 W. R., 230**

**104.** ——————— *Landlord and tenant.—Held* that the mode of estimating the amount of mesne profits in respect of a talook held by plaintiff under defendant was to ascertain the amount of profits which plaintiff could have realised from the talook if he had not been dispossessed therefrom by the wrongful act of defendant; and that as there was no necessary relation between those profits and the amount of revenue payable by the latter on account of the inferior holding, such revenue could not be treated as an element in the calculation; but that the amount of rent payable by plaintiff to defendant ought to be deducted from the gross calculation of the talook. *Held*, also, that there seemed no reason why the same rule should not be adopted in this case merely because the wrong-doer was the landlord. BHYRUB CHUNDER MOJOOMDAR *v.* HURO PROSUNNO BHUTTACHARJEE. HURO PROSUNNO BHUTTACHARJEE *v.* BHYRUB CHUNDER MOJOOMDAR **[17 W. R., 257**

MESNE PROFITS—*continued.*

3. MODE OF ASSESSMENT AND CALCULATION—*continued.*

**Mode of calculation of mesne profits—** *continued.*

**105.** ——————— *Remission of rent or neglect to make collection.*—The rule for the assessment of mesne profits is, that the right of the true owner is to all the profits of the land, and not merely to the amount of the cash collections during the time that he is illegally kept out of possession, and the trespasser must be held responsible for all that he has realised, and receive credit for everything for which he is entitled to credit, such as rents paid and charges for collection. He does not lessen his responsibility by remitting rent or neglecting to make collections. KALEE DEBEE *v.* MODHOO SOODUN CHOWDHRY . . . . **16 W. R., 171**

**106.** ——————— *Gross produce of estate.—Value of produce.*—Mesne profits should not be estimated on the gross produce of an estate except when all other means of ascertaining them fail. The rents due from the actual cultivators, or, if he cultivate the land by his own servants, the value of the produce, should be taken as the amount of the mesne profits. KHEMON KUREE DEBIA *v.* MODHOOMUTTY DEBIA . . . **4 W. R., Mis., 23**

**107.** ——————— *Fair and reasonable rent.*—In a suit for possession and wasilat, where the plaintiff was the actual cultivator of the land and obtained a decree, it was held that the Full Bench ruling in *Asmut Koer* v. *Indurjeet Koer, B. L. R., Sup. Vol., 1003: 9 W. R., 446*, and not that in the case of *Saudamini Debi* v. *Anand Chandra Haldar, 7 B. L. R., 178, note: 13 W. R., 37*, was applicable, and that plaintiff was entitled to such fair and reasonable rent as the defendant might have derived from the land had he left it during the period of his wrongful occupation. MADHUB CHUNDER DUTT *v.* HARADHUN PAUL . . **14 W. R., 294**

**108.** ——————— *Person not himself cultivating the land.*—The mode of calculation laid down in *Asmut Kooer* v. *Indurjeet Kooer, B. L. R, Sup. Vol., 1003: 9 W. R., 445*, held to be applicable also to a case where a person, the wrong-doer, has not himself cultivated the land. PROMOTHONATH ROY *v.* TRIPOORA SOONDUREE DABEE **[10 W. R., 463**

**109.** ——————— *Principle of assessment.—Person cultivating land.*—A suit by a ryot having been remanded with a view to the assessment of mesne profits on the principle laid down in *Sandamini Debi* v. *Anand Chandra Haldar, 7 B. L. R., 178, note: 13 W. R., 37*, if it was found that the plaintiff had himself cultivated the lands before leasing them out to an indigo factory, the first Court, finding this to be the case, assessed the mesne profits accordingly,—*i.e.*, at the lowest rate deposed to by the plaintiffs' witnesses. The District Judge reversed the decision on the ground of a later ruling in *Madhub Chunder Dutt* v. *Haradhun Paul, 14 W. R., 294. Held* that the Judge ought to have followed the course indicated by the order of remand. *Held*, also,

**MESNE PROFITS**—*continued.*

**3. MODE OF ASSESSMENT AND CALCULATION**—*continued.*

**Mode of calculation of mesne profits**—*continued.*

that the special respondent, if dissatisfied with the order of remand, ought to have applied for a review, and not having done so he was not entitled to ask the Court to go behind that order and consider whether it was wrong with reference to *Madhub Chunder Dutt* v. *Haradhun Paul, 14 W. R., 294. Held,* further, that the later decision did not overrule the earlier one, but referred to a different case, —*viz.,* that of a large zemindar entitled to rent only;—and that the Full Bench ruling referred to in the later decision did not intend to lay it down that a party who is himself a cultivator is not entitled to recover the profits which he would have made out of the land by his own cultivation. NURSINGH ROY *v.* ANDERSON . . . . **19 W. R., 125**

**110.** ——————— *Zerayet and bhowli lands.—Production of accounts to show value and produce of land.*—The loss of the party wrongfully kept out of possession must generally be measured by the actual profits arising from the usufruct of the land during that time, on an occupation of the same character as that of the party wrongfully kept out of possession at the date of his ouster or of the last legal occupant whom the plaintiff claims to succeed to, if the plaintiff himself never entered into possession. A difference in assessment should be made between zerayet and bhowli lands, a deduction being allowed as to the former on account of expenses of cultivation. As regards the produce and value of the lands in such cases, it is the duty of the judgment-debtor to produce his accounts and to prove what were the real assets of the property. ROOKUMEE KOOER *v.* RAM TUHUL ROY . . . **17 W. R., 156**

**111.** ——————— *Suit by cultitor.—Damages.*—Where the plaintiff, who was a cultivator, sued for possession of certain land, of which he had been dispossessed by the defendant, with mesne profits, and the Judge gave him a decree for possession, and as to mesne profits decreed that the plaintiff should have the actual profits realised from the land, and if that could not be ascertained (as to which the burden of proof, he said, should be on the defendant), then, according to the capabilities of the soil in an average season, making the deductions necessary on account of the bad seasons, expense of cultivation, rise and fall of prices, and cost of seed; and in the case of indigo, the value of the raw produce and not of the manufactured article;—it was held that the principle on which damages were awarded was a correct principle, where the plaintiff was himself a cultivator. WATSON *v.* PYARI LAL SHAHA . . . . . **7 B. L. R., 175**

SAUDAMINI DEBEE *v.* ANAND CHANDRA HALDAR **[7 B. L. R., 178, note: 13 W., R., 37**

**112.** ——————— *Cultivator.*—Where the party recovering possession of land of which he was wrongfully dispossessed, and claiming wasilat, is himself the cultivator, he is entitled to recover the profits which he would have made out of the land by the cultivation had he not been dispossessed. NUR SINGH ROY *v.* ANDERSON **[16 W. R., 21**

SHISTEE PERSHAD CHUCKERBUTTY *v.* KUMLA KANT ROY . . . . **17 W. R., 348**

**113.** ——————— *Amount which might have been received.*—Where one party illegally dispossesses another and lets his estate in farm, the amount of the rent which the party wrongfully ousted might have ordinarily received had he been in possession, and not the amount of the farm rents received during the wrongful possessor's incumbency, will, unless any special custom be proved, be the measure of mesne profits to be awarded. JUGURNATH SINGH *v.* AHMEDOOLLAH . . . **8 W. R., 132**

**114.** ——————— *Unprofitable lands.*—In executing a decree for mesne profits, a Court does right in excluding from the account lands of such a nature as would, under ordinary circumstances, yield no profit, regarding which it has not been shown that the judgment-debtors had opportunities of disposing of them for a profit. BECHARAM DASS *v.* BROJONATH PAL CHOWDHRY . **9 W. R., 369**

**115.** ——————— *Value of produce of julkur.*—In a suit for wasilat, where it was decreed that the value of the produce of a julkur should be ascertained in execution, the lower Appellate Court was held to have come to a right conclusion without any error of law in taking the nearest approximate value of the produce indicated by the evidence and the plaintiff's statement. ENAET ALI *v.* SOBHNATH MISSER . . **15 W. R., 258**

**116.** ——————— *Cancelment of durputni tenure.*—A zemindar granted a putni to *A.*, who granted a durputni to *B.* The putni was sold for arrears of rent to *C.*, who entered into possession, cancelled *B.'s* durputni, and, after two years' possession, granted a durputni to *D.* Meantime *A.*, the original putnidar, had the sale set aside in a regular suit brought for that purpose, and thereupon *B.* brought a suit against *D.* alone for mesne profits. *Held* that *D.* was entitled to be credited with the amount of rent which he had paid to his putnidar, *C.*, and with the expenses of collection. NUFFAR ALI BISWAS *v.* RAMESHAR BHUNICK . **3 C. L. R., 28**

**117.** ——————— *Decree-holder wrongfully kept out of possession.*—A decree-holder who stands in the shoes of his judgment-debtor, but who has been wrongfully kept out of possession of land for which the judgment-debtor granted a lease, is entitled to receive the profit which the judgment-debtor made out of them, and which the decree-holder would have made had he been in possession. GOOROO DYAL MUNDUR *v.* GOPAL SINGH **[24 W. R., 272**

**MESNE PROFITS**—*continued.*

3. MODE OF ASSESSMENT AND CALCULATION—*continued.*

**Mode of calculation of mesne profits**—*continued.*

**118.** ——————— *Suit for mesne profits against trespasser.—Costs and expenses of trespasser in collection of rent.—Held*, by the majority of the Full Bench, that a trespasser on the land of another should, in estimating the mesne profits which the owner of the land is entitled to recover from him, be allowed such costs of collecting the rents of the land as are ordinarily incurred by the owner, where such trespasser has entered or continued on the land in the exercise of a *bonâ fide* claim of right; but where he has entered or continued on the land without any *bonâ fide* belief that he was entitled so to do, the Court may refuse to allow such costs, although he may still claim all necessary payments, such as Government revenue or ground rent. *Per* STUART, *C. J.*—Whether such trespasser is a trespasser *bonâ fide* or not, he should be allowed such costs. ALTAF ALI *v.* LALJI MAL **[I. L. R., 1 All., 518**

**119.** ——————— *Allowance for extraordinary profits.*—Where a party is decreed entitled to mesne profits, the trespasser cannot be allowed to urge that the owner would not have realised as much from the land as he (the trespasser) did; but if he had obtained extraordinary profits by the expenditure of capital on the land, allowance should be made for such expenditure. SREENATH BOSE *v.* NOBIN CHUNDER BOSE . **9 W. R., 473**

**120.** ——————— *Damages incurred by tenant in consequence of ejectment.*—A landlord who ejects his tenant illegally and holds possession as a wrong-doer, although he settles another tenant on the land, is liable, not only for the rent he receives under such possession, but also for the damages incurred by the tenant whom he has ejected, in consequence of the ejectment. MAHOMED AZMUL *v.* CHADEE LALL PANDEY . **12 W. R., 104**

**121.** ——————— *Co-sharers.—Decrees for and against different parties.*—The mode of calculating mesne profits in cases of decrees for and against each of the parties, is to calculate and rateably divide them, and then to allow a set-off to the extent of the profits actually received by each sharer, the deficit in each year being made good by the party who received in excess of his share. BIJOY GOBIND NAIK *v.* KALEE PROSUNNO NAIK **[16 W. R., 294**

**122.** ——————— *Co-sharers.—Fair rent.*—Where the parties to a suit for certain land and for the payment of mesne profits in respect of the same were co-sharers in the estate comprising such land, and the defendants had themselves occupied and cultivated such land,—*Held* that the most reasonable and fitting mode of assessing such mesne profits was to ascertain what would be a fair rent for such land if it had been let to an ordinary tenant

**MESNE PROFITS**—*continued.*

3. MODE OF ASSESSMENT AND CALCULATION—*continued.*

**Mode of calculation of mesne profits**—*continued.*

and had not been cultivated by the defendants. GUNGA PROSAD *v.* GAJADAR PRASAD **[I. L. R., 2 All., 651**

**123.** ——————— *Costs of collection of rent.*—Where a suit is decreed as one for possession with mesne profits, the decree-holder is not barred from asking the Court, under section 197, Civil Procedure Code, to inquire into the amount of mesne profits in execution. In decreeing mesne profits, a Court has no right to disallow the costs of collection on the assumption that a landed zemindar can collect rents without costs. GOOROO DOSS ROY *v.* ANUND MOYEE DEBIA . . **15 W. R., 203**

**124.** ——————— *Mustagiri tenures.*—Where the custom of collecting rents from mustagirs prevails, the mustagiri jumma is to be the basis of account of mesne profits to be recovered from a judgment-debtor. AHMED REZAH *v.* ENAET HOSSEIN . . . . **1 W. R., Mis., 20**

**125.** ——————— *Rent left uncollected.*—In a suit for mesne profits the defendant cannot have credit for rents which he has left uncollected from the ryots. MUHROOA *v.* HEERARAM MISSER . . . . . **1 Hay, 277**

**126.** ——————— *Value of trees cut down.—Decree for mesne profits.*—The value of trees cut down and appropriated by a judgment-debtor, against whom a decree with mesne profits has been given, may be included in the mesne profits for which the judgment-debtor whilst in wrongful possession is liable. BUNEEAD SINGH *v.* SUDASEEB DUTT . . . . . **2 W. R., Mis., 50**

**127.** ——————— *Surunjamee, upon what profits to be allowed.*—Surunjamee should be allowed upon the amount actually collected, and not upon the net proceeds coming to the zemindar. ERFOONISSA CHOWDHRAIN *v.* RUKEEBOONISSA . . . . . **9 W. R., 457**

**128.** ——————— *Average of several years.*—Decree of Sudder Court estimating the amount of mesne profits from the average of two preceeding years, as ascertained in a former suit (the evidence in the present suit being unsatisfactory on both sides), upheld. SOORIAH ROW *v.* ENOOGUNTY SOORIAH **[5 W. R., P. C., 125 : 2 Moore's I. A., 72**

**129.** ——————— *Endowed lands.—Expenses of worship.*—In the case of endowed lands, the judgment-debtor is entitled to a deduction, from the amount of mesne profits ascertained to be due, of the expenses incurred by him in carrying on the worship of the idols. THAKOOR DOSS ACHARJEE CHUCKERBUTTY *v.* SHOSHEE BHOOSUN CHATTERJEE **[17 W. R., 208**

BENGAL SECRETARIAT

MESNE PROFITS—*continued.*

3. MODE OF ASSESSMENT AND CALCULATION—*continued.*

**Mode of calculation of mesne profits—** *continued.*

130. ——————— *Oudh Talookdars' Relief Act, 1870.—Interest on mesne profits.*— An under-proprietor having been dispossessed by a manager of the superior estate, appointed under the Oudh Talookdars' Relief Act, 1870, recovered possession under a decree, and afterwards sued for mesne profits. *Held* that a person who had not himself received the mesne profits having come into possession of the talook upon its being released from management under the above Act, would not be chargeable with sums which, as it was alleged, might have been received by way of mesne profits, but had not been received in consequence of the manager's wilful default; there being nothing to show that such talookdar could be charged with anything more than was actually received by him. There being no rule of law obliging the Court to allow interest upon mesne profits, it is a matter for the discretion of the Court, upon consideration of the facts, whether to allow interest or not. KISHNANAND *v.* PARTAB NARAIN SINGH

[I. L. R., 10 Calc., 792: L. R., 11 I. A., 88

131. ——————— *Experience of Judge deciding case.—Evidence.*—In estimating mesne profits for a period of wrongful dispossession, the lower Courts were held to have pursued an incorrect course in deciding upon the supposed personal experience of the Judges instead of upon evidence laid before them. The Court ought to have done its best to estimate, from the evidence before it, what would have been the net profits which the dispossessed owner would have earned by the cultivation during that period had he been in possession. KISHEN PERSHAD SINGH *v.* CROWDY

[23 W. R., 15

132. ——————— *Amount claimed less than amount proved.*—The Court cannot give a larger amount of mesne profits than is claimed, although more is proved. SOORIAH ROW *v.* COTAGHERY BOOCHIAH

[5 W. R., P. C., 127: 2 Moore's I. A., 113

GOOROO DOSS ROY *v.* BUNSHEE DHUR SEIN

[15 W. R., 61

KAROO LALL THAKOOR *v.* FORBES

[7 W. R., 140

133. ——————— *Decree for amount larger than that claimed.*—A decree for wasilat for a larger sum than that mentioned in the plaint was upheld in appeal, on the ground that the plaint did not profess to do more than give the approximate value of the produce of the land, and that the sum decreed had been found due after two careful local investigations. PEAREE SOONDUREE DOSSEE *v.* ESHAN CHUNDER BOSE . . 16 W. R., 302

134. ——————— *Execution of decree.—Amount awarded in execution larger than that claimed in plaint.—Court Fees Act (VII of 1870), s. 11, para. 2.*—The plaintiff brought a suit for possession and for a certain sum as mesne profits, which he assessed at three times the annual rent paid to the defendant by tenants in actual possession of the land. He obtained a decree for possession, and the decree ordered that the amount of mesne profits due to him should be determined in the execution proceedings. On an investigation a larger sum was found to be due to him for mesne profits than that claimed by him in his suit. The plaintiff, therefore, paid the excess fee as provided by paragraph 2 of section 11 of Act VII of 1870; but it was held that the amount of mesne profits recoverable by him must be limited to the amount claimed in the plaint. BABOOJAN JHA *v.* BYJNATH DUTT JHA

[I. L. R., 6 Calc., 474: 7 C. L. R., 539

135. ——————— *Amount claimed in plaint.—Larger amount found due by Ameen.*— Where a plaintiff, in bringing a suit for possession and for mesne profits, approximately estimates the amount of such mesne profits at a certain sum, and obtains a decree which leaves the amount due as mesne profits to be ascertained in execution, he is not bound down to the amount claimed in his plaint; but if more is found due to him, he is entitled on payment of further Court fees to recover the larger amount so found due. *Baboojan Jha* v. *Byjnath Dutt Jha, I. L. R., 6 Calc., 474,* distinguished. JADOOMOEY DABEE *v.* HAFEZ MAHOMED ALI KHAN

[I. L. R., 8 Calc., 295

136. ——————— *Execution of decree.—Amount stated in plaint.—Estoppel.*— When, in a suit for possession of land and mesne profits at a rate stated in the plaint, a decree is passed which directs that the amount of mesne profits be ascertained in execution of the decree, the plaintiff is not limited to the amount or rate stated in his plaint, though it may be used as evidence against him in favour of the defendant. *Baboojan Jha* v. *Byjnath Dutt Jha, I. L. R., 6 Calc., 474,* explained. GAURI PRASAD KOONDOO *v.* REILY

[I. L. R., 9 Calc., 112: 12 C. L. R., 41

HURRO GOBIND BHUKUT *v.* DIGUMBUREE DEBIA

[9 W. R., 217

MILITARY AUTHORITIES, JURISDICTION OF—

*See* JURISDICTION OF CRIMINAL COURT—EUROPEAN BRITISH SUBJECTS.

[13 B. L. R., 474

MILITARY CODE.

*See* SMALL CAUSE COURT, MOFUSSIL—LAW OF SMALL CAUSE COURT, MOFUSSIL.

[5 Bom., A. C., 99

MILITARY COURTS OF REQUEST.

*See* APPEAL—ACTS—MILITARY COURTS OF REQUESTS ACT . . 2 N. W., 229

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**MILITARY COURTS OF REQUEST—** *continued.*

*See* JURISDICTION—QUESTION OF JURISDICTION—GENERALLY . **1 Agra, 222**

*See* SMALL CAUSE COURT, MOFUSSIL—JURISDICTION—MILITARY MEN.
**[1 Mad., 443**
**2 Mad., 389, 439**

**1. ——— Jurisdiction.**—*Act XLII of 1860.—Stat. 20 & 21 Vict., c. 66, s. 67.*—Section 6 of Act XLII of 1860 did not alter or interfere with the jurisdiction of the Military Courts of Requests established by Statute 20 and 21 Victoria, Cap. 66, section 67. SHANMUGA *v.* MEDDLETON
**[1 Mad., 443**

**2. ——— Act XI of 1841.**—*Act XII of 1842 (Military Bazars Act).—Right of suit.*—The provisions of Act XII of 1842 apply to all the Courts established by Act XI of 1841, whether those Courts are held within or without British territory. It is incumbent on all persons claiming the privilege of suit given by these Acts, when residents within cantonments, to cause themselves to be registered. TEJ RAM *v.* MOOLTAN MULL . . **3 N. W., 70**

**3. ——— *Suit against Cantonment Magistrate.***—Act XI of 1841 did not confer jurisdiction on a Military Court of Requests to entertain a suit against the Cantonment Magistrate as representing the Government. JODHRAJ *v.* CANTONMENT MAGISTRATE OF MORAR
**[1 N. W., 174: Ed. 1873, 253**

**4. ——— *Civil Procedure Code, 1859, ss. 114, 119.***—The Code of Civil Procedure, 1859, except so far as its provisions enact rules for appeals from Subordinate Courts, did not apply to proceedings under Act XI of 1841 (Military Court of Requests Act). These proceedings are regulated by the Act, and sections 114 and 119 of the Civil Procedure Code do not apply. GUNSAM DOSS *v.* MOOLTAN MULL . . . . . **2 N. W., 192**

**5. ——— ss. 2, 17.**—*Persons beyond British territory.*—Sections 2 and 17 of Act XI of 1841 must be read together as regards persons amenable to Military Courts of Requests beyond British territory. MOOLTAN MULL *v.* GUNSAM DOSS
**[3 N. W., 75**

**6. ——— s. 17.**—*Decree by default on non-appearance of plaintiff.*—The term "rules in force" in section 17 of Act XI of 1841 is to be interpreted as equivalent to "rules for the time being in force." It is not competent for a Court of Requests to pronounce a decree (by default) in favour of defendant without considering the evidence before it. GHUNTHAM DOSS *v.* MOOLTAN MULL
**[2 N. W., 229**

**MILITARY OFFICER.**

*See* ATTACHMENT—SUBJECTS OF ATTACHMENT—SALARY . **I. L. R., 1 All., 730**

*See* SERVICE OF SUMMONS.
**[11 B. L. R., Ap., 43**

**MILITARY OFFICER—***continued.*

*See* SMALL CAUSE COURT, MOFUSSIL—JURISDICTION—MILITARY MEN.
**[2 B. L. R., S. N., 3**
**2 Mad., 389, 439**

**MINISTERIAL OFFICER.**

*See* APPEAL—ORDERS.
**[3 B. L. R., A. C., 370**
**14 W. R., 328**

*See* SUPERINTENDENCE OF HIGH COURT—CHARTER ACT, S. 15—CIVIL CASES.
**[19 W. R., 148**
**20 W. R., 470**

**1. ——— Appointment.**—*Act XII of 1856, s. 3.—Civil Court Ameens.*—The High Court had no authority to interfere in the case of a person who was not confirmed in an acting appointment of Civil Court Ameen for which the Judge considered some other candidate to be more fit. IN THE MATTER OF DOORGA DOSS DOSS . . . . **17 W. R., 226**

**2. ——— *Act XVI of 1868.***—*Power of Subordinate Judges.*—Act XVI of 1868 contemplated that the selection and appointment of persons to fill ministerial offices in the establishments of Subordinate Judges should be left to those Judges, the power of the Zillah Judge extending merely to the approval or disapproval of the person appointed. The latter's refusal of sanction must be based on grounds personal to the appointee; and he must not interfere and control the selection of persons so as to influence the inferior Judge towards the appointment of a particular candidate. IN THE MATTER OF THE PETITION OF OOLFUT HOSSEIN
**[13 W. R., 197**

**3. ——— *Act XVI of 1868, s. 9.—Munsif's Court.***—Under section 9, Act XVI of 1868, the nomination and appointment of the ministerial officers of a Munsif's Court rested with the Munsif, subject to the approval of the District Judge. If the District Judge did not approve, he could refuse his sanction, but the law did not permit him to appoint any other person. IN THE MATTER OF RAJOOMAR GOOPTO . . . **11 W. R., 354**

**4. ——— *Act XVI of 1868, s. 9.—Appointment of serishtadar.***—In the mattter of the appointment of a serishtadar in a Munsif's Court, it was held to be no irregularity or impropriety on the part of a Judge to call the attention of the Munsif to a circular order of the High Court communicating the wishes of Government that preference should be given to certain discharged officers. IN THE OF MATTER ANUND CHUNDER CHUCKERBUTTY
**[14 W. R., 376**

**5. ——— *Power of Judge to interfere with appointment of serishtadar by Munsif.***—Where a Munsif appointed a person as serishtadar in his Court, and it did not appear that the person so appointed was in any respect disqualified for the appointment, or that his appointment was open to any sort of objection whatever, or that the Munsif had neglected any of the preliminary inquiries

**MINISTERIAL OFFICER.—Appointment** —*continued.*

or formalities prescribed for such cases,—*Held* that it was not competent to the Zillah judge, merely on the ground that in his opinion the claims of some other persons were superior to those of the person appointed, to remove him from the office, and to direct the appointment of a different and specified person. IN THE MATTER OF THE PETITION OF BHOYRUB CHUNDER DEB . . 7 W. R., 131

6. ——————— *Removal of officer.* —*Power of Zillah Judge.*—A Zillah Judge may refuse to confirm the appointment, by a Subordinate Court, of a disqualified person as a ministerial officer, or may rescind such an appointment if not made conformably to the rules prescribed by the High Court, and require the Subordinate Court to make a fresh appointment after observance of the rules. But he has no authority, after allowing an appointment to stand for nine months, to displace the person so appointed and to appoint another in his stead. IN THE MATTER OF THE PETITION OF KALLY PROSUNNO CHATTERJEE . . 7 W. R., 224

7. ——— Removal.—*Removal of mohurrir.* —*Power of Zillah Judge.*—A Zillah Judge is not competent to remove a mohurrir from one Munsifi without any fault of his, and to subject him to loss by requiring him to go to a distant Munsifi. IN THE MATTER OF HURRO GOBIND BISWAS [7 W. R., 246

8. ——— Dismissal.—*Ground for dismissal.*—The fact of a ministerial officer carrying on a shop is not such an irregularity in his conduct as to justify his dismissal. IN RE KOMUL LOCHUN BHADOORY . . . . . 2 Hay, 674

9. ——————— *Ground for dismissal.*—Private concerns of a ministerial officer need not generally be taken notice of by the head of a Court or office, but if they appear on the face of the record of a case to be such that he cannot be entrusted with any onerous duty, the head of that office or Court is justified in dismissing him from office. IN THE MATTER OF THE PETITION OF FEDDAH HOSSEIN . . . . . 2 Hay, 677

**MINOR.**

Col.
1. EVIDENCE OF MINORITY. . . 3849
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*See* COMPROMISE—CONSTRUCTION ENFORCING, EFFECT OF AND SETTING ASIDE DEEDS OF COMPROMISE. [I. L. R., 6 Calc., 687

*See* DECREE—FORM OF DECREE—CONSENT-DECREE . . . 16 W. R., 232

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*See* CASES UNDER GUARDIAN.

*See* CASES UNDER HINDU LAW—ALIENATION—ALIENATION BY FATHER.

*See* CASES UNDER HINDU LAW—GUARDIAN.

*See* HINDU LAW—PARTITION—REQUISITES FOR PARTITION. [8 B. L. R., 363: 10 W. R., 273

*See* INSOLVENT ACT, s. 7. [I. L. R., 7 Bom., 411 I. L. R., 13 Calc., 68

*See* LETTERS OF ADMINISTRATION. [I. L. R., 4 Calc., 87

*See* CASES UNDER LIMITATION ACT, 1877, s. 7.

*See* CASES UNDER MAHOMEDAN LAW—GUARDIAN.

*See* MAHOMEDAN LAW—PRE-EMPTION—RIGHT OF PRE-EMPTION—WAIVER OF RIGHT OR REFUSAL TO PURCHASE. [I. L. R., 1 All., 207

*See* CASES UNDER MAJORITY, AGE OF—

*See* CASES UNDER MAJORITY ACT.

*See* PAUPER SUIT—SUITS. [I. L. R., 3 Mad., 3 11 B. L. R., 373

*See* PLAINT—FORM AND CONTENTS OF PLAINT—PLAINTIFFS. [I. L. R., 12 Calc., 48 17 W. R., 144 20 W. R., 453 10 Bom., 414

*See* REGISTRATION ACT, 1877, s. 35. [I. L. R., 1 All., 465 I. L. R., 5 All., 599 I. L. R., 8 Calc, 967

*See* REVIEW—FORM OF AND PROCEDURE ON APPLICATION . 16 W. R., 231

*See* SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE—RIGHTS OF PURCHASERS—RECOVERY OF PURCHASE-MONEY . . I. L. R., 1 All., 568

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——— Obtaining possession of, for purposes of prostitution.

*See* PENAL CODE, ss. 372, 373.

[6 B. L. R., 34
5 Mad., 415, 473
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——— Power of, to adopt or give permission to adopt.

*See* HINDU LAW—ADOPTION—WHO MAY ADOPT . . I. L. R., 1 Calc., 289
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——— Sale of share of—

*See* CASES UNDER HINDU LAW—JOINT FAMILY—POWERS OF ALIENATION BY MEMBERS.

*See* CASES UNDER HINDU LAW—ALIENATION—SALE OF JOINT FAMILY PROPERTY IN EXECUTION, &c.

1. EVIDENCE OF MINORITY.

1. ——— Plea of minority, Determination of.—*Personal appearance of minor.*—The plea of minority should be decided on positive evidence, and not merely on the appearance of the alleged minor. KHETTERMOHUN GHOSE *v.* RAMESSUR GHOSE . . . . W. R., 1864, 304

KALEE HALDAR *v.* SREERAM GHOSE
[W. R., 1864, 366

2. LIABILITY ON CONTRACTS.

2. ——— Power to contract.—*Necessaries.—Authority to third person.—Settlement of account.*—Minors have a qualified power of contracting, and an implied or express contract for necessaries is binding absolutely on a minor. As a minor cannot himself, by reason of insufficient capacity for business, state and settle an account so as to be bound thereby, so neither can he authorise another party to do for him that which he cannot do himself. BYKUNTNATH ROY CHOWDHRY *v.* POGOSE . . 5 W. R., 2

3. ——— Voidable contract.—*Act IX of 1872, ss. 10, 11.—Bond.—Minority of obligee.*—A contract entered into with a minor is merely voidable at the option of the minor; and there is nothing to prevent him suing thereon, supposing the contract to be otherwise valid. SASHI BHUSAN DUTT *v.* JADU NATH DUTT . . I. L. R., 11 Calc., 552

*See* HARI RAM *v.* JITAN RAM
[3 B. L. R., A. C., 426

4. ——— Purchase from minor.—*Validity of purchase.*—A purchase from a minor is not *ipso facto* invalid. RENNIE *v.* GUNGA NARAIN CHOWDHRY . . . . 3 W. R., 10

5. ——— Pre-emption.—*Guardian.*—The circumstance that a co-sharer of a village was a minor at the time of the preparation of the wajib-ul-urz, and that document was not attested on his behalf by

MINOR—*continued.*

2. LIABILITY ON CONTRACTS—*continued.*

Pre-emption—*continued.*

a guardian or duly authorised representative, is not a reason for excluding him from the benefit of the provisions of that document relating to pre-emption. LAL BAHADUR SINGH *v.* DURGA SINGH
[I. L. R., 3 All., 437

6. ——— Mortgage.—*Power of minor to take a mortgage.*—Observations by STUART, *C. J.*, on the competency of a minor to take a mortgage. BEHARI LAL *v.* BENI LAL . I. L. R., 3 All., 408

7. ——— *Act XL of 1858, s. 18.—Guardian and minor.—Mortgage without the sanction of the Civil Court.—Void contract.—Ratification by minor.*—A minor cannot ratify a mortgage of his immoveable property made by his guardian appointed under Act XL of 1858, without the sanction of the Civil Court, such a mortgage being under section 18 of that Act void *ab initio.* MAUJI RAM *v.* TARA SINGH
[I. L. R., 3 All., 852

8. ——— *Sale in execution of decree.—Usufructuary mortgage.—Right of purchaser.*—The acts of a minor are only voidable, and not absolutely void. The purchaser of the right, title, and interest of a judgment-debtor sued to obtain immediate possession of the property purchased at a sale held in execution of a decree, after setting aside an usufructuary mortgage executed by the judgment-debtor while a minor. *Held* that the sale in execution merely transferred to the purchaser the reversionary right of the judgment-debtor in the property, after the satisfaction of the usufructuary mortgage, and the right to set aside an act done during minority. *Held* also that, until a transaction by a minor was avoided by some distinct act on attaining majority, it must be considered valid. HARI RAM *v.* JITAN RAM
[3 B. L. R., A. C., 426 : 12 W. R., 378

*See* SASHI BHUSAN DUTT *v.* JADU NATH DUTT
[I. L. R., 11 Calc., 552

3. LIABILITY FOR TORTS.

9. ——— Responsibility of minor for his acts.—As regards torts a minor is responsible for his own acts. LUCHMUN DOSS *v.* NARAYAN
[3 N. W., 191

4. CUSTODY OF MINORS (ACT IX OF 1861, &c.).

10. ——— Right to choose custody.—*Habeas corpus, Return to.*—A girl under sixteen years of age has not such a discretion as enables her, by giving her consent, to protect any one from the criminal consequences of inducing her to leave the protection of a lawful guardian; but where the return to the writ of *habeas corpus* stated that a girl was above the age of sixteen (though her mother stated her to be of the age of thirteen years and nine months), the Court held that she was of years of discretion to choose for

MINOR—*continued.*

4. CUSTODY OF MINORS (ACT IX OF 1861, &c.)—*continued.*

**Right to choose custody**—*continued.*

herself under whose protection she would remain. QUEEN *v.* VAUGHAN. IN THE MATTER OF GANESH SUNDARI DEBI . . . **5 B. L. R., 418**

IN THE MATTER OF KHATIJA BIBI **[5 B. L. R., 557**

11. ——— **Application for custody of minor daughter.**—*Act XL of 1858, s. 2.—Principal Civil Court of original jurisdiction.*—An application was made to a Munsif for the custody of a minor daughter, which, on appeal to the Civil Judge, was dismissed. On appeal to the High Court,—*Held,* all the proceedings must be quashed. The application should have been made in the principal Civil Court of original jurisdiction in the district. HARASUNDARI BAISTABI *v.* JAYADURGA BAISTABI **[4 B. L. R., Ap., 36**

S. C. HURO SOONDUREE BOISTOBEE *v.* JOY DOORGA BOISTOBEE . . . **13 W. R., 112**

KRISTO CHUNDER ACHARJEE *v.* KASHEE THAKOORANEE . . . . **23 W. R., 340**

12. ——— **Act IX of 1861.**—*Construction of Act.—Principal Civil Court of original jurisdiction.—Semble,*—In Act IX of 1861, "the principal Civil Court of original jurisdiction in the district" means the principal Court of ordinary original civil jurisdiction. RAM BUNSEE KOOMAREE *v.* SOOBH KOOMAREE . . **2 Ind. Jur., N. S., 193**

S. C. RAM BUNSEE KOONWAREE *v.* SOOBH KOONWAREE . . . . **7 W. R., 321**

13. ——— *Pegu.—European British minors.*—Act IX of 1861 applied to Pegu, and also to minors the lawful children of European natural-born British subjects. IN RE HUTTON **[3 W. R., Rec. Ref., 5**

14. ——— *European British minors, Custody of.—Jurisdiction of Zillah Judge.*—Appellant having presented a petition to a Zillah Judge under Act IX of 1861, claiming the possession and custody of his two minor children alleged to be detained by their mother, the parties being European British subjects,—*Held* that such Judge had no power to entertain the application. IN THE MATTER OF THE PETITION OF SHANNON . **2 N. W., 79**

15. ——— **s. 7.**—*Act XL of 1858, s. 12.—Jurisdiction of Civil Court.*—Where application was made under Act IX of 1861, and an estate was taken charge of by the Collector under section 12, Act XL of 1858, the interference of the Civil Court was held to be precluded alike by the former Act (section 7) and by the latter. MOHESSUR ROY *v.* COLLECTOR OF RAJSHAHYE . **16 W. R., 263**

16. ——— *Wife.—Outcast for criminal offence.—P.,* whose minor wife had refused to return to cohabitation with him on the ground that he was out of caste in consequence of having

MINOR—*continued.*

4. CUSTODY OF MINORS (ACT IX OF 1861, &c.)—*continued.*

**Act IX of 1861, s. 7**—*continued.*

committed a criminal offence, applied to the District Court under Act IX of 1861 for the custody of her person. *Held* that that Act did not apply to such a case. PAKHANDU *v.* MANKI **[I. L. R., 3 All., 506**

17. ——— *Wife.—Dispute on fact of marriage.*—Where a person claims the custody of a female minor on the ground that she is his wife, and such minor denies that she is so, Act IX of 1861 does not apply. Such person should establish his claim by a suit in the Civil Court. BALMAKUND *v.* JANKI . . . **I. L. R., 3 All., 403**

18. ——— *Jurisdiction of District Judge.—Marriage.—Injunction.*—The paternal uncle of a female Hindu minor, whose father was dead, applied to the District Judge, under Act IX of 1861, for the custody of the minor, and for an injunction to prevent the mother of the minor from carrying out a projected marriage. On the 8th of March 1881 the Judge issued an *ad interim* injunction. When the application came on for hearing, it appeared that the marriage had taken place before the order of injunction had reached the parties. The District Judge found that though the mother was entitled to the custody of the minor, yet the petitioner was entitled to give the minor in marriage in preference to the mother. The District Judge also found that the marriage had not in fact been validly performed. On appeal to the High Court, it was contended that the District Judge had no jurisdiction to determine the right of any party to give an infant in marriage on an application under Act IX of 1861, or to grant an injunction; and it was also contended that the Magistrate was wrong in entering into the question of the *factum* of the marriage. *Held* that, under the provisions of Act IX of 1861, the District Judge had jurisdiction. *Balmakund* v. *Janki, I. L. R., 3 All., 403; Wolverhampton Waterworks Co.* v. *Hawkesford, 28 L. J. (N. S.) C. P., 242;* and *Collector of Pubna* v. *Romanath Tagore, B. L. R., Sup. Vol., 630,* referred to. *Held,* also, that for the purpose of deciding whether the injunction should issue, the Judge was justified in entering into the question of the *factum* of the marriage, though his finding on that point would have no effect in determining its validity. IN THE MATTER OF THE PETITION OF KASHI CHUNDER SEN. BROHMOMOYEE *v.* KASHI CHUNDER SEN **[I. L. R., 8 Calc., 266: 10 C. L. R., 91**

5. REPRESENTATION OF MINOR IN SUITS.

19. ——— **Disability to sue.**—*Objection on ground of disability.*—An infant cannot sue except by next friend, and where an objection is made on the ground of the disability of the plaintiff it was held that the suit might be dismissed. CHINNIAH *v.* BAUBUN SAIB . . . . **5 Mad., 435**

20. ——— **Disability to carry on suit.**—*Suit by minor.—Next friend.*—Plaintiff being a

MINOR—*continued.*

5. REPRESENTATION OF MINOR IN SUITS —*continued.*

**Disability to carry on suit**—*continued.*

minor his suit was not dismissed, but he was directed to appoint a next friend to sue for him. ROLLO *v.* SMITH . . . 1 B. L. R., O. C., 10

21. ——— **Suit by minor whose guardian has omitted to sue.**—A minor when he comes of age is not precluded from suing in his own name for anything that his guardian, either through ignorance or negligence, has ommitted to prosecute. KYLASH CHUNDER SIRCAR *v.* GOOROO CHURN SIRCAR. GOOROO CHURN SIRCAR *v.* KYLASH CHUNDER SIRCAR . . . . . 3 W. R., 43

22. ——— **Suit on behalf of minor.**—*Act XL of 1858, s. 3.—Suit of small value.*—A suit can be prosecuted or defended by a relative on behalf of a minor without a certificate under Act XL of 1858 when the subject-matter of the suit is of small value. A suit to recover real and personal property of the value of R7,260 was allowed to be prosecuted by the brother of a minor on behalf of himself and his minor brother, under Act XL of 1858, section 3. NABADWIP CHANDRA SIRKAR *v.* KALINATH PAL [3 B. L. R., Ap., 130

23. ——— *Objection to minor's representative.*—Where a suit was brought by a manager, appointed by the Court of Wards on behalf of an infant who had a right to sue, an objection to the manager's authority was disallowed as merely technical. HARDI NARAIN SAHU *v.* RUDER PERKASH MISSER . . I. L. R., 10 Calc., 627 [L. R., 11 I. A., 26

24. ——— *Next friend of minor.—Uncle representing minor nephew.—Mahomedan law.—Guardian.*—The rule of Mahomedan law that an uncle cannot be the guardian of the property of a minor, does not prevent an uncle representing his infant nephew, under the Code of Civil Procedure as next friend in a suit. ABDUL BARI *v.* RASH BEHARI PAL . . . 6 C. L. R., 413

25. ——— *Improper representation of minor.—Effect on proceedings.*—Where on appeal the Court was of opinion that certain minors were not properly represented in a suit brought by them, it declared all the proceedings in the suit to be null and void as far as the minors were concerned. With regard to the party acting as their next friend, the Court allowed her to withdraw the suit with liberty to bring a fresh suit, and returned the plaint. GURU PERSHAD SINGH *v.* GOSSAIN MUNRAJ PURI . . I. L. R., 11 Calc., 733

26. ——— **Effect of decree in suit brought by elder brothers.**—*Manager.*—The plaintiffs, Hindu brothers, brought a suit for redemption. During the minority of the plaintiffs their elder brothers had brought a previous suit to redeem the same property, which suit had been dismissed. There was no evidence to show that in that suit they had assumed to act on behalf of the family, or that

MINOR—*continued.*

5. REPRESENTATION OF MINOR IN SUITS —*continued.*

**Effect of decree in suit brought by elder brothers**—*continued.*

any one of them had been a *de facto* manager of the family property. *Held* that the plaintiffs were not sufficiently represented in the previous suit, and that, therefore, their present suit was maintainable. *Durgapersad* v. *Kesho Persad, I. L. R., 8 Calc., 656: L. R., 9 I. A., 27,* explained. PADMAKAR VINAYAK JOSHI *v.* MAHADEV KRISHNA JOSHI [I. L. R., 10 Bom., 21

27. ——— **Suit against minor.**—*Parties.—Guardian.—Act XL of 1858, s. 3.—Declaratory decree.*—In a suit to set aside, "the allegation of the defendant that her son *S.* had been adopted by the father of the plaintiff, and had therefore inherited his property," the defendant was described in the plaint, as *M.*, the mother of *S.*; and subsequently the words "a minor" were inserted after the name of *S.* In the proceedings in the suit the defendant designated herself as mother and guardian of *S.*, a minor, but there was nothing to show she had obtained a certificate of guardianship, or had been appointed guardian *ad litem.* The two lower Courts gave a decree for the plaintiff. On special appeal to the High Court it was contended that *S.* ought to be a party to the suit. *Held* that the suit, as it stood, could not be treated as a suit against the minor: the minor ought himself to have been made and been described as defendant, some other person being named as guardian. If treated as a suit against *M.* only, it was wrongly brought, no suit to make any declaration as to the adoption could be brought against any other than *S.* himself. MONGOLA DOSSEE *v.* SARODA DOSSEE . . . . . 12 B. L. R., Ap., 2

S. C. MONGULA DOSSEE *v.* SHARODA DOSSEE. [20 W. R., 48

28. ——— **Sufficiency of representation.**—*Improper representation of minor.—Suit for "self and as guardian."—Semble,*—That the fact of a suit being brought by *A.* for self and as guardian of *C.*, a minor, is not conclusive evidence that *C.* is not so far a party to the suit as to be bound by the decree. *Sreenarain Mitter v. Kishen Soondery Dassee, 11 B. L. R, 171;* and *Mongola Dassee v. Saroda Dossee, 12 B. L. R., Ap., 2,* cited. GRISH CHUNDER MOOKERJEE *v.* MILLER . 3 C. L. R., 17

29. ——— *Civil Procedure Code, 1877, ss. 440, 444.—Liability of pleader to pay costs.*—The plaintiff, who sued for confirmation of possession of certain land on behalf of her minor sons, thus described herself in the heading of the plaint: "*S. B.*, widow of the late *C. B.*, mother and guardian on behalf of the minors, *S.* and *K.*, plaintiff." The suit being dismissed, an appeal was preferred under the same heading. On second appeal the appeal was headed "*S. B.*, widow of the late *C. B.*, mother and guardian of *S.* and *K.*, minors, appellant." The plaint alleged that the plaintiff had held possession as guardian of the minor sons. *Held* that the proceedings were bad in law, the plaint not having been framed in

MINOR—*continued.*

5. REPRESENTATION OF MINOR IN SUITS —*continued.*

**Sufficiency of representation**—*continued.*

accordance with the provisions of section 440 of the Civil Procedure Code. The High Court further directed that the pleader who filed the original suit and the pleaders who filed the appeal in the lower Appellate Court should be called upon to show cause, before the presiding officers of the original and the lower Appellate Courts respectively, why they should not be ordered, under section 444 of the Civil Procedure Code, to pay the costs of the suit and the appeal. SHONAI BEWA *v.* MONORAM MUNDUL [11 C. L. R., 15

30. ——————— *Civil Procedure Code (Act XIV of 1882), s. 440.—Suit by next friend on behalf of minor.—Act XL of 1858, s. 3.—Certificate.*—The effect of section 3 of Act XL of 1858, read with section 440 of the Code of Civil Procedure, is, that a minor plaintiff must not only always sue by his next friend, but, when the suit relates to the minor's estate, the person representing the minor must either hold a certificate under the Act, or must obtain the sanction of the Court for the suit to proceed. The mere admission of a plaint by the Court does not sufficiently indicate that sanction is accorded. DURGA CHURN SHAHA *v.* NILMONEY DASS . I. L. R., 10 Calc., 134 : 13 C. L. R., 369

See *contra*, AUKHIL CHUNDER *v.* TRIPOORA SOONDUREE . . . . . 22 W. R., 525

31. ——————— *Next friend—Certificate under Act XL of 1858, s. 3.—Civil Procedure Code (Act XIV of 1882), s. 440.*—Section 440 of the Civil Procedure Code, read with section 3 of Act XL of 1858, does not make the receipt from the Court of a written permission to sue compulsory upon the next friend of an infant plaintiff. NEWAJ *v.* MAKSUD ALI . . I. L. R., 12 Calc., 131

32. ——————— *Insufficient appearance on behalf of infant.—Succession Act, s. 261.—Civil Procedure Code (Act X of 1877), ch. XXXI, ss. 440-464.—Act XL of 1858, s. 3.*—No judgment or order passed in a suit, to which a minor subject to the provisions of Act XL of 1858 is a party, will bind him on his attaining majority, unless he is represented in the suit by some person who has either taken out a certificate, or has obtained the permission of the Court to sue or defend on his behalf without a certificate. Permission granted to sue or defend on behalf of a minor, under section 3 of Act XL of 1858, should be formally placed on the record. Chapter XXXI of the Civil Procedure Code lays down the form in which a minor should appear as a party, and this form should be strictly followed. MEINAMOYI DABIA *v.* JOGODISHURI DABIA [I. L. R., 5 Calc., 450 : 5 C. L. R., 361

33. ——————— *Suit on behalf of minor.—Permission to sue.*—The uncle of a minor instituted a suit on his behalf without obtaining the formal permission of the Court in which such suit was instituted to sue on his behalf. The uncle's right to sue was denied by the defendant, and the first of the issues framed was whether he had such right. The Court decided that he had such right. *Held*, in second appeal, that, although permission to sue or defend a suit on behalf of a minor should be formally granted, to be of effect, such decision might fairly be accepted as in this case a sufficient and effective permission to the uncle to sue, and he was competent to maintain such suit. *Mrinamoyi Dabia* v. *Jogodishuri Dabia, I. L. R., 5 Calc., 450,* referred to. PIRTHI SINGH *v.* SOBHAN SINGH . I. L. R., 4 All., 1

34. ——————— *Permission of Court to guardian to sue.—Discretion of Court.—Act XL of 1858.—Civil Procedure Code (Act XIV of 1882), s. 440.—Return of plaint.*—A volunteer guardian has no right to sue on behalf of a minor; the accord or refusal of permission to sue is a matter in the discretion of the Court. Where a suit is brought in violation of section 440 of the Code of Civil Procedure, or of the provisions of Act XL of 1858, the proper course for a Court to pursue is to return the plaint, in order that the error may be rectified. RUSSICK DAS BAIRAGY *v.* PREONATH MISREE . I. L. R., 10 Calc., 102 : 12 C. L. R., 405

35. ——————— *Improper representation of minor.—Appearance by a guardian not sanctioned.—Act XL of 1858, s. 3.—Act VIII of 1859.—Suit against minor.—Presumption when no permission recorded by Court.—Misdescription of minor.—Act XIV of 1882, s. 443.*—A suit was brought against a mother "for self and as guardian of *A.* and *B.*, minor sons of *C.*, deceased," at a period when Act VIII of 1859 was in force. The mother had not taken out a certificate under Act XL of 1858, and no permission was recorded by the Court allowing the mother to defend on behalf of the infants under the provisions of section 3 of that Act. A decree was made in the suit, and in execution thereof certain property belonging to *A.* and *B.* was sold and purchased by *X.*, the decree-holder. Subsequently, on *A.'s* coming of age, *A.* and *B.*, by *A.* as his next friend, instituted a suit against *X.* and their mother to recover the property so purchased by *X.* *Held* that under the provisions of Act VIII of 1859 it was not necessary to formally record sanction to the mother to defend under section 3 of Act XL of 1858; and that the fact of sanction having been given might be presumed by the Court, and that on the facts of the case such presumption was warranted. *Held*, also, that though *A.* and *B.* were not properly described in the previous suit, it was a mere defect in form, and did not affect the merits of the case, being in accordance with the prevailing practice at the time when the suit was brought; and that there is no authority for saying that, when minors have been really sued, though in a wrong form, a decree against them would not be valid. JOGI SINGH *v.* KUNJ BEHARI SINGH [I. L. R., 11 Calc., 509

36. ——————— *Guardian ad litem, Appointment of.—Act XIV of 1882, ss. 443, 464.*

MINOR—*continued.*

5. REPRESENTATION OF MINOR IN SUITS —*continued.*

Sufficiency of representation—*continued.*

—*Act XL of 1858, s. 3.—Minors, Suit against, improperly framed.*—In a suit intended to be brought against some minors, the defendants were set out in the heading of the plaint as "Sharoda Sunderi Debya, widow of Chundra Kanta Chuckerbutty, deceased, mother and guardian of the minors" (setting out their names). At the filing of the plaint, the plaintiff applied for and obtained an order making Sharoda guardian of the minors for the purposes of the suit. She was not, however, guardian of the property and persons of the minors under Act XL of 1858. *Held* that the minors were not parties to the suit; that the order making Sharoda guardian *ad litem* was not made in a suit in which the minors were defendants; and that the suit must be dismissed as against the minors. *Held*, also, that neither the Code of Civil Procedure nor the proviso of section 3 of Act XL of 1858 give a plaintiff any power to institute a suit against a person named by himself as guardian *ad litem* on behalf of a minor, nor do they give to the Court the power of transferring, by a mere order made *ex parte*, an irregular proceeding such as the one above mentioned into a suit against the minor. GURU CHURN CHUCKERBUTTY *v.* KALI KISSEN TAGORE [I. L. R., 11 Calc., 402

37. ——————— *Suit against person of whose estate a certificate of administration is subsequently obtained.—Right of guardian to defend.*—A suit having been instituted upon a bond and no appearance entered by the defendant, who admittedly was over 18 years of age on the date of the institution of the suit, *A.* obtained a certificate of guardianship in respect of the property of the defendant under Act XL of 1858, and having been allowed upon such certificate to defend the suit on behalf of the original defendant, pleaded minority. *Held* that, notwithstanding the appointment as guardian, *A.* ought not to have been made a defendant, the original defendant not being a minor when the suit was instituted. KRISHNA MONGUL SHAHA *v.* AKBAR JUMMA KHAN [9 C. L. R., 213

38. ——————— *Appearance for minor.—Notice of decree.—Presence of vakil.*—A statement in a decree that a vakil had appeared and was present in Court for a minor when the decree was made, was held, in a suit to set the decree aside as being made behind his back, to be notice to the minor of the decree having been made. RUKHYAKUR BHUTTACHARJEE *v.* KUROONA MOYEE DABEE [25 W. R., 280

39. ——————— *Civil Procedure Code, s. 442.*—Section 442 of the Civil Procedure Code refers to a case where the plaint on the face of it appears to have been filed by a person who was a minor. BENI RAM BHUTT *v.* RAM LAL DHUKRI [I. L. R., 13 Calc., 189

40. ——————— Costs.—*Costs of defendants, Suit for.—Necessaries.—Contract Act, s. 68.*—Where a suit has been brought against a minor, the effect of which, if successful, would be to deprive the minor of his property, the costs of successfully defending that suit on his behalf may, when his property is in the hands of the Receiver of the Court, be recovered from the minor as necessaries in an action brought against him by his attorney. WATKINS *v.* DHUNNOO BABOO . I. L. R., 7 Calc., 140: 8 C. L. R., 433

MINOR—*continued.*

5. REPRESENTATION OF MINOR IN SUITS —*continued.*

Costs—*continued.*

41. ——————— *Suit on behalf of minor by Court of Wards.—Personal liability of officer representing Court of Wards.—Choice between innocent persons.*—A suit on behalf of a minor by the Court of Wards, which was the Deputy Commissioner before whom it was instituted, having been dismissed in appeal by the High Court, it was held that the Deputy Commissioner by whose authority it had been instituted ought not to have tried the suit, and that though in an ordinary case, the person who appeared on the record on behalf of the infant would be liable for the costs, in this case, as the Deputy Commissioner was no longer in office, one of two innocent persons must bear the costs, either the minor or the defendant. It was determined accordingly that the defendant must suffer, as he was in part to blame for allowing the suit to proceed. BIKROMAJEET MULLO OGALSUNDO DEB *v.* COURT OF WARDS . . . . 21 W. R., 312

42. ——————— *Suit by legatees on behalf of themselves and other legatees.—Civil Procedure Code.—Act XIV of 1882, s. 30.—Costs against next friend.*—A legatee cannot sue on behalf of himself and other legatees without an order of the Court obtained under section 30 of the Civil Procedure Code enabling him so to sue. Where a legatee, a minor, sued in that form by her next friend without such an order, the next friend was held liable for costs on his adducing no evidence to show that the suit was for the benefit of the minor. GEEREEBALLA DABEE *v.* CHUNDER KANT MOOKERJEE [I. L. R., 11 Calc., 213

43. ——— Certificate of heirship.—*Bom. Reg. VIII of 1827.*—Under the provisions of Regulation VIII of 1827 a certificate of heirship cannot be granted to a minor. BAI BAIBA *v.* BAI DAGUBA . . . I. L. R., 6 Bom., 728

6. CASES UNDER MINORS ACT (BOMBAY), XX OF 1864.

*See* ACCOUNT, SUIT FOR— [I. L. R., 8 Bom., 14

*See* CASES UNDER GUARDIAN.

*See* SALE IN EXECUTION OF DECREE—DECREES AGAINST REPRESENTATIVES. [I. L. R., 5 Bom., 14

44. ——— Application of Act.—*Minors resident out of Presidency.*—The Bombay Minors Act (XX of 1864) does not apply to minors who are

MINOR—*continued.*

6. CASES UNDER MINORS ACT (BOMBAY), XX OF 1864—*continued.*

**Application of Act**—*continued.*

not resident within the Presidency of Bombay. MAGANBHAI PURSHOTAMDAS *v.* VITHOBA BIN NARAYAN SHET . . . **7 Bom., A. C., 7**

**45.** ——— **s. 11.**—*Construction.*—"*May,*" "*shall.*"—The provision in section 11 of the Minors Act (XX of 1864), that when the estate of a minor consists of land, the Court "may" direct the Collector to take charge of the estate, is not obligatory. IN RE BOEVEY . . . **I. L. R., 4 Bom., 635**

**46.** ——— **Nazir of Court.**—*Officer of Government.—Bombay Civil Courts Acts (XIV of 1869, s. 32, and X of 1876, s. 15).—Collector.—Public curator under Act XIX of 1841.*—The nazir of a Civil Court who is appointed guardian of the estate of a minor under Act XX of 1864, is not an officer of Government within the meaning of section 32 of Act XIV of 1869 as amended by section 15 of Act X of 1876. An officer of Government, in order to come within those enactments, must be a party to a suit *in his official capacity.* The only officers of Government whom Act XX of 1864 contemplates as guardians of the estates of a minor in their official capacity, are the Collector of the district and the public curator, appointed as such under Act XIX of 1841. MOHAN ISHWAR *v.* HAKU RUPA **[I. L. R., 4 Bom., 638**

*Contra,* VASUDEV VISHNU DIKSHIT *v.* NARAYAN JAGANNATH DIKSHIT **[I. L. R., 4 Bom., 642, note**

**47.** ——— **Natural father of minor.**—*Adoption.—Residence of minor.*—The natural father of a minor who has been adopted into another family is not by Hindu law his proper guardian when either of the adoptive parents is living and willing to act as guardian. The residence of the minor with the adoptive parents is a part of the consideration for their adoption of a son, and unless serious ill-treatment or incompetency on their part be proved, they and the survivor of them are the proper guardians. LAKSHMIBAI *v.* SHRIDHAR VASUDEV TAKLE **[I. L. R., 3 Bom., 1**

**48.** ——— **Foreign guardian.**—*Suit by next friend.*—A foreign guardian will not be recognised in the Courts in this country in a suit brought by such guardians to recover, on account of a minor, profits arising from immoveable property. Where a suit was brought by the agent of a minor's guardian appointed by H. H. the Gaikwad of Baroda, it was ordered that the proceedings should be amended by describing such agent as the next friend of the minor, in which capacity he was then permitted to sue. MAGANBHAI PURSHOTAMADAS *v.* VITHOBA BIN NARAYAN SHET . . . **7 Bom., A. C., 7**

**49.** ——— **Certificate of administration.**—*Father suing on behalf of minor son.*—A father on behalf of his minor son entitled to property in his own right must obtain a certificate of administration under section 2 of Act XX of 1864. SITARAM BHAT *v.* SITARAM GANESH **[6 Bom., A. C., 250**

MINOR—*continued.*

6. CASES UNDER MINORS ACT (BOMBAY), XX OF 1864—*continued.*

**Certificate of administration**—*continued.*

**50.** ——— *Widow suing on behalf of son.*—A widow without a certificate of administration under Act XX of 1864 is precluded from bringing a suit in her own name in respect of her minor son's property. GOPAL KASHI *v.* RAMABAI SAHEB PATVADHAN . . . **12 Bom., 17**

**51.** ——— *Suit against minor.—Power of District Judge.*—Section 2 of Act XX of 1864 does not prohibit a person having a claim against a minor from bringing a suit until a certificate of administration has been granted. He may properly bring his suit, but immediately after his doing so he should apply to the District Judge for the appointment of an administrator, and it is competent to the District Judge under section 8 of the Act to make that appointment. IN RE MOTIRAM RUPACHAND . . . . **11 Bom., 21**

**52.** ——— *Right to institute suit on behalf of minor.*—There is nothing in the Minors Act (XX of 1864) to prevent the institution of a suit by the next friend of a minor who has not obtained a certificate of administration to the minor's estate, but who claims no right to have charge of the minor's property, asking for a declaration of the minor's rights, and for an order directing the defendant to pay money he owes to the minor into the principal Civil Court of the district. As the right, however, of a friend to institute a suit on behalf of a minor is under the control of the Court, and as the Minors Act, by sections 3-7, enables a friend of the minor to protect his interests by applying for the appointment of a fit person to have charge of the property of the minor and to protect his estate, the proper course for a Court, to which a plaint on behalf of a minor is presented by his friend, is either to refuse to accept the plaint, when there is no pressing necessity for its acceptance, or in case such pressing necessity exists, to accept the plaint and stay proceedings until the plaintiff has duly obtained a certificate under the Act. VIJKOR *v.* JIJIBHAI VAJI . . . . **9 Bom., 310**

**53.** ——— *Suit against minor.*—A suit against a minor whose estate exceeds R250 in value cannot be proceeded with unless he be represented by a person holding a certificate of administration under Act XX of 1864. The plaintiff may apply to the District Judge to appoint an administrator if none such has been appointed. DHONDIBA LAKSHUMAN *v.* KUSA . **6 Bom., A. C., 219**

**54.** ——— *Guardian.—Act XX of 1864, s. 2—Procedure—Civil Procedure Code (Act X of 1877), s. 440.*—Act XX of 1864 is not superseded by Act X of 1877. Where, therefore, a widow claimed to have charge of property in trust for her minor sons, it was held necessary, under sec-

MINOR—*continued.*

6. CASES UNDER MINORS ACT (BOMBAY), XX OF 1864—*continued.*

**Certificate of administration**—*continued.*

tion 2 of Act XX of 1864, that she should obtain a certificate of administration if the whole estate was of greater value than R250; and that it was competent to the Court, if there was any pressing necessity (owing to the operation of the law of limitation) that a suit should be brought at once to accept the plaint and stay proceedings until the mother had obtained a certificate under Act XX of 1864. MURLIDHUR *v.* SUPDU . . I. L. R., 3 Bom., 149

55. ——————— *Next friend.—Security of minor's estate.—Act XX of 1864.*—Where there is a next friend of a minor willing and competent to act for him, such next friend may file a suit on his behalf, or continue one already filed, without a certificate of administration. In the event of a decree being passed in the minor's favour, the Court can, in the absence of an administrator under Act XX of 1864, make such arrangements as it deems expedient for the security of the minor's estate, as by appointing an administrator under the Act. NAG THAKUR *v.* MADNAJI SADASHIV [I. L. R., 8 Bom., 239

56. ——————— *Hindu law.—Joint family.—Unseparated minor.—Certificate of administration of minor's share when necessary.—Manager.*—Three brothers belonging to a joint Hindu family instituted a suit in the Court of a Subordinate Judge in their own names and on behalf of their minor brother to set aside an alienation of the family property made by their deceased father. The Subordinate Judge ruled that one of the plaintiffs must procure a certificate of administration under Act XX of 1864, section 2, before the suit could proceed. *Held* that no certificate was necessary. The manager of the family should be allowed to proceed with the suit as next friend of the minor, with permission, if necessary, to amend the plaint accordingly. NARSINGRAV RAMCHANDRA *v.* VENKAJI KRISHNA . . I. L. R., 8 Bom., 395

57. ——————— *Proceeding to enforce award.—Civil Procedure Code, 1859, s. 327.—Bom. Act XX of 1884, s. 2.*—As proceedings taken to file and enforce an award under section 327 of the Civil Procedure Code are of the nature of a suit within the meaning of section 2 of Act XX of 1864, a minor must be represented in such proceedings by a person holding a certificate of administration. VASUDEB VISHNU *v.* NARAYAN JAGANNATH 9 Bom., 289

MINORITY, DISABILITY OF—

*See* LIMITATION—STATUTES OF LIMITATION—ACT XXV OF 1857, s. 9. [13 B. L. R., 445

*See* LIMITATION—STATUTES OF LIMITATION—ACT IX OF 1859, s. 20. [13 B. L. R., 292

*See* CASES UNDER LIMITATION—ACT XV OF 1877, s. 7.

MIRASIDARS, RIGHT OF—

*See* CASES UNDER LANDLORD AND TENANT—MIRASIDARS . I. L. R., 1 Mad., 205
[I. L. R., 3 Bom., 340
I. L. R., 2 Mad., 149

MISAPPROPRIATION OF PROPERTY.

*See* CERTIFICATE OF ADMINISTRATION—EFFECT OF CERTIFICATE. [5 B. L. R., 371

*See* CRIMINAL MISAPPROPRIATION.

MISCARRIAGE.

1. ——— **Causing miscarriage.**—*Penal Code, s. 312.*—The offence defined in section 312 can only be committed when a woman is in fact pregnant. QUEEN *v.* KABUL PATTUR . 15 W. R., Cr., 4

2. ——————— *Penal Code, s. 312.—"With child."—Stage of pregnancy immaterial.*—A woman is with child within the meaning of section 312 of the Penal Code as soon as she is pregnant. *Held*, therefore, where a woman was acquitted on a charge of causing herself to miscarry, on the ground that she had only been pregnant for one month, and that there was nothing which could be called even a rudimentary fœtus or child, that the acquittal was bad in law. QUEEN-EMPRESS *v.* ADEMMA . . . I. L. R., 9 Mad., 369

3. ——— **Attempt to cause miscarriage.**—*Penal Code, ss. 312, 511.*—In a case in which the child was full grown the Court declined to convict the accused of causing miscarriage under section 312 of the Penal Code—that section supposing expulsion of the child before the period of gestation is completed,—but convicted them of an attempt to cause miscarriage under sections 312 and 511 read together. QUEEN *v.* ARUNJA BEWA [19 W. R., Cr., 32.

MISCELLANEOUS PROCEEDINGS.

——————— *Civil Procedure Code, 1877-1882, s. 647 (Act III of 1861, s. 38).—Procedure.*—Section 38, Act XXIII of 1861, was not intended to make the procedure and the powers of the Court which may be applicable in suits before decree applicable to proceedings in suits after decree, but to provide a procedure as nearly resembling Act VIII of 1859 as possible for other cases not being suits. IN THE MATTER OF THE PETITION OF JODOO MONEE DOSSEE [11 W. R., 494

MISCHIEF.

*See* ATTEMPT TO COMMIT OFFENCE. [3 B. L. R., A. Cr., 55

1. ——— **Requisites for offence.**—*Penal Code, s. 425.*—The authority vested in the Criminal Court of punishing persons for acts of mischief is one which must be exercised with great caution, and it must be very clear, before conviction, that the accused has brought himself within the meaning of section 425 of the Penal Code. IN THE MATTER OF THE PETITION OF RAM GHULAM SINGH [6 W. R., Cr., 59

**MISCHIEF.—Requisites for offence—*continued.***

2. ——————— *Probable consequential damage to other property.*—To constitute the offence of mischief according to the Penal Code, the act done must be shown to have caused destruction of some property or such a change in the property, or the situation of it, as destroys or diminishes its value or utility, or affects it injuriously. The probable consequential damage to other property would not of itself constitute mischief. ANONYMOUS [4 Mad., Ap., 16

3. ——————— *Penal Code, s. 426.—Wrongful intention.*—In order to convict a person of the offence of mischief under section 426, Penal Code, it is for the prosecution to prove that the accused caused damage with a wrongful intent with a knowledge that he was not justified in doing it, and that the party under whose orders he was acting had no real title. ISSUR CHUNDER MUNDLE v. ROHIM SHEIKH . . 25 W. R., Cr., 65

4. ——— **Damage to non-existent right.**—*Penal Code, s. 425.—Revenue sale.—Damage done between date of sale and grant of certificate.—Wrongful loss to property held under incomplete title.*—The damage contemplated in section 425 of the Penal Code need not necessarily consist in the infringement of an existing, present, and complete right, but it may be caused by an act done *now* with the intention of defeating and rendering infructuous a right *about to come into existence.* Any person who contracts to purchase property, and pays in a portion of the purchase-money, has such an interest in that property, although his title may not be complete, or his right final and conclusive, that the destruction of such property may cause to him wrongful loss or damage within the meaning of section 425. DHARMA DAS GHOSE v. NUSSERUDDIN [I. L. R., 12 Calc., 660

5. ——— **Invasion of right causing wrongful loss.**—*Penal Code (Act XLV of 1860), ss. 341, 425.—Wrongful restraint.*—Where complainant had for the purpose of removal placed certain goods upon a cart, and accused came and unyoked the bullocks, and turned the goods off the cart on to the road, and complainant thereupon went away at once leaving them there,—*Held* that, under these circumstances, a conviction under section 341 of the Penal Code could not be sustained; but that there was such "mischief" as to bring the offence within section 425. *Held,* also, that section 425 does not necessarily contemplate damage of a destructive character. It requires merely that there should be an invasion of right, and diminution of the value of one's property, caused by that invasion of right, which must have been contemplated by the doer of it when he did it. IN THE MATTER OF THE PETITION OF JUGGESHWAR DASS. JUGGESHWAR DASS v. KOYLASH CHUNDER CHATTERJEE [I. L. R., 12 Calc., 55

6. ——— **Person dealing with property under belief it in his own.**—*Penal Code, s. 425.*—If a person deals injuriously with property in the *bonâ fide* belief it is his own, he cannot be convicted of mischief. EMPRESS v. BUDH SINGH [I. L. R., 2 All., 101

**MISCHIEF.—Person dealing with property under belief it in his own—*continued.***

7. ——— **Cutting and carrying away bamboos.**—*Penal Code, s. 426.*—In a case in which the accused was charged with having cut and carried away bamboos, the right to which was disputed, it was held that he could not be convicted of mischief under section 426 of the Penal Code. SHAKUR MAHOMED v. CHUNDER MOHUN SHA [21 W. R., Cr., 38

8. ——— **Cutting trees on land in another's possession.**—A person commits mischief if he cuts trees on land which he claims, but of which possession, after an execution sale, has been legally made over to another person, without any objection or formal intervention on his part. SONAI SARDAR v. BUKHTAR SARDAR . 25 W. R., Cr., 46

9. ——— **Cutting Government trees without leave.**—*Held* that it was not illegal to convict prisoners of mischief as well as of theft, the offences charged being that they had cut down Government trees without leave, and appropriated them. REG. v. NARAYAN KRISHNA [2 Bom., 416: 2nd Ed., 392

10. ——— **Cattle straying.**—*Penal Code, s. 425.—Act III of 1857, s. 17.—Negligence.*—Section 425 of the Penal Code supposes that the destruction was caused with the intention to cause wrongful loss or damage, and does not apply to cases of mere carelessness; and section 17, Act III of 1857, supposes the mischief (cattle trespass) was done intentionally, and not by negligence. QUEEN v. ABAZ SIRCAR . . . 10 W. R., Cr., 29

KASHINATH GHOSE v. DINOBUNDHOO MYTEE [16 W. R., Cr., 72

11. ——————— *Allowing cattle to stray.*—The mere fact of allowing cattle to stray, whereby damage is caused to the complainant, affords no evidence to support a conviction on the charge of mischief. ANONYMOUS . . 6 Mad., Ap., 37

12. ——————— *Trespass.*—Mere neglect on the part of an owner of cattle to keep them from straying into fields, is not causing cattle to enter a compound within the meaning of section 425 of the Penal Code. That section requires that before the owner is convicted of the offence, it must be proved that he actually caused the cattle to enter, knowing that by so doing he was likely to cause damage. FORBES v. GIRISH CHANDRA BHUTTACHARJEE . 6 B. L. R., Ap., 3: 14 W. R., Cr., 31

13. ——————— *Penal Code (Act XLV of 1860), s. 425.*—In order to constitute the offence of mischief within the meaning of section 425 of the Penal Code, it is not sufficient to show that the owner of cattle which had caused damage was guilty of carelessness in allowing them to stray. The prosecution is bound to show that there was an

**MISCHIEF.—Cattle straying—*continued.***

intention to cause wrongful loss or damage. EMPRESS *v.* BAI BAYA . **I. L. R., 7 Bom., 126**

**14. ———** *Penal Code, s. 426.—Cattle Trespass Act, I of 1871, s. 10.—Cattle causing damage to crop.—Liability of owner.*—The owner of an animal which strays on to another's land, and causes damage to the crop thereon, does not, unless he has wilfully driven it upon the land, commit the offence of mischief under section 426 of the Penal Code. QUEEN-EMPRESS *v.* SHAIK RAJU **[I. L. R., 9 Bom., 173**

**15. ———** *Cattle Trespass Act, 1857, s. 18.—Penal Code, s. 425.*—In the case of a conviction by a Subordinate Magistrate, under section 18 of Act III of 1857, of a person who through neglect permitted a public road to be damaged, by allowing his pigs to trespass thereon,—*Held*, on a reference to the District Magistrate, that the conviction was not illegal, because the land damaged was a public road, as the right to use a public road is limited to the purposes for which the road is dedicated. REG. *v.* LINGANA BIN GINBANA **[4 Bom., Cr., 14**

**16. ——— Grazing cattle on waste lands.**—The defendants were convicted of mischief under section 427 of the Penal Code for grazing their cattle upon waste lands without payment of certain capitation fees to which the prosecutor was entitled. *Held* that there was no evidence that the defendants caused mischief. ANONYMOUS **[5 Mad., Ap., 30**

**17. ——— Interference with fishery.**—*Penal Code, s. 425.—Wrongful loss.—Proof of title.*—The right to a fishery was in dispute between the zemindar of Bally and the zemindar of Moharajpore. The former obtained a decree in the Civil Court declaring the fishery to be his, in proceedings to which the latter was not a party, and the servants of the Bally zemindar thereupon removed a bamboo bar, which the Moharajpore people had erected to prevent the passage of fish. For this they were convicted of mischief under the Penal Code, and punished by fine. *Held*, on reference to the High Court, that the conviction could not stand, as the Moharajpore zemindar had not shown that he was legally entitled to the fishery, and as it did not appear that the defendants were acting otherwise than from a *bonâ fide* belief that the Moharajpore zemindar was encroaching on their master's rights. BAKAR HALSANA *v.* DINOBANDHU BISWAS . . **3 B. L. R., A. Cr., 17**

S. C. QUEEN *v.* DENOO BUNDHOO BISWAS **[12 W. R., Cr., 1**

**18. ——— Pulling up stakes lawfully placed at sea within territorial limits.**—*Penal Code, ss. 425 and 427.*—Where certain of the inhabitants of the village of Manari in the Thana district sallied out in boats and pulled up and removed a number of fishing stakes lawfully fixed in the sea within three miles from the shore by the villagers of a neighbouring village, it was held that the Penal Code was the substantive law applicable to

**MISCHIEF.—Pulling up stakes lawfully placed at sea within territorial limits—*continued.***

the case, and that the offence amounted to mischief within the meaning of sections 425 and 427 of that Code. REG. *v.* KASTYA RAMA . **8 Bom., Cr., 63**

**19. ——— Opening irrigation sluice at wrong time.**—*Penal Code, s. 425.*—The defendants were convicted of mischief under the following circumstances. During certain seasons of the year they received water through a sluice for the irrigation of their lands. At another season the sluice was closed and the water allowed to flow to the lands of other cultivators. This arrangement was prescribed by the revenue authorities, and the defendants violated it by opening their sluice during the season prescribed for the irrigation of the lands of the other cultivators. *Held* that the conviction could not be sustained: there had been no destruction of property or diminution in the value or utility of property by the defendants within the meaning of section 425 of the Penal Code. ANONYMOUS . **7 Mad., Ap., 39**

**20. ——— Endangering safety of river embankment.**—*Intention.*—Where the accused had, while extending a garden and laying the foundation of a house, encroached on the inner slope of a river embankment, and thereby endangered the safety of the whole station,—*Held* that, in order to justify a conviction for the offence of mischief, it must appear that the accused person had done a particular act with intent to cause, or knowing it to be likely to cause, wrongful loss, and that, as the house and garden on which the accused was engaged would be the first to be swept away in the event of the dreaded breach in the bund and consequent irruption of the river, such guilty knowledge or intent could not reasonably be inferred on his part. IN THE MATTER OF THE PETITION OF PRAN NATH SHAHA. IN THE MATTER OF THE PETITION OF ROMA NATH BANERJEE . . **25 W. R., Cr., 69**

**21. ——— Act done without show of right.**—*Penal Code, s. 430.—Causing diminution of water-supply.—Held*, by the majority of a Full Bench, INNES, *J.*, dissenting, that it is not part of the definition of the offence of causing a diminution of water-supply for agricultural purposes that the act of the accused should be a mere wanton act of waste. It is sufficient that the act is done without any show of right. RAMAKRISHNA CHETTI *v.* PALANYANDI KUDAMBAR . . . **I. L. R., 1 Mad., 262**

**22. ———** *Causing diminution of water-supply.—Penal Code, s. 430.—Water-course.*—Where upon the evidence it appeared that the complainant was the exclusive owner of a water-course, and that the accused had no sort of right to assert any claim to it, the causing of a diminution of the supply of water by the accused, even though in the assertion of a right, was held to be only an additional wrong, and to constitute mischief within the meaning of section 430 of the Penal Code. *Ram Krishna Chetty* v. *Palanyandi Kudambar, I. L. R., 1 Mad., 262*, followed. QUEEN-EMPRESS *v.* JAGANNATH BHIKAJI BHAVE **[I. L. R., 10 Bom., 183**

**MISCHIEF**—*continued.*

**23. ——— Damage to bridge through floating logs.**—The accused were convicted of mischief. The acts were, that whilst the accused were employed in floating timber through a bridge, some of the logs struck against the arch of the bridge. *Held* that the conviction was bad. ANONYMOUS . . . . . 5 Mad., Ap., 40

**24. ——— Erection by one joint owner of edifice without consent of others.**—*Land held by joint owners.—Penal Code, s. 425.—Wrongful loss.—A.*, a joint owner of a parcel of land, erected on it an edifice without the consent and against the will of *B.*, another joint owner. A dispute having arisen in consequence, the Magistrate held an inquiry, and made an order, under section 530 of the Criminal Procedure Code, 1872, awarding to *A.* exclusive possession of the part of the land on which the edifice had been erected. *B.* then brought a suit in the Civil Court to establish his title to joint possession of the whole parcel and for a declaration that *A.* was not entitled to erect any edifice thereon; and he further prayed that such edifice should be removed. *B.* obtained a decree, whereupon his servants went on the land and pulled it down. They were charged before the Deputy Magistrate with having committed mischief, and on this convicted and fined. Subsequently the accused found the men in the employ of *A.* were putting up this erection, a nawbatkhana, again, and accordingly protested against its erection, pulled down the bamboos, thrust aside the servants of *A.*, throwing to the ground one man who was clinging to the bamboos. *Held, per* JACKSON, *J.*, that as there had been no causing of wrongful loss, the accused had not been guilty of mischief. *Held*, further, *per* CUNNINGHAM, *J.*, that the acts of the complainants in erecting the nawbat-khana amounted to mischief, and came within the purview of section 425 of the Penal Code. EMPRESS *v.* RAJCOOMAR SINGH . I. L. R., 3 Calc., 573: 1 C. L. R., 352
[2 C. L. R., 62

**25. ——— Destruction of carcass.**—*Right to skin of animals.—Village mahars.—Custom.*—The owner of an animal who buries it after its death is not guilty of mischief or any other offence, although he does so with the express object of preventing the mahars of his village from taking its skin according to the custom of the country. QUEEN-EMPRESS *v.* GOVINDA PUNJA
[I. L. R., 8 Bom., 295

**26. ——— Destruction of immoral document.**—*Penal Code, s. 426.*—The destruction of a document evidencing an agreement void for immorality may constitute the offence of mischief within the meaning of section 426 of the Penal Code. QUEEN *v.* VYAPURI . . I. L. R., 5 Mad., 401

**MISDIRECTION.**

*See* CASES UNDER CHARGE TO JURY—MISDIRECTION.

*See* REVISION—CRIMINAL CASES—VERDICT OF JURY AND MISDIRECTION.
[1 B. L. R., A. Cr., 8

**MISJOINDER.**

*See* ADMINISTRATION.
[15 B. L. R., 296

*See* APPELLATE COURT—OTHER ERRORS AFFECTING MERITS OF SUIT.
[6 Bom., A. C., 177
7 Bom., A. C., 19
23 W. R., 408
13 W. R., 176
I. L. R., 10 Calc., 1061

*See* CASES UNDER COSTS—SPECIAL CASES—MISJOINDER.

*See* HINDU LAW—JOINT FAMILY—POWERS OF ALIENATION BY MEMBERS—OTHER MEMBERS . I. L. R., 1 Calc., 226

*See* CASES UNDER JOINDER OF CAUSES OF ACTION.

*See* CASES UNDER MULTIFARIOUSNESS.

*See* SLANDER.
[15 B. L. R., 161, 166, note

*See* SPECIFIC RELIEF ACT, s. 27.
[I. L. R., 1 All., 555

**1. ——— Misjoinder of parties.**—*Suit for account from different dates against two persons.*—In a suit for an account against *A.* and *B.* as agents, the plaintiff asked for an account as against *A.* from 1265 (1858) to 1283 (1876), and as against *B.* from 1281 (1874) to 1283 (1876). *Held* that there had been no misjoinder. DEGAMBER MITTER *v.* KALLYNATH ROY
[I. L. R., 7 Calc., 654

S. C. DEGUMBER MOZUMDAR *v.* KALLYNATH ROY.
[9 C. L. R., 265

**2. ———** *Suit on bond not pledging lands.*—Plaintiff sued on a simple money-bond for the recovery of a sum of money lent by him to *R. A.*, a female, whose estates were under the management of a Court of Wards, and he made co-defendants in the suit certain other parties whom he charged with endeavouring to have the estates of *R. A.* transferred to them. He also tendered in evidence another bond, by which *R. A.*, the principal defendant, purported to secure a further advance, and to pledge her zemindari estates to the plaintiff till the debt was paid off. *Held* that the plaintiff had no ground of suit against the other defendants, as to whom there was misjoinder, except *R. A.*, the principal female defendant, as his cause of action against *R. A.* was based on the first bond, which did not create any charge upon the lands with which they are said to have meddled. MAHOMED ZAHOOR ALI KHAN *v.* RUTTA KOOER . 9 W. R., P. C., 9
[11 Moore's I. A., 468

**3. ———** *Suit on bond hypothecating immoveable property.—Joinder of debtor and purchaser of property.*—The holder of a bond hypothecating property who seeks to recover the debt due under the bond from his debtor, and to bring to sale the hypothecated property which is in the hands of a purchaser, is at liberty to implead the

**MISJOINDER.—Misjoinder of parties—** *continued.*

debtor and the purchaser in the same suit, and there is no objection to such an action on the ground of misjoinder. BHOGI LAL *v.* CHUTTER SINGH [6 N. W., 323

Distinguishing MAKUND RAM DEBI DAS [6 N. W., 324, note

4. ——— *Suit on bond.*—The plaintiff alleged in his plaint that *R.* had agreed in a bond to borrow from him R5,000 in order to institute a suit against *D.*, as to his share in certain joint ancestral property; that *R.* consequently borrowed R3,000 from him, and that while the suit was pending, *R.* and *D.*, in collusion with each other and their mother, in order to deprive the plaintiff of his money, agreed to refer the suit to their mother, who by reason of their collusion made a statement which resulted in a smaller sum being decreed to *R.* than was claimed by him, and in the property in suit remaining in the possession of *D.*; and that, as both *R.* and *D.* had taken collusive proceedings, with intent to obstruct the plaintiff's realisation of his money, they were both liable for the said sum of R3,000, and he therefore brought this suit to recover R3,000 principal, and R3,000, an equivalent of that sum, under the terms of the bond; and that the cause of action arose on the day on which *R.* and *D.* agreed to refer their suit to their mother. *Held* (PEARSON, *J.*, dissenting) that the suit was bad for misjoinder of parties. BISHESHUR PERSHAD *v.* RAM CHURUN . . . . . 5 N. W., 25

5. ——— *Non-registration as tenants.*—Where a single suit for rent against the holders of several tenures is objected to on the ground of misjoinder, the mere fact of non-registration as separate holdings is no answer to the objection. The Court should inquire whether the tenants have not in fact been dealt with as holders of separate tenures. LALUN MONEE *v.* SONA MONEE DABEE [22 W. R., 334

6. ——— *Suit against lessees and their sureties.—Jurisdiction of Revenue Court.*—Though a Revenue Court had, under Act X of 1859, no jurisdiction to take cognisance of a suit against the sureties of a lessee, a suit brought against the lessees and their sureties was not bad for misjoinder. DOORGA PERSHAD *v.* SHEORAJ SINGH [5 N. W., 222

7. ——— *Suit for share of partnership assets.—Insolvent estate.—Administration suit by creditors.—Addition as plaintiff of receiver in administration suit.*—In a suit by the widow and executrix of a testator who at his death was a member of a mercantile firm, the plaintiff claimed to be entitled to 60 cents or shares in the firm up to the date of the testator's death, and to a like share in the profits earned subsequently to his death, or to be earned by the firm so long as it continued to carry on the said agency business of the company. The defendant admitted the right of the plaintiff to the share claimed in the profits earned prior to the testator's death, but resisted her claim to any portion of the subsequent profits. The testator's estate had proved insolvent; and previously to the filing of this suit an administration suit had been filed by creditors. By a decree made in that suit on the 23rd January 1883 a receiver had been appointed, who was made a co-plaintiff with the executrix in the present suit. It was contended on behalf of the defendant that there was a misjoinder, the receiver being only entitled to sue for what might be due to the testator's estate up to the date of his death. *Held* that there was no misjoinder. The receiver might have sued for every thing that was due to the estate, but for greater safety the executrix was added as a plaintiff. BACHUBAI *v.* SHAMJI JADOWJI . . . I. L. R., 9 Bom., 536

8. ——— *Plaintiffs having separate interests.*—In a suit by two plaintiffs for the value of personal property plundered, of which one plaintiff owned certain articles and the other was the owner of others, if the cause, time, place, and parties charged be the same in both instances, the fact that both plaintiffs have not a joint interest in the whole of the property plundered by the defendants is insufficient to put them out of Court. JUGOBUNDHOO DUTT *v.* MASEYK . . . W. R., 1864, 81

9. ——— *Procedure where one plaintiff is found to have no interest.*—In a suit to recover property bought by one *S.* and his mother *D.* as guardian of his minor brother, where it was found that *D.* alone was entitled to the properties as heir to its owner, her late father,—*Held* that it was not necessary to dismiss the suit on account of its formal incorrectness, but the name of *S.* should have been struck off the record, and the suit allowed to proceed as that of *D.* alone. SREERAM HAZRAH *v.* GYARAM HATEE . . . . . 11 W. R., 507

10. ——— *Suit by mortgagee to recover possession of mortgaged property.*—In a suit by a mortgagee for possession of the mortgaged property, on the allegation that some of the defendants under subsequent mortgages and purchases had opposed him in obtaining possession; and to have it declared that the said mortgages and purchases were inoperative,—*Held* that the plaintiff had but one cause of action upon his mortgage deed, and was right in joining all the defendants in the suit. BAL KISHEN MAHAPATTUR *v.* BISTOO CHURN [22 W. R., 532

11. ——— *Suit to cancel mortgage and deed of sale.*—A registering officer having refused to register a deed of sale of certain property executed by *S.* in favour of *B.*, *B.* sued *S.* and *K.* claiming the completion of the sale with delivery of the sale deed duly executed, and possession of the property by cancelment of a deed of mortgage of the same executed in *K.'s* favour by *S.* *Held* the suit was bad for misjoinder. BEHARI LAL *v.* KUNDAN LAL . . . . . 7 N. W., 103

12. ——— *Owners of separate holdings once joint.*—A suit to recover possession as cultivators, brought by two plaintiffs,

**MISJOINDER.—Misjoinder of parties—** *continued.*

whose holdings, although originally one, have for a long time been separated and held separately, will be dismissed for misjoinder. GIRWUR *v.* NYAZ ALI [2 N. W., 306

13. ——————— *Separate interests in subject-matter of suit.*—*R.* owned one-third of an estate, and *P.*, *B.*, and *S.* owned another third jointly. In a suit in which *R.*, *P.*, *B.*, and *S.* joined in bringing against *N.*, who was in possession under a deed of gift, they claimed possession and to have the deed of gift set aside. *Held* by the Full Bench that there was no misjoinder of plaintiffs in the suit. RAM SEWAK SINGH *v.* NAKCHED SINGH [I. L. R., 4 All., 261

14. ——————— *Suit for confirmation of possession of land not in joint possession.*—The plaintiffs alleged that certain of their lands had been wrongly recorded in some settlement papers as belonging to the defendants, but declared themselves to be still in possession of them, and prayed that they might be maintained in possession by the correction of the error in the record, which threatened the disturbance of their possession. They did not allege, however, that the fields in question, or any of them, had been recorded as jointly belonging to the defendants, nor was such the case. *Held* that, under such circumstances, the plaintiffs had no such common cause of action in the matter of the suit against the defendants, as would justify the course taken in suing them all together. GUNGA RAI *v.* SAKEENA BEGUM [5 N. W., 72

15. ——————— *Suit for pre-emption.*—Three several sales of separate shares in the same mehal were the subject-matter of the deed of sale in a suit for pre-emption, and the purchasers of one of the shares and the purchaser of the other two shares were different persons, and the plaintiff claimed the right of pre-emption in respect of all three shares, and indiscriminately impleaded all the several vendors and vendees, who had no community of interest in the subject matter of the suit. The Court, allowing the plea of misjoinder, which both the lower Courts had overruled, remanded the case to the Court of first instance, in order that the plaint might be returned to the plaintiff for amendment, and the suit tried and decided afresh after amendment. GOLAM *v.* WAJIDA BIBI [7 N. W., 188

16. ——————— *Suit for redemption of mortgage.—Civil Procedure Code, 1859, s. 8.—Parties.*—*K.* was in possession of mouzah Dharmapore as usufructuary mortgagee. A share in the mouzah was sold in the execution of a decree against the shareholder. It was afterwards transferred by private sale to *S.* by the auction-purchaser. *S.* alleging that the mortgage-debt had been satisfied out of the usufruct, sued to recover possession of the share, and impleaded not only *K.*, but also the heirs of the mortgagors, and his vendee, the auction-purchaser, but no cause of action was declared against those parties nor did they resist the suit. The lower Courts dismissed the suit on the ground that separate causes of action, not between the same parties, had been included in one suit. The High Court reversed the decrees of the lower Courts so far as they dismissed the suit against the heirs of the mortgagors and the mortgagee, and remanded the suit for trial, as since the heirs of the mortgagors were interested in the account which must have been taken in the suit, it was necessary to make them parties in order that they might be bound by it. SUKHAWAT ALI *v.* KESHO TEWARI [6 N. W., 208

17. ——————— *Specific performance, Suit for.—Joinder of third person not party to the contract.*—In a suit for specific performance of a contract entered into by defendant No. 1, the plaintiff joined as a defendant a third person who alleged that he was the owner of the property, the subject of the contract, seeking to obtain possession and other relief as against such third person stating that he was a benamidar of the first defendant. There was nothing to show that such third person had any interest distinct from the first defendant. *Held* that there was no misjoinder. The principle laid down in the cases of *Houghton* v. *Money, L. R., 2 Ch. App., 166,* and *Luchumsey Ookerda v. Fazulla Cassumbhoy, I. L. R., 5 Bom., 177, viz.,* that a person not a party to the contract cannot be joined in a suit for specific performance, is only applicable where from the plaintiff's case it appears that the third party, not a party to the contract, has a distinct interest from that of the other parties to the contract, which interest is sought to be declared null and void. MOKUND LALL *v.* CHOTAY LALL [I. L. R., 10 Calc., 1061

18. ——————— *Civil Procedure Code, s. 26.—Amendment of plaint.—Specific Relief Act, s. 42.—Declaratory suit.*—Suit by six plaintiffs praying for a declaration that certain proceedings of a District Temple Committee removing them from office as trustees of a temple were illegal. Defendants pleaded that the suit would not lie because of misjoinder. *Held* that, under section 26 of the Code of Civil Procedure, the plaintiffs could not sue jointly, and that the plaint should be returned for amendment, one of the plaintiffs to be allowed to use it as his own. RAMANUJA *v.* DEVANYAKA [I. L. R., 8 Mad., 361

**MISPRISION OF TREASON.**

*See* WAGING WAR AGAINST THE QUEEN. [7 B. L. R., 63

**MISREPRESENTATION.**

*See* RIGHT OF SUIT—MISREPRESENTATION. [I. L. R., 4 Bom., 465
2 N. W., 13

**MISTAKE, CONDITION IMPOSED BY NON-FULFILMENT OF—**

*See* HINDU LAW—ADOPTION—SECOND, SIMULTANEOUS, AND CONDITIONAL ADOPTIONS . . I. L. R., 2 Bom., 377

**MISTAKE, MONEY PAID BY, IN EXCESS IN SATISFACTION OF DECREE.**

*See* CIVIL PROCEDURE CODE, 1882, s. 244 (ACT XXIII OF 1861, s. 11)—QUESTIONS IN EXECUTION OF DECREE.
[I. L. R., 1 All., 388

**MISTAKE, SUIT BROUGHT UNDER, OR WANT OF INQUIRY.**

*See* LIMITATION ACT, 1877, s. 14 (1871), s. 15 . . I. L. R., 3 Calc., 817
[I. L. R., 9 Calc., 255

**MISTAKE OF FACT.**

*See* CONTRACT ACT, s. 23—ILLEGAL CONTRACTS—GENERALLY.
[I. L. R., 3 Calc., 602

**MISTAKE OF FACT, AGREEMENT MADE UNDER, EFFECT OF—**

*See* WAIVER . . 5 Mad., 437, 444

**MOFUSSIL COURTS, POWER OF—**

——— Mofussil Courts have no power to make orders *in pœnam* against persons not parties to a suit such as is possessed by the original side of the High Court. RAMNIDHY KOONDOO *v.* OJOODHYARAM KHAN . . 11 B. L. R., Ap., 37

S. C. RAM NIDHEE KOONDOO *v.* AJOODHYA RAM KHAN . . . . . 20 W. R., 123

**MOHUNT.**

*See* CASES UNDER HINDU LAW—ENDOWMENT.

*See* HINDU LAW—INHERITANCE—RELIGIOUS PERSONS, &c.
[I. L. R., 1 All., 539
5 W. R., Mis., 57
3 Agra, 295

*See* HINDU LAW—INHERITANCE—DIVESTING OF, EXCLUSION FROM, AND FORFEITURE OF, INHERITANCE—MARRIAGE.
[I. L. R., 5 Bom., 682

*See* ONUS PROBANDI—CUSTOM.
[I. L. R., 5 Bom., 682

**MOHUNT, PERSONAL ESTATE OF—**

*See* CERTIFICATE OF ADMINISTRATION—ISSUE OF, AND RIGHT TO, CERTIFICATE.
[I. L. R., 4 Calc., 954

**MOKURRARI ISTEMRARI.**

*See* LEASE—CONSTRUCTION.
[2 B. L. R., P. C., 23
5 B. L. R., 652
3 B. L. R., 226
13 B. L. R., 124
3 W. R., 84
5 W. R., 101
I. L. R., 5 Calc., 543
I. L. R., 8 Calc., 569, 664
I. L. R., 12 Calc., 117

**MOKURRARI TENURE.**

*See* GRANT—CONSTRUCTION OF GRANTS.
[I. L. R., 1 Calc., 391

——— **Effect on, of subsequent farming lease.**—A mokurrari holding cannot be extinguished by a subsequent farming lease. DHURM ROY *v.* MUDDOOSOODUN PROSAD CHOWDHRY
[W. R., 1864, Act X, 117

**MONEY HAD AND RECEIVED.**

*See* CASES UNDER LIMITATION ACT, 1877, ART. 62.

1. ——— **Money paid under compulsion of law.**—*Payment into Court by mortgagee of amount of decree to prevent sale of mortgaged property.—Voluntary payment.*—The defendant sued one *J. H. P.* in the Small Cause Court, and obtained a decree, in execution of which he caused a steamer to be attached as being the property of *J. H. P.* Thereupon the plaintiffs, alleging themselves to be in possession of the steamer as mortgagees from *J. H. P.*, in order to obtain its release, paid the amount of the decree against *J. H. P.* into Court, and the steamer was given up. Subsequently an order was made by the Court, on the application of the plaintiffs, that the money should remain in Court pending the result of a suit to be brought by them for its recovery. They accordingly brought a suit against the defendant. The Judge of the Small Cause Court found that *J. H. P.* had no attachable interest in the steamer, and that the plaintiffs had paid the amount of the decree on compulsion. *Held*, the plaintiffs could maintain the suit, although the defendant had not actually received the amount of the decree. MORAN *v.* DEWAN ALI SIRANG
[8 B. L. R., 418

2. ——— Money paid under compulsion of law cannot be recovered back as money had and received. JUGGOBUNDHOO GHOSE *v.* CHOWDHRY MUMTAZ HOSSEIN . W. R., 1864, 205

3. ——— **Voluntary payment.**—*Payment without authority.*—If *A.* without *B.'s* authority pay *B.'s* creditor, he cannot recover back from the creditor the amount so paid. MOOL CHUND *v.* AJOODHYA PERSHAD . . . . 3 N. W., 162

4. ——— *Suit by sub-lessee against lessor for malikana which he was compelled to pay.*—Where a sub-lessee pays malikana which was not specified in the sub-lease as being a charge on the property, and as to which he was ignorant,—*Held* that he was equitably entitled to recover over from his lessor. TARSANAM *v.* KADHAREY LALL . . . . . 5 N. W., 1

5. ——— **Proceeds of joint immoveable property after satisfaction of decree by sale of tenure, Suit for.**—The plaintiff and the defendant were co-owners of a certain talook. The zemindar brought a suit for arrears of rent of the talook against the defendant, obtained a decree, and in execution of that decree sold the tenure. The proceeds of the sale, after satisfying the zemindar's

**MONEY HAD AND RECEIVED.—Proceeds of joint immoveable property after satisfaction of decree by sale of tenure, Suit for—*continued.***

decree, were taken by the defendant; and the plaintiff instituted the present suit to recover an 8 annas share thereof. *Held* that the plaintiff was entitled to recover. RAM COOMAR SEN *v.* RAM COMUL SEN [I. L. R., 10 Calc., 388

**MONEY ILLEGALLY LEVIED AS TAX, SUIT TO RECOVER—**

*See* MADRAS TOWNS IMPROVEMENT ACT III OF 1871, s. 85. [I. L. R., 1 Mad., 158

**MONEY OBTAINED BY COLLUSION AND FRAUD, SUIT TO RECOVER—**

*See* LIMITATION ACT, 1877, ART. 62 (1871, ART 60) . I. L. R., 2 Calc., 393

**MONEY PAID.**

*See* CASES UNDER LIMITATION ACT, 1877, ART. 61.

**——— by mistake.**

*See* CASES UNDER CONTRACT ACT, s. 72.

**——— by mistake in excess satisfaction of decree.**

*See* CIVIL PROCEDURE CODE, 1882, s. 244 —QUESTIONS IN EXECUTION OF DECREE. [I. L. R., 1 All., 388
6 Mad., 304
17 W. R., 14
15 W. R., 160
19 W. R., 413
4 C. L. R., 577

**——— by trespasser in possession.**

*See* WRONGFUL POSSESSION. [I. L. R., 4 Calc., 566

**——— in execution of decree, Suit to recover—**

*See* CIVIL PROCEDURE CODE, 1882, s. 244 —QUESTIONS IN EXECUTION OF DECREE. [5 B. L. R., 223
I. L. R., 1 Mad., 203
I. L. R., 6 Bom., 146
I. L. R., 6 Mad., 41

*See* CASES UNDER CIVIL PROCEDURE CODE, 1882, ss. 257, 258.

**——— to prevent sale.**

*See* CASES UNDER SALE FOR ARREARS OF RENT—DEPOSIT TO STAY SALE.

*See* CASES UNDER SALE FOR ARREARS OF REVENUE—DEPOSIT TO STAY SALE.

**——— to sirdar as wages of coolies.**

*See* ATTACHMENT—SUBJECTS OF ATTACHMENT—WAGES . 13 B. L. R., S. N., 15

**MONEY PAID—*continued.***

**——— to stay foreclosure, Suit for—**

*See* ATTACHMENT—ALIENATION DURING ATTACHMENT . 4 B. L. R., A. C., 24

**——— under mistake, Liability of payee for—**

*See* CONTRACT ACT, s. 72. [I. L. R., 1 All., 79
I. L. R., 7 Calc., 573
8 Bom., A. C., 102
3 N. W., 136

1. **——— Voluntary payment.**—*Compulsory payment of revenue.—Previous request.—L.,* having been compelled by a revenue officer to pay revenue payable by *P.*, sued *P.* to recover the amount as having been paid on his account. His plaint disclosed no cause of action against *P.*, triable in a Civil Court, for he did not plead that the payment was made at the request, expressed or implied, of *D.* There being no such request on the part of *P.* to support the action, it was held that *L.* could not recover. PATTU LAL *v.* LUCHMAN PARSHAD . 7 N. W., 155

2. **———** *Payment to stay sale.*—Plaintiff's ancestor had purchased in execution the right, title, and interest of *R.*, one of the defendants. Antecedently to that sale the right, title, and interest of *R.*, and those of two others, had been attached in execution of a decree against *D.* (the uncle of *R.* and father of the two others), and a sale having been ordered after purchase by plaintiff's ancestor, the latter, whose objections did not avail, finally prevented the sale by paying in the amount due. *Held* that as *R.* was not legally bound to pay the amount due under the decree against *D.*, and the payment was in every sense voluntary, plaintiff could not recover from her and the sons of *D.* COLLECTOR OF SHAHABAD *v.* RAM BUDDUN SINGH [10 W. R., 400

3. **———** *Money paid to protect property afterwards shown to have been wrongly attached in execution of decree.*—Where the plaintiff was obliged to bring a suit and carry it up to the Appellate Court to have his title declared to his own property which the defendant had seized and attempted to sell in execution of a decree against another person, the defendant was held to have no right either in law or equity to retain money which the plaintiff had been compelled to pay him to save the property from sale. FUTTICK CHUNDER BANERJEE *v.* GOLAM ALI CHOWDHRY . 10 W. R., 453

**MONEY PAID UNDER PROCESS OF DECREE.**

*See* COSTS—INTEREST ON COSTS. [I. L. R., 4 Calc., 229

*See* MONEY HAD AND RECEIVED. [W. R., 1864, 205

1. **——— Reversal or supersession of decree.**—Money recovered under a decree or judgment cannot be recovered back in a fresh suit or action, whilst the decree or judgment under which it

**MONEY PAID UNDER PROCESS OF DECREE.—Reversal or supersession of decree—*continued.***

was recovered remains in force. But this rule of law rests upon the ground that the original decree or judgment must be taken to be subsisting and valid, until it has been reversed or superseded by some ulterior proceeding. If it has been so reversed or superseded, the money recovered under it ought to be refunded, and is recoverable either by summary process or by a new suit. DOORGA PERSHAD ROY CHOWDRY *v.* TARA PERSHAD ROY CHOWDHRY. SHAMA PERSHAD ROY CHOWDHRY *v.* HURRO PERSHAD ROY CHOWDHRY . **3 W. R., P. C., 11 [10 Moore's I. A., 203**

Interest cannot be recovered on it. ASHRUHUNISSA BEGUM *v.* KHANUM JANU . . **6 W. R., 285**

**2. ———— *Suit to recover money paid under decree.—Act XXIII of 1861, s. 11.*** —In a suit by the present defendant against the present plaintiff for enhancement of rent, the Court of first instance and the High Court made decrees for enhanced rent. The Privy Council, in the year 1873, reversed those decrees, and held that the rent could not be enhanced. Before the date of the Privy Council judgment the present defendant obtained several other judgments for enhanced rent against the present plaintiff. No application was made by him for review of those judgments, but in 1875 he brought this suit to recover the difference between the amount of enhanced rent recovered and the fixed rent which he was bound to pay. *Held* by MACPHERSON, MARKBY, and AINSLIE, *JJ.*, following *Shama Pershad Roy Chowdhry* v. *Hurro Pershad Roy Chowdhry, 10 Moore's I. A., 203,* that the decrees for enhanced rent were superseded, and that such a suit as the present one would lie. *Held* by GARTH, *C. J.*, and JACKSON, *J.*, distinguishing *Shama Pershad's* case, that these decrees were not superseded; that the principle of *Marriot* v. *Hampton, 2 Smith's L. C., 6th Ed., 375,* applied, and that the plaintiff was not entitled to recover. JOGESH CHUNDER DUTT *v.* KALI CHURN DUTT. . **I. L. R., 3 Calc., 30: 1 C. L. R., 5**

**3. ———— Supersession of decree.—*Suit for money paid under conditional decree.—A.*** obtained against *B.* a decree for arrears of rent at enhanced rates for the year 1871. Pending an appeal from this decree, *A.* obtained a second decree against *B.* for arrears of rent at enhanced rates for the succeeding year. This decree, however, made the payment of so much of the rent calculated at enhanced rates contingent on the event of the Appellate Court affirming the decree in the former suit. *A.* executed this last decree, and obtained payment of the rent at enhanced rates. On the reversal of the decision in the former case by the Appellate Court, *B.* applied for a refund of so much of the money paid *A.* as represented the rent calculated at enhanced rates. *Held* that the portion of the second decree, relating to enhanced rent, being merely conditional, was virtually superseded by the order made by the Appellate Court in the previous suit, and that such moneys were, therefore, recoverable. MOHAMED ELAHEE BUKSH *v.* KALLY MOHUN MOOKHOPADHYA **[I. L. R., 5 Calc., 539 : 5 C. L. R., 519**

**MONEY PAID UNDER PROCESS OF DECREE—*continued.***

**4. ———— Decree subsequently found to be barred.—*Suit to recover money paid to save estate from sale under decree afterwards held to be barred.—Jurisdiction of Civil Court.*** —Application having been made to a Deputy Collector to execute a decree for rent, the judgment-debtor in order to save his tenure from sale brought the money into Court, and it was taken out by the decree-holder. This was done while the question was being litigated in the Civil Courts whether the decree was not barred by limitation. The result was that the decree was declared barred. *Held* that the judgment-debtor's only remedy was by a suit in the Civil Court to get back the money. GHANNOO SINGH *v.* RAM GOBIND SINGH **[13 W. R., 231**

**5. ———— Decree passed ultra vires and subsequently reversed.—*Suit for money paid under it.*** —The assignee of a decree having obtained execution of it in the Deputy Collector's Court under cover of a declaratory and mandatory decree of the Civil Court, which latter decree was set aside on appeal, a suit was brought against the assignee to recover the money which he had obtained by means of the execution proceedings. *Held* that the judgment-debtor or his representative (the plaintiff) had no title to recover the money unless he could show that he had been in some way defrauded by the transaction; the proceeding of the Deputy Collector giving him no cause of action by the mere fact of its having been *ultra vires* or not done in full exercise of judicial discretion. RAM GOBIND SINGH *v.* GHEENOO SINGH **[20 W. R., 406**

**6. ———— Decree afterwards reversed. —*Suit to recover money paid under it.*** —Money realised in execution of a decree may be recovered by suit, if the decree is set aside as regards the party seeking to recover. If such party was not a party to the original decree and his name appeared there owing only to misrepresentation he is not restricted to the Court executing the decree, but is at liberty to seek his remedy in a separate suit. SHERO COOMAREE DABEE *v.* SHITARAM HAZRA . **21 W. R., 346**

**7. ———— Voluntary payment.—*Executor de son tort.—Payment of debt due by deceased. —Suit to recover amount paid from heir.*** —*K.*, the widow of a deceased Hindu, sued to recover his estate from *V.*, his brother, who had taken possession thereof as heir. Pending this suit a decree was obtained against *V.* and *K.* for payment of a debt due by the deceased out of his estate. *V.* paid the debt out of his own money. *K.* having recovered the estate, *V.* sued her to recover the money paid by him in satisfaction of the decree. *Held* that *V.* was entitled to recover. KANAKAMMA *v.* VENKATARATNAM . . . . **I. L. R., 7 Mad., 586**

**MONEY PAYABLE BY INSTALMENTS.**

*See* ATTACHMENT—ALIENATION DURING ATTACHMENT . **4 B. L. R., A. C., 20**

*See* CASES UNDER BOND.

**MONEY PAYABLE BY INSTALMENTS**—*continued.*

*See* CASES UNDER CIVIL PROCEDURE CODE, 1882, ss. 257, 258.

*See* CASES UNDER LIMITATION ACT, 1877, ARTS. 74, 75.

*See* CASES UNDER LIMITATION ACT, 1877, ART. 179—ORDER FOR PAYMENT AT SPECIFIED DATE.

**MONEY PAYABLE ON DEMAND.**

*See* HINDU LAW — CONTRACT — MONEY LENT . . . 5 B. L. R., 396
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*See* CASES UNDER LIMITATION ACT, 1877, ART. 73.

**MONEY, SUIT FOR SPECIFIC SUM OF—**

*See* RES JUDICATA—CASES OF ACTION.
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**MONEY-DECREE.**

*See* CASES UNDER EQUITY OF REDEMPTION.

*See* EXECUTION OF DECREE—MODE OF EXECUTION—MORTGAGE.
[4 B. L. R., O. C., 83

*See* CASES UNDER MORTGAGE—SALE OF MORTGAGED PROPERTY—MONEY-DECREES ON MORTGAGES.

**MONEY-VALUE.**

*See* LIMITATION ACT, 1877, ART. 62.
[I. L. R., 8 Bom., 234

**MOOKTEAR.**

*See* CASES UNDER PLEADER.

*See* PRINCIPAL AND AGENT—AUTHORITY OF AGENTS . . . 14 W. R., 36
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**——— Admission of title by—**

*See* PRINCIPAL AND AGENT—AUTHORITY OF AGENTS . . 13 B. L. R., 177

**——— Giving commission to—**

*See* PLEADER—REMOVAL, SUSPENSION, AND DISMISSAL . . 11 B. L. R., 312

**——— Power of, to present application for execution of decree.**

*See* LIMITATION ACT, 1877, ART. 179 (1871, ART. 167)—JOINT DECREES—JOINT DECREE-HOLDERS . I. L. R., 4 Calc., 605

**——— and client.**

*See* PRIVILEGED COMMUNICATION.
[1 B. L. R., A. Cr., 8

**MOOKTEAR**—*continued.*

1. **——— Admission of mooktears.**—*Power of High Court.*—The High Court would not interfere with Zillah Judges in the selection and admission of mooktears, under the 39th section of the Pleaders' Rules, 1866. IN THE MATTER OF THE PETITION OF MAHOMED HOSSEIN
[5 W. R., Mis., 49

2. **———** *Rule 39 of Rules of High Court.*—The 39th of the Rules for mooktears, issued by the Court in 1866, only required that every person who had been practising as a mooktear in the Criminal Courts should be at liberty to satisfy the Judge that he was a person of good moral character and qualified by his knowledge of law and procedure, before he could be entitled to admission under that rule. But it was not the intention of the Court that parties should be subjected to regular examinations, or that the duty imposed upon the Judge should be delegated to the Magistrate. IN RE GOLUCK CHUNDER KUR . . . . 6 W. R., Mis., 29

3. **———** *Grant of certificate.—Limitation.*—There was no limitation of time for the grant of a certificate by a Judge, under Rule 39 of the Rules made by the Court in 1866 for the admission of mooktears. IN RE JOAKIM
[6 W. R., Mis., 120

4. **——— Application for leave to practise in Court in another district.**—*Omission to get certificate from first District Court.—Ground for refusal of leave to practise.*—Where a mooktear who had been practising in Backergunge applied to the Judge of the 24-Pergunnahs for a renewal of his certificate, and the Judge of the latter district refused to grant him a certificate to practise in his district without a certificate from the authorities of Backergunge of the truth of his representations, the High Court declined to interfere, thinking the refusal reasonable; but observed that, as the application had been made within three years from the date of his certificate, if the applicant procured the certificate required by the Judge within six weeks from this date, the application ought to be treated as made within time. IN THE MATTER OF KALEE CHURN BANERJEE . . 18 W. R., 295

5. **——— Appearance of mooktear.**—*Right to appear.—Criminal Procedure Code, Act X of 1872, s. 278.—Appeal in criminal case.*—An appellant in a criminal case has a right to appear and be heard by a mooktear. EMPRESS *v.* SHIVRAM GUNDO . . . . . I. L. R., 6 Bom., 14

*See* IN RE SUBBA AITALA
[I. L. R., 1 Mad., 304

6. **——— Acting as mooktear.**—*Act XX of 1865, s. 13.*—The mere bringing a plaint to a vakeel for his signature by a mooktear not duly qualified, was not an acting as a mooktear which rendered the party liable to a fine under section 13, Act XX of 1865. The Judge of a Court of Small Causes had no jurisdiction in such a matter, unless the plaint was one to be presented to that Court. IN RE MUDDUN MOHUN BISWAS . 6 W. R., Civ. Ref., 29

**MOOKTEAR.—Acting as mooktear**—*continued.*

7. ——————— *Act XX of 1865, ss. 11 and 13.—Practising without certificate.*—The writing a petition for a party who presents it in Court is not acting as a mooktear within the meaning of section 11, Act XX of 1865; and the writer is not liable to punishment under section 13 for practising as a mooktear without a certificate. IN RE KALI CHARAN CHUND
[9 B. L. R., Ap., 18: 18 W. R., Cr., 27

8. ——————— *Presenting application for execution.—Pleading.—"Act."—"Plead."—Practice on original side, High Court.*—A mooktear having presented an application for execution under Act VIII of 1859, section 207, the Munsif returned it upon the ground that it ought to have been presented through a pleader, and not through a mooktear. *Held* that, upon the proper construction of Act XX of 1865, section 11, the decision of the Munsif was right, and what the mooktear was desirous of doing comes under the word "plead." The construction put by the Munsif upon the words "act" and "plead" is the same which has been put upon them for many years on the original side of the High Court, where attorneys are excluded from making any applications in Court; but advocates, who have only the right to plead, are allowed to make them. IN THE MATTER OF ISHUR KANT BHADOOREE . . . 24 W. R., 233

9. ——————— *Act XX of 1865, ss. 13 and 42.—Practising as mooktear.—Applying for copy of judgment.—Quære,*—Whether an application by a person holding an am-mooktearnamah, but having no certificate, for a copy of the judgment in a suit in which neither himself nor his employer is a party, amounts to practising as a mooktear within the meaning of section 13, Act XX of 1865, so as to render the applicant liable to a fine under section 42 of that Act, supposing the application to have been made for and on behalf of the employer. IN RE BAMA CHURUN GHOSAL
[2 C. L. R., 553

10. ——————— *Act XX of 1865, s. 13.—Mooktear and private agent, Distinction between.—Per* WHITE and MITTER, *JJ.*—The mere fact that a person looks after an appeal and gives instructions to pleaders in connection with such appeal, does not show that such person was practising as a mooktear within the meaning of section 13 of Act XX of 1865. *Per* GARTH, *C. J.*—Where a person is in the habit of acting for persons in Courts of law, and holds himself out as ready to perform what is usually considered mooktear's work, for reward, such person is no less acting as a mooktear on any particular occasion, because he may have abstained on the particular occasion from doing any of those acts which a duly qualified mooktear is alone legally capable of performing. KALI KUMAR ROY *v.* NOBIN CHUNDER CHUCKERBUTTY
[I. L. R., 6 Calc., 585: 7 C. L. R., 562

11. ——————— *Revenue Court.—Reference to arbitration.—Held* that a mooktear in a Revenue Court must be empowered by an instrument in writing to refer the matter in dispute to arbitration in the same way as a pleader in a regular suit—chapter VI of the Civil Procedure Code, 1859, being made applicable to suits under Act X of 1859 by section 14 of Act XIV of 1863. RAM PERSHAD *v.* NAZEER HOSSEIN . . 1 Agra, Rev., 63
SHUNKER *v.* HUR NARAIN . 1 Agra, Rev., 49

12. ——— **Suspension or dismissal of mooktear.**—*Power of High Court.*—The High Court had power, under section 15, Act XX of 1865, to suspend or dismiss a mooktear from his office, when it saw "reasonable cause," although he might not have committed any act of "professional misconduct" under section 16. IN THE MATTER OF THE PETITION OF GHOLAB KHAN . 7 B. L. R., 179
[16 W. R., Cr., 15

13. ——— **Dismissal of mooktear.**—*Power of Magistrate to dismiss.*—A Magistrate has no power to give a mooktear "general dismissal" unless he is convicted of an offence involving moral turpitude or infamy. QUEEN *v.* SHAM CHAND CHOWDHRY . . . 1 W. R., Cr., 34

14. ——— **Suspension of mooktear.**—*Power of Magistrate to suspend mooktear.—Act XX of 1865.*—A Magistrate has no power to suspend a mooktear under Act XX of 1865. ROOPO BEWAH *v.* KEKAROO . . . . 21 W. R., Cr., 41

15. ——————— *Act XX of 1865, s. 16.—Suspension from practice.*—Before making an order suspending a mooktear from practising, the requirements of section 16, Act XX of 1865, should be complied with by the Magistrate. IN THE MATTER OF THE PETITION OF GHOLAB KHAN
[6 B. L. R., Ap., 83: 15 W. R., 171
IN RE BANCHANIDHI MAHANTY
[17 W. R., Cr., 6

16. ——— **Removal of mooktear.**—*Criminal charge.—Evidence justifying dismissal.*—Evidence which does not support a conviction on a criminal charge, cannot justify a removal from a profession (the present case being that of a mooktear). IN THE MATTER OF NIL KANT BISWAS
[9 W. R., Cr., 29

17. ——— **Reinstatement of mooktear.**—*Conviction on criminal charge.*—Case of a mooktear who was reinstated by the High Court to his practice after suspension by reason of his having been convicted in two cases, the circumstances of these cases not showing that the mooktear was guilty of any moral turpitude or that he was unfit to act in the Criminal Courts as a mooktear. IN THE MATTER OF KOYLASHNAUTH CHOWDHRY
[16 W. R., Cr., 41

18. ——— **Proper Court to punish mooktear.**—*Legal Practitioners Act (XVIII of 1879), ss. 10, 32.—Pleader.—Illegal practice.*—A pleader or mooktear practising in contravention of the provisions of section 10 of Act XVIII of 1879 is

**MOOKTEAR.—Proper Court to punish mooktear—*continued.***

punishable under that Act only by the Court before which he has so practised. IN THE MATTER OF THE PETITION OF GANGA DAYAL . I. L. R., 4 All., 375

**MOOKTEARNAMAH.**

——— *Validity of mooktearnamah under seal.*—A mooktearnamah under seal is as valid as a mooktearnamah under signature. A Judge is not bound or authorised to require proof of the genuineness of the seal. IN THE MATTER OF THE PETITION OF THE MAHARAJAH OF BURDWAN . 7 W. R., 475

**MORTGAGE.**


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*See* COSTS—SPECIAL CASES—MORTGAGE. [I. L. R., 3 Bom., 202

*See* CASES UNDER DECREE—CONSTRUCTION OF DECREE—MORTGAGE.

*See* CASES UNDER DECREE—FORM OF DECREE—MORTGAGE.

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*See* CASES UNDER JURISDICTION—SUITS FOR LAND—REDEMPTION.

*See* CASES UNDER LIMITATION ACT, 1877, ART. 135 (1859, S. 1, CL. 12).

**MORTGAGE—*continued.***

*See* MAHOMEDAN LAW—ENDOWMENT. [4 B. L. R., A. C., 86

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I. L. R., 11 Calc., 582
I. L. R., 6 All., 262

*See* VENDOR AND PURCHASER—NOTICE. [I. L. R., 1 Bom., 237
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*See* CASES UNDER VENDOR AND PURCHASER—PURCHASE OF MORTGAGED PROPERTY.

——— **by administrator of minor's property.**

*See* ACT XL OF 1858, S. 18. [I. L. R., 2 Calc., 283

——— **by Hindu purdah lady.**

*See* EVIDENCE—PAROL EVIDENCE—VARYING OR CONTRADICTING WRITTEN INSTRUMENTS. [1 B. L. R., O. C., 28, 31, note

**MORTGAGE**—*continued.*

**——— by member of joint Hindu family.**

*See* CASES UNDER HINDU LAW—ALIENATION—ALIENATION BY FATHER.

*See* CASES UNDER HINDU LAW—JOINT FAMILY—POWERS OF ALIENATION BY MEMBERS.

*See* LIMITATION ACT, 1877, ART. 127 (1859, s. 1, CL. 13) . **6 B. L. R., 530**

*See* VENDOR AND PURCHASER—PURCHASE OF MORTGAGED PROPERTY. **[6 B. L. R., 530**

**——— Decree on—**

*See* MANAGER OF ATTACHED PROPERTY. **[I. L. R., 3 Calc., 335**

**——— Property sold subject to—**

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**——— Property subject to—**

*See* COURT FEES ACT, SCH. I, ART. 11. **[I. L. R., 1 Bom., 118**
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**8 B. L. R., Ap., 43**

**——— Suit by mortgagor to set aside—**

*See* APPEAL—ACTS—COURT FEES ACT, 1870 . **I. L. R., 2 Bom., 145**

1. FORM OF MORTGAGES.

**1. ——— Bond containing hypothecation.**—A bond which hypothecates property for money advanced is a deed of simple mortgage. NAZINA BIBEE *v.* JUGGOMOHUN DUTT **[14 W. R., 461**

**2. ——— Proof of actual pledge and ownership of property by pledgor.**—*Decree on mortgage bond pledging land.*—The contract of hypothecation defined. A creditor suing under such a contract must prove that there was an actual pledge, and that the land was part of the debtor's estate at the time of pledge. The decree will then be for sale of the property hypothecated, unless the debtor pay the amount due with interest within a period to be fixed by the Court. CHETTI GAUNDAN *v.* SUNDARAM PILLAI . . . . . **2 Mad., 51**

**3. ——— Immoveable property made security for loan without power of sale.**—*Remedy of creditor who has a right to realise charge not amounting to a mortgage.—Foreclosure.*—Where immoveable property is made by act of parties security for the payment of a debt, but no power of sale, without the intervention of a Court, is given to the creditor, there is no transfer to him of an interest in the property until a decree for sale has been made in his favour, and the transaction does not amount to a mortgage. When immoveable property has been so made security for the payment of a debt, there can be

**MORTGAGE**—*continued.*

1. FORM OF MORTGAGES—*continued.*

**Immoveable property made security for loan without power of sale**—*continued.*

no foreclosure by the creditor, unless the terms of the contract admit of it. KHEMJI BHAGVANDASS *v.* RAMA . . . . **I. L. R., 10 Bom., 519**

**4. ——— Mortgage without change of possession.**—*Parol mortgages of chattels.*—A mortgage may be supported if proved to have been made *bonâ fide*, although the property mortgaged may have been left in the possession of the mortgagor. Mortgages of chattels may be made by parol. SHYAM SOONDER *v.* CHEITA . . **3 N. W., 71**

**5. ——— Advance to save property from sale.**—*Lien.*—A person who advances money to another for the purpose of saving a mehal of the latter from sale for arrears of rent has no lien on the property for the money advanced. *Dutt Jha* v. *Pearee Kaunt, 18 W. R., 404*; and *Enayet Hossein* v. *Muddun Moonee Shahoo, 14 B. L. R., 155 : 22 W. R., 411*, cited and held not to apply. HURRY MOHUN BAGCHI *v.* GIRIS CHUNDER BUNDOPADHYA **[1 C. L. R., 152**

**6. ——— Form of words of hypothecation.**—*Intention of parties.*—Formal words of hypothecation are not necessary to make an hypothecation valid, if the intention of the parties is sufficiently expressed. MARTIN *v.* PURSRAM . **2 Agra, 124**

**7. ——— *Uncertain agreement.*—*Semble,*—**That where certain persons, describing themselves as residents of J., give a bond for the payment of money, in which, as collateral security, they charge "their property" with such payment, they do not thereby create a charge on their immoveable property situated in J. *Martin* v. *Pursram, 2 Agra, 124*, distinguished. DEOJIT *v.* PITAMBER **[I. L. R., 1 All., 275**

**8. ——— *Charge on immoveable property.—Ambiguity.*—***A.*, to whom the Government had made a grant of certain villages, executed an instrument in favour of his brother charging the payment of an annual allowance to him and his heirs for ever on the "granted villages." The instrument did not name the villages which had been granted to *A.*, but there was no doubt as to the particular villages which had been granted to him. *Held* that the fact that such instrument did not specify the villages which had been granted to *A.* did not constitute such an ambiguity in such instrument as to render the charge created thereby invalid. *Deojit* v. *Pitambar, I. L. R., 1 All., 275*, distinguished. *Rae Manik Chand* v. *Beharee Lal, 2 N. W., 263*, followed. KANAHIA LAL *v.* MUHAMMAD HUSAIN KHAN . . . **I. L. R., 5 All., 11**

**9. ——— Agreement in petition creating a lien.**—*Money-decree.*—Where a suit was brought on a petition which the plaintiff contended created a mortgage lien on certain property, the Court found the document was executed by the mortgagor with the consent of the mortgagee, and

MORTGAGE—*continued.*

1. FORM OF MORTGAGES—*continued.*

**Agreement in petition creating a lien—** *continued.*

contained a clause by which the property was distinctly hypothecated to the plaintiff as a collateral security for the debt which the mortgagor had contracted. *Held* that the petition was a valid agreement between the parties creating a mortgage in favour of the plaintiff. Although a mortgagee has obtained a money-decree, he can bring a regular suit to enforce his mortgage lien. DUMA SAHU *v.* JEONARAYAN LAL . . **4 B. L. R., A. C., 27, note**

S. C. DOOMA SAHOO *v.* JOONABAIN LALL **[12 W. R., 362**

**10. ——— Clause in agreement giving right to sell property in default of payment.** —*Suit for money-decree on mortgage.*—The plaintiff sued to recover a sum of money, with interest, on a mortgage-deed, which contained the following clause: "If, by sale of the above land, the money receivable by you be not satisfied with charges, then you will realise the proper amount by selling my other landed properties, to which I will make no objection or excuse." The plaintiff asked for a simple money-decree. The defendant had other landed property besides the property mortgaged. *Held* that the plaintiff was entitled to a simple money-decree available against his moveable property only. JOGESWAR DUTT *v.* NITAICHUND CHUCKERBUTTY **[4 B. L. R., Ap., 48**

**11. ——— Creation of charge on property.**—*Construction of agreement.*—An agreement in a bond, executed by a mortgagor subsequently to a mortgage in the following words, *viz.*,—"after the expiry of the mortgage, when the time comes for payment of the mortgage-money, first I will pay the bond with interest, and after that I will pay the amount of the mortgage,"—is sufficient to create a charge on the mortgaged estate. BHUGWAN DOSS *v.* MAHOMED JAFER . . . . **4 N. W., 161**

**12. ——— ———** *Construction of mortgage-deed.*—The following terms in a deed—"that, for the security of the payment of this debt, the lands mentioned in this deed are pledged by me; and that, until the principal money and the interest recited in this deed are paid off, I will not on any account transfer the property pledged to anybody by sale or hiba-bil-awar, or gift or mortgage in any other way"—were held to amount to a mortgage. LALA RAMDHARI LAL *v.* JANESSAR DAS **[6 B. L. R., Ap., 14**

**13. ——— ———** *Hypothecation, Validity of, as against purchaser.*—Where an instrument whereby certain persons describing themselves therein as zemindars and shareholders of a certain named mouzah, declared that for the consideration therein expressed they mortgaged their "respective zemindari shares," and all other moveable and immoveable property owned and possessed by them, to secure the payment of the debt therein mentioned,—*Held* to be such an hypothecation as to create an in-

MORTGAGE—*continued.*

1. FORM OF MORTGAGES—*continued.*

**Creation of charge on property—***continued.*

terest in favour of the mortgagees which could not be defeated by a subsequent *bonâ fide* purchaser for value. RAE MANICK CHUND *v.* BEHAREE LALL **2 N. W., 263**

**14. ——— ———** *Words creating simple mortgage.*—A suit was brought in 1884, upon a hypothecation-bond executed in April 1875 in which the obligors agreed to repay the amount borrowed with interest, at R1-8 per cent. per mensem, in June of the same year. There was no provision as to payment of interest after due date. The bond specified certain property as belonging to the obligors and contained the following provision: "Our rights and property in the aforesaid talooka Rajapur shall remain pledged and hypothecated for this debt." *Held* that the terms of the bond by which the property was hypothecated were sufficiently clear and explicit to constitute a legal hypothecation of the shares and interests of which it recited at the opening that the obligors were owners. BISHEN DAYAL *v.* UDIT NARAIN . **I. L. R., 8 All., 486**

**15. ——— ———** *Usufructuary mortgage.—Hypothecation.—Suit for money charged on immoveable property.*—*M.* and *S.* executed an instrument in favour of *K.* and *G.* in the following terms: "We, *M.* and *S.*, declare that we have mortgaged a house situated in Ghaziabad, owned and possessed by us, for R300, to *K.* and *G.*, for two years: that we have received the mortgage-money, and nothing is due to us; that we have put the mortgagees in possession of the mortgaged property; that eight annas has been fixed as the monthly interest, in addition to the rent of the house, which we shall pay from our own pocket; that we promise to pay the aforesaid sum to the mortgagees within two years, and redeem the mortgaged property; that if we fail to pay the mortgage-money within two years, the mortgagees shall be at liberty to recover the mortgage-money in any manner they please." *Held per* STUART, *C. J.*, OLDFIELD, *J.*, and STRAIGHT, *J.* (SPANKIE, *J.*, dissenting), in a suit upon this instrument to recover the principal sum advanced by the sale of the house, that the instrument created a mortgage of the house as security for the payment of such principal sum. *Dulli* v. *Bahadur, 7 N. W., 55,* distinguished. PHUL KUAR *v.* MURLI DHAR **[I. L. R., 2 All., 527**

**16. ——— ———** *Construction of agreement.—Agreement to give possession of land till repayment of debt.—Right to redeem.*—By the terms of an agreement entered into by the plaintiff and defendants, a pending suit was compromised, and payment of an ascertained balance fund due by plaintiff was secured by the creditors (defendants) being placed in possession of plaintiff's land for fifty-five years, with the right of enjoying all the rents and profits thereof, subject to the payment of a fixed rent, part of which was to be paid to the plaintiff, and the remainder to be retained by the creditors towards payment of the debt. *Held* that the agreement was a

**MORTGAGE**—*continued.*

1. FORM OF MORTGAGES—*continued.*

**Creation of charge on property**—*continued.*

mortgage, and, as such, redeemable on the usual terms. MASHOOK AMEEN SUZZADA *v.* MAREM REDDY [8 Mad., 31

17. ——————— *Right to decree for sale of property.—Suit for money charged on immoveable property.*—The obligor of a bond for the payment of money gave the obligee a moiety of the profits of a certain mouzah up to the end of the current settlement and charged the other moiety of such profits with the payment of such money. It was also stipulated in such bond that the obligee should take the management of such mouzah, rendering accounts to the obligor, and that if the obligor failed to pay such money when due, the obligee should remain in possession of the entire mouzah until payment of all that was due. The original obligor having died his heir gave the obligee a second bond, in which he admitted the creation of the original charge and a certain further debt. A portion of such further debt he undertook to pay on a certain date, and he agreed that the balance due should be realised by the obligee from a moiety of the profits of the mouzah, according to the terms of the first bond, and that the mouzah should remain in the obligee's possession until the amounts due under both bonds were realised by him, and that he, the obligor, should have no power to sell, mortgage, or alienate the mouzah. *Held* in a suit by the obligee on the bonds that the bonds created a mortgage only of the profits of the mouzah and not of the mouzah itself, and accordingly that they did not entitle the obligee to a decree for the sale of the mouzah. GANGA PRASAD *v.* KUSYARI DIN . . . . . I. L. R., 1 All., 611

18. ——————— *Mortgage of crops that may be grown upon a certain plot of land, its nature and effect.—Transfer of Property Act.—Contract Act.*—The mortgage of indigo crops that may be grown upon a certain plot of land is a valid transaction. The transaction is neither governed by the Transfer of Property Act nor by the Contract Act; but it is in the nature of an agreement to mortgage moveable property that may come into existence in future. MISRI LAL *v.* MOZHAR HOSSEIN . . . . . I. L. R., 13 Calc., 262

19. ——————— *Will.—Devise of immoveable property subject to its being charged in a particular way.—Suit to enforce mortgage not so made.*—Certain immoveable property was devised by will upon condition that the devisee, who was also an executor of such will, should execute a mortgage of such property to the Official Trustee of Bengal for the time being to secure the payment of a certain legacy. The devisee, with the intention of giving effect to such condition, mortgaged such property to his co-executors. *Held*, in a suit by one of such co-executors to enforce the mortgage, that the mortgage, not being executed in accordance with the terms of the will, was invalid, and the suit was not maintainable. VAUGHAN *v.* HESELTINE [I. L. R., 1 All., 753

**MORTGAGE**—*continued.*

1. FORM OF MORTGAGES—*continued.*

**Creation of charge on property**—*continued.*

20. ——————— *Legal and equitable mortgages.—Mortgage of moveable property without possession.*—The Courts of this country being Courts both of law and equity, it is immaterial for the determination of claims to attached property whether a mortgage is a legal or equitable one. Where goods are mortgaged and left in the possession of the original owner, the circumstance that they are so left is not to be held as a fraud *per se* rendering the mortgage liable to be defeated as between the mortgagor and third parties, such as *bonâ fide* purchasers or judgment-creditors. But when possession is left with the mortgagor, this is a circumstance of which the Court should take notice when determining whether the mortgage is *bonâ fide* or fraudulent. A mortgagee is not bound to take possession immediately default is made. DEANS *v.* RICHARDSON . . . . . 3 N. W., 54

21. ——————— *Intention of parties.—Advance of part only of consideration.*—Where part only of the consideration has been advanced in respect of a mortgage transaction, it does not follow that the mortgagee who makes such advance is entitled to possession of a part of the mortgagor's land proportionate to the money advanced; but whether the parties by their subsequent conduct raised the inference that this was meant, may be a question of fact for the Court to determine. ACHUMBEET TEWAREE *v.* BHUGWANT PANDEY . 1 N. W., Ed. 1873, 161

22. ——————— *Agreement not to alienate.—Subsequent mortgage to pay off former one.*—A stipulation not to alienate cannot operate to annul a *bonâ fide* conveyance to a third person by the mortgagor for the purpose of paying off the original mortgage-debt. DOOKHCHORE RAI *v.* HIDAYUTOOLLAH . Agra, F. B., 7 : Ed. 1874, 5

23. ——————— *Condition against alienation.*—*Held* that where a person stipulates generally not to alienate his property, he does not thereby create a charge on any particular property belonging to him. BHUPAL *v.* JAG RAM [I. L. R., 2 All., 449

24. ——————— *Agreement not to alienate.—Form of mortgage.*—By an agreement reciting that *A.* had executed a bond in favour of *B.* for a certain sum of money, *A.*, "in order to repay the bond-money in the terms in the bond contained," declared that, "until the repayment of the money covered by the bond, he would not, from the date of the agreement, convey the property mentioned therein to any one by deed of sale, or deed of conditional sale, or mokurrari pottah, or deed of mortgage, or zur-i-peshgi tieca pottah. Should he make any of these transactions in respect of the said lands, the instrument relating thereto shall be deemed invalid, and as executed in favour of nominal parties for evading payment of the money covered by the said lands." *Held* (MARKBY, *J.*, doubting), that

MORTGAGE—*continued.*

1. FORM OF MORTGAGES—*continued.*

**Creation of charge on property**—*continued*

the instrument operated as a mortgage to *A.* of the lands comprised therein. No precise form is required to create a mortgage. RAJ KUMAR RAMGOPAL NARAYAN SINGH *v.* RAM DUTT CHOWDRY [5 B. L. R., 264: 13 W. R., F. B., 82

25. ——————— *Covenant not to alienate.—Mortgage.*—A bond contained a clause that the obligors would not dispose of any of the property, moveable or immoveable, in their possession until the debt was paid. *Held* that such a clause did not give the obligee of the bond a lien on such property, though he might sue for damages in respect of breach of contract. RAMBUKSH *v.* SOOKH DEO . . 1 N. W., 111: Ed. 1873, 159

26. ——————— *Stipulation not to alienate.*—An ikbaldawah, containing a stipulation that the debtor shall not alienate certain property till the satisfaction of the decree, does not amount to hypothecation giving the decree-holder a lien on the property. The decree-holder may sue for damages on the breach of contract by the judgment-debtors, but has no right to the property against a purchaser. CHOONER LALL *v.* PUHULWAN SINGH [3 Agra, 270

27. ——————— *Agreement not to alienate.—Construction of mortgage-deed—Gift to wife for dower.*—A mortgagor stipulated that he would not sell the property mortgaged during the subsistence of the mortgage-term; but that if he did sell, he would sell to the mortgagee at a fixed price. He subsequently alienated a moiety of the property to his wife in lieu of dower; a suit was instituted by the mortgagee to set aside the alienation. *Held*, on the construction of the mortgage-deed, that the condition did not absolutely prohibit alienation, but simply conferred on the mortgagee a pre-emption right to purchase, and that the mortgagee could not sue for avoidance of the alienation to the wife, without claiming or expressing a willingness to purchase. SHIVA CHARAN DASS *v.* ROOSTUM . Agra, F. B., 69: Ed. 1874, 53

28. ——————— *Covenant not to alienate.—Transfer to purchaser.—Claim to pay by instalments.*—A mortgage-bond provided that the mortgage-debt should be paid in instalments, and that no transfer by the mortgagor of the property mortgaged so long as the debt was undischarged, should be made or should be valid. Subsequently the mortgagor transferred the mortgaged property, the sale-deed providing that the unpaid balance of the mortgage-debt should be paid to the original mortgagees by instalments, and that any further sum should be paid by the mortgagor. The Court of first instance decreed possession to the purchaser, whose possession was resisted by the mortgagees, on payment of the unpaid balance of the mortgage-debt in full. On the appeal of the purchaser, who claimed to pay off the debt by instalments, the Court declined to interfere with the decree. MAHOMED ZAKAOOLLAH *v.* BANER PERSHAD . . . 1 N. W., Ed. 1873, 135

MORTGAGE—*continued.*

1. FORM OF MORTGAGES—*continued.*

**Creation of charge on property**—*continued.*

29. ——————— *Condition against alienation.—Auction-purchaser at sale in execution of decree.*—A transfer of mortgaged property made in contravention of a condition not to alienate is not absolutely void, but voidable in so far as it is in defeasance of the mortgagee's rights. Where, in contravention of a condition not to alienate, the mortgagor had transferred his proprietary right in the mortgaged property to a third person for a term of years, the Court declared that such transfer should not be binding on a purchaser at the sale in execution of the decree obtained by the mortgagee for the sale of the property in satisfaction of the mortgage-debt, unless such purchaser desired its continuance. CHUNNI *v.* THAKUR DAS [I. L. R., 1 All., 126

And *see* KHUB CHAND *v.* KALIAN DAS [I. L. R., 1 All., 240

30. ——————— *Right of assignee of bond containing covenant not to alienate property.*—A stipulation in a bond to the effect that the obligor will make no transfer of certain property hypothecated by such bond until the debt thereby secured has been paid up, cannot be used by a third person, not a party to the bond, to defeat a subsequent charge upon the same property granted in favour of another creditor of the obligor. KOONDUN LAL *v.* WAZEER ALI . . 3 N. W., 205

31. ——————— *Purchaser at sale in execution of decree, Right of.—Condition against alienation.*—*J.* gave *B.* a bond for the payment of money in which he hypothecated certain immoveable property as security for such payment, covenanting not to sell or transfer such property until the mortgage-debt had been paid. In breach of this condition he granted *M.* a lease of his rights and interests in such property for a term of twelve and a half years. *B.*, having sued on such bond and obtained a decree charging such property with the satisfaction of the decree, sued *M.* and *J.* for the cancelment of the lease and a declaration that it would not be binding on the purchaser at a sale in the execution of the decree, alleging that the lease had been granted to defeat the execution of the decree. The High Court refused, in view of its decision in *Chunni v. Thakur Das, I. L. R., 1 All., 126*, to interfere with the decree of the lower Court giving *B.* such a declaration. MUL CHAND *v.* BALGOBIND [I. L. R., 1 All., 610

32. ——————— *Covenant not to alienate.*—An agreement recited that *A.* had executed a bond in favour of *B.*, in which it was declared, "I promise to re-pay the whole principal, with interest, in the month of Phalgun, 1271, F.S., and till payment of the amount I will not transfer any property by conditional sale or mortgage." The bond contained no further proviso declaring invalid future alienations of the lands belonging to *A.*, in the manner specified in the bond. *Held* that the instru-

**MORTGAGE**—*continued.*

1. FORM OF MORTGAGES—*continued.*

**Creation of charge on property**—*continued.*

ment did not operate as a mortgage by *A.* GUNOO SINGH *v.* LATAFUT HOSSAIN [I. L. R., 3 Calc., 336: 1 C. L. R., 91

33. ——— *Covenant not to alienate or encumber.*—The obligors of a bond for the payment of money covenated as follows: "To secure this money, we have mortgaged a five gandas share out of a ten gandas share in each of the villages, &c. So long as the principal amount with interest is not paid, the hypothecated share will not be sold or mortgaged to any one." *Held* (PETHERAM, *C. J.*, dissenting) that the bond created a simple mortgage. *Per* PETHERAM, *C. J.*, that the bond gave the obligee a charge only on the property. SHEORATAN KUAR *v.* MAHIPAL KUAR [I. L. R., 7 All., 258

34. ——— *Agreement not to alienate.—Mortgage bond.*—In consideration of a loan, *A.* gave a bond, by which he covenanted "not to alienate the property of himself and his daughter, or the rest of his own property, until the loan secured by the bond was paid." The bond was recorded under the Registration Act in the book numbered "four" required to be kept by the Act. *A.* subsequently sold his immoveable property, and the conveyance was recorded in the book numbered "one," in which documents relating to immoveable property have to be recorded. In a suit by the bond-creditor against the purchaser seeking to establish a lien on *A.'s* immoveable property by virtue of the bond,—*Held* that the general words used in the bond were not sufficient to give a lien upon any specific property, and that the fact that the bond had been recorded in book "four" showed that it was not the intention of the parties that the immoveable property of the debtor should be charged. NAJIBULLA MULLA *v.* NUSIR MISTRI . . I. L. R, 7 Calc., 196 [8 C. L. R., 454

*See* also DOSS MONEY DOSSEE *v.* JONMENJOY MULLICK [I. L. R., 3 Calc., 363: 1 C. L. R., 446

35. ——— **Usufructuary mortgage.**—*Construction of deed of mortgage.*—In ascertaining whether a deed, confessedly ambiguous, amounts to an usufructuary mortgage or to a lease in perpetuity, the Judge should look within the four corners of the instrument before him and ascertain from it what kind of transaction the parties had in view when they entered into it. In the case of an usufructuary mortgage, where no term is specified, the mortgagor is entitled to re-enter on the property when, on taking an account, he is able to show that the principal and interest have been satisfied. LALA DOUL NARAIN *v.* RUNJIT SINGH . 1 C. L. R., 256

36. ——— *Advance on zur-i-peshgi lease.*—A lease was granted on a zur-i-peshgi advance for seven years at an annual jumma of R214-4, from which a deduction of R111-15 was to be made on account of interest; and it was also

**MORTGAGE** *continued.*

1. FORM OF MORTGAGES—*continued.*

**Usufructuary mortgage**—*continued.*

stipulated that if, after the expiration of the lease, the loan was not repaid, the lease should continue. *Held* that, under the circumstances as stated above, the transaction between the parties was a mortgage. KISHTO COOMER SINGH *v.* CHOWDREE BEERAJ SINGH . . . . . 2 Hay, 159

37. ——— *Advance of money with possession of land till advance is repaid.*—Where a sum of money is advanced, and the person making the advance is put in receipt of the rents and profits of land by way of payment of interest on the loan, this is not a mere license or permission to the lender of the money to receive the rents, revocable at the will of the borrower, but is in the nature of a mortgage transaction. KHOOSHAL RAE *v.* JANKEE DOSS . . . . . 2 N. W., 9

38. ——— *Advance by tenant to landlord on account of security for payment of rent.*—A sum taken by a landlord as an advance, to be credited to his lessee in his accounts as rent, may be considered as security for the payment of the rent, but does not change the lease into a mortgage. GRIDHAREE SINGH *v.* COLLIS [8 W. R., 497

39. ——— *Zur-i-peshgi lease with covenant not to alienate or evict lessee.*—By a zur-i-peshgi lease granted upon the advance of R5,517, the lessee was to hold possession of certain villages for the term of five years, and to pay himself, out of the proceeds of the villages, interest on the loan; and the lessor undertook not to mortgage or alienate the property during the term, and not to oust the lessee, or, if he did, that he would pay him R1,000. Before the expiration of the term the villages were taken in execution, and sold under a decree at the suit of a third party, and the lessee turned out of possession. *Held* that the lessee had no claim against the villages for the principal money, and that the sum of R1,000 was forfeited. NUNDLALL *v.* KULLIANABUTTEE . Marsh., 209: 1 Hay, 532

40. ——— *Usufructuary lease for loan.—Construction of deed.—Suit for possession under deed of lease or mortgage.*—*A.*, the lessee for a term of a zemindari, brought a suit against *B.*, the lessor, to prevent *B.* interfering with his possession which he had under the lease granted to him by *B.* in consideration of certain pecuniary advances made by him to *B.* The relief sought was in effect an injunction to restrain *B.* from collecting the revenue of the zemindari. The defence set up by *B.* in his answer was in substance that the lease was an executory contract, and being without consideration could not be enforced; and was, moreover, void for maintenance, by reason of a subsequent agreement for the advance of a sum of money to carry on a suit which had not been carried out. The Judge of the Civil Court adopted this view and held the lease void. The High Court of Madras on appeal treated the case as a suit for specific performance and decreed execution of the lease. On appeal the

**MORTGAGE**—*continued.*

1. FORM OF MORTGAGES—*continued.*

**Usufructuary mortgage**—*continued.*

Judicial Committee sustained the decree as to possession under the lease, but as it appeared from the evidence questionable whether the transaction in respect of the lease did not really operate only as a loan, and as a right to redeem might exist, the affirmance was made with a declaration that it was to be without prejudice to the claim (if any) of *B.* to which he might be entitled, and to any question which might be raised as to the amount which was actually advanced by *A.* to *B.* KAMALA NAIKEN *v.* PITCHACOOTTY CHETTY . **10 Moore's I. A., 386**

**41.** ——————— *Party paying off debt, Right to possession of.*—A party who by paying off a mortgage becomes an usufructuary mortgagee in place of the original zur-i-peshgidar, does not need to sue for the amount due, but is entitled to remain in possession until the whole debt has been discharged by the usufruct. FYEZOOLLAH *v.* KAZIM HOSSEIN **[14 W. R., 29**

**42.** ——————— *Right to proceed against land to realise debt.*—A covenant to put the creditors into possession of certain property which they were to retain for a certain period, taking the profits in lieu of interest, is only an usufructuary mortgage and not a deed of hypothecation, and a suit to bring the property to sale for the realisation of the amount due under the deed is not maintainable. DULLI *v.* BAHADUR . . . **7 N. W., 55**

**43.** ——————— *Covenant not to lease.—Lease of property mortgaged.—Suit to set aside lease.*—*A.* mortgaged certain property to *B.*, agreeing, amongst other things, not to grant in zur-i-peshgi or mortgage the property to any one so as to cause any difficulty in the realisation of the money advanced under the mortgage-bond. *A.* subsequently leased in zur-i-peshgi part of the property to *C. B.* obtained a sale-decree against *A.* on his mortgage, and at the sale himself became the purchaser of the property. He then brought a suit against *C.* to set aside the zur-i-peshgi lease, and to obtain khas possession. *Held* that the covenant in the mortgage-bond merely created a personal liability between *A.* and *B.*, and that the sale under *B.'s* mortgage-decree did not put an end to the zur-i-peshgi lease or affect the interests of the zur-i-peshgidar; that *B.'s* suit against *C.* was wrong in form; and that his proper course was to sue to have his right declared to sell the property in satisfaction of his mortgage-debt, so as to give the zur-i-peshgidar an opportunity of redeeming. RADHA PERSHAD MISSER *v.* MONOHUR DASS **[I. L. R., 6 Calc., 317 : 7 C. L. R., 293**

**44.** ——— **Mortgage by conditional sale.**—*Law of mortgage in Madras and Bombay.*—The contract of mortgage by conditional sale is a form of security known throughout India, and which, by the ancient law of India, which must be taken to prevail in every part of India, where it has not been modified by actual legislation or established practice, is enforceable according to its letter. From the year 1858 the Courts of the Madras Presidency, and from the year 1864 the Courts of the Presidency of Bombay, have erroneously, and in contravention of the law of India as declared by the earlier decisions, adopted, with regard to this class of securities, doctrines which the English Courts of Equity have applied to mortgages in England. *Quære,*—Whether in dealing with future cases the Judicial Committee ought to follow the new course of decision which has sprung up in these Presidencies, or their own decision in the case of *Pattabiramier* v. *Vencatarow Naicken, 7 B. L. R, 136 : 13 Moore's I. A., 560.* The essential characteristic of a mortgage by conditional sale is, that on the breach of the condition of repayment the contract executes itself, and the transaction is closed and becomes one of absolute sale without any further act of the parties or accountability between them. Where land was mortgaged on a condition that the rents should be applied first in payment of the Government revenue, next in payment of the salary of a manager, and afterwards in reduction of the debt, and it was further stipulated that instalments of a fixed amount should be paid up to a certain date by the mortgagor to the mortgagee, and that on that date a settlement of accounts should be made, and in the event of there being a balance against the mortgagor, and his not paying the same on a date fixed, the mortgagee should become the purchaser at a fixed value of so much of the land as would satisfy such balance, retaining his right to sue the mortgagor personally for any further sum that might remain due, owing to the whole of the land, as valued, growing insufficient to satisfy such balance,—*Held* that this was not a contract of mortgage by conditional sale. THUMBUSAMY MOODELLY *v.* HOOSAIN ROWTHEN . **I. L. R., 1 Mad., 1 [L. R., 2 I. A., 241**

**45.** ——————— *Sale expiring before 1858.*—When the term of a conditional sale, whether made as a security for a loan or not, had expired before 1858, the rule laid down in *Thumbusawmy's case, I. L. R, 1 Mad., 1,* must be observed and effect given to the contract. BAPIRAZU *v.* KAMARAZU . . . **I. L. R., 3 Mad., 26**

**46.** ——————— *Continuing debt.*—When one party to a transaction alleges it to be a mortgage and the other alleges it to be a sale, the question for consideration is whether or not there continued to be a debt from the former to the latter. The plaintiffs sued for possession of certain lands, alleging that they had been mortgaged to the defendant by their father under two documents. The defendant produced them and relied upon them as deeds of sale, which conveyed to him absolutely the lands mentioned in them. The form of the instruments was not conclusive, but it appeared *aliunde* by the conduct of the defendant himself that the deeds were intended as mere securities for money, and that he had treated them as such. Certain entries in the defendant's accounts also treated the respective considerations named in the deeds as continuing debts due to the defendant from the plaintiffs' father. The

**MORTGAGE**—*continued.*

1. FORM OF MORTGAGES—*continued.*

**Mortgage by conditional sale**—*continued.*

Subordinate Judge awarded the plaintiffs' claim, but his decree was reversed, on appeal, by the Assistant Judge, who held that the transaction was a sale and not a mortgage. On appeal to the High Court,—*Held* that, under the circumstances mentioned above, a Court of Equity would regard the instruments as mere securities for money. GOVINDA *v.* JESHA PREMAJI . . . . **I. L. R., 7 Bom., 73**

**47.** ——————— *Sale since 1858.—Construction of right of redemption.—Per Curiam* (INNES, *J.*, dissenting).—In the Madras Presidency, where contracts of mortgage by way of conditional sale have been entered into subsequent to the year 1858, redemption after the expiry of the term limited by the contract must be allowed as suggested in *Thumbusawmy Moodelly* v. *Hossain Rowthen, I. L. R., 1 Mad., 1. Per* INNES, *J.*—Contracts of mortgage and conditional sale must be construed in accordance with the intention of the parties, which can only be gathered from the terms of the instrument. It cannot be presumed that parties to mortgages by way of conditional sale executed since 1858 contracted with reference to the rule enforced by English Courts of Equity, adopted by the Sudder Court in 1858, and followed for thirteen years in this Presidency. RAMASAMI SASTRIGAL *v.* SAMIYAPPANAYAKAN **[I. L. R., 4 Mad., 179**

**48.** ——————— *Deed, Construction of.—Bai-bil-wafa.—Foreclosure in the Central Provinces.*—By a bond, dated 10th February 1857, a certain village was mortgaged by one *G.* to the appellants and their father as security for a loan; the bond providing that, "if I fail to pay the money as stipulated, I and my heirs shall, without objection, cause the settlement of the said village to be made with you." The interest of *G.* in the village was described as that of a malguzar, and his proprietary right therein was declared by the revenue authorities shortly after the execution of the mortgage, but his payments of revenue being in arrear, the Board of Revenue granted a lease of the village for ten years to the appellants' father. The mortgagees in a suit on the bond obtained the following decree on 3rd November 1860: "As the defendant acknowledges the plaintiffs' claim, it is ordered that a decree be given to the plaintiffs for principal and interest and costs against the defendant and the mortgaged property." In proceedings in the Civil Court taken under this decree, the mortgagees asked for possession of the village, and obtained, on 17th July 1862, an order, in pursuance of which they were put in possession, an appeal by *G.* being rejected. *G.* took various steps to obtain possession of the mortgaged property, or a declaration of his proprietary interest therein, but failed in his endeavours, an application for a grant of the proprietary right in the village, and an appeal from an order cancelling his pottah, being rejected by the revenue authorities on 8th December 1864 and 27th July 1865, respectively; and on 12th August 1867 *G.* conveyed the village by deed of sale to the respondents. In a suit brought by them

**MORTGAGE**—*continued.*

1. FORM OF MORTGAGES—*continued.*

**Mortgage by conditional sale**—*continued.*

to redeem the mortgage and obtain possession of the property,—*Held* that the effect of the bond was to create a simple mortgage, and not a conditional deed of sale; and that the proceedings taken under the decree of 3rd November 1860, and the order made therein of 17th July 1862, by virtue of which the mortgagees obtained possession of the mortgaged property, did not operate so as to extinguish the right of redemption. The rule that a bai-bil-wafa does not become absolute upon breach of the condition as to payment, without proceedings for foreclosure, obtains in the Central Provinces of India. GOKUL DOSS *v.* KRIPARAM **[13 B. L. R., P. C., 205**

**49.** ——————— *Deed of sale convertible into a mortgage.—Construction of deed.*—Where a deed, which on the face of it was described as a mortgage, stated that the grantee was already in possession under a previous mortgage by the grantor and was under the second deed to receive the profits in liquidation of interest so far as they would go, and that the grantor was not to be liable to repay the principal money or such balance of interest (if any) as might accrue upon it, unless he adopted a son, and the grantee, unless that event happened, was to enjoy the property conveyed in right of purchase for the sum (principal and interest) due to him,—*Held* that the deed was a sale liable to be converted into a mortgage, and not a mortgage liable to be converted into a sale. *Howard* v. *Harris, 1 Ver., 190; Ramji* v. *Chinto, 1 Bom., 199; Shankurbhai* v. *Kassibhai, 9 Bom., 69,* referred to and distinguished. SUBHABHAT *v.* VASUDEVBHAT . . **I. L. R., 2 Bom., 113**

**50.** ——————— *Deed of sale convertible into a mortgage.—Construction of deed.—Redemption, Right of.—Alienation of immoveable property.*—Where the grantor executed to the grantee a document reciting a mortgage by the former to the latter of certain lands for R125, on which R200 were then due from the grantor to the grantee, and containing an agreement that the grantee should pay R75 to another creditor of the grantor, and purporting, in consideration of R275 so made up, absolutely to sell and convey the mortgaged lands to the grantee, and the grantee executed to the grantor a document of the same date reciting the sale of the mortgaged lands by the grantor to the grantee for the consideration of R275, and covenanting that the grantee should reconvey to the grantor the lands, the subject of the grant, if the grantor should repay to the grantee the sum of R275 within a certain period, and providing that, in case of default in such payment within such period, the covenant for reconveyance should become null. *Held* that the transaction was a sale and not a mortgage, and that, consequently, the grantor had no right to redeem the lands after the expiration of the period so fixed for the payment of R275 by the grantor to the grantee, there being no evidence or allegation that, at the date of the execution of the two documents, the sum of R275 was an insufficient consideration for

**MORTGAGE**—*continued.*

1. FORM OF MORTGAGES—*continued.*

**Mortgage by conditional sale**—*continued.*

the sale of the lands, nor any stipulation that the grantee should account for the rents and profits received by him, or that the grantor should pay interest on the R275, nor anything to show that the grantor remained in possession after the execution of the two documents, or that subsequently to that time any advances were made by the grantee to the grantor on the security of the lands, nor anything in either document which pointed to a right on the part of the grantee to recover from the grantor the sum of R275, or any part of it, before, at, or after the period named for the repurchase. The law as laid down in *Ramji* v. *Chinto, 1 Bom., 199, viz.*, once a mortgage always a mortgage, is still in force, in the Presidency of Bombay, with regard to mortgages containing clauses of conditional sale, whether executed before or after 1858. The ancient law and usage of the country respecting gahan lahan mortgages, and generally the alienation of immoveable property, discussed. BAPUJI APAJI *v.* SENAVARAJI MARVADI [I. L. R., 2 Bom., 231

51. ———— *Vendor and purchaser.—Sale.—Held* that an agreement by the purchaser of certain immoveable property that it should, on payment by the vendor of a certain sum within a specified time, be restored to the vendor, and that on failure of such payment it should become the absolute property of the purchaser, did not create the relation of mortgagor and mortgagee between the parties, and that upon the vendor's failure to comply with the terms of the agreement, the property vested in the purchaser. BHUP KUAR *v.* MUHAMMADI BEGAM . . . . I. L. R., 6 All., 37

52. ———— *Sale of perpetual lease, with conditional agreement to sell back to vendor, not amounting to mortgage.—Reservation of right to repurchase.—Right to redeem.*—A purchaser of land, another person advancing the purchase-money for him, granted to the latter a mokurrari patta or perpetual lease, not as a security for the debt, but as an absolute acquittance of it. At the same time an ikrarnama was executed, whereby it was stipulated that when the grantor or his heirs should pay to the grantee or his heirs the amount of the above debt without interest, out of his or their own moneys without borrowing from any other person, then the patta should be cancelled, the grantor having no claim to mesne profits during the possession of the mokurraridar. *Held* that, with regard to the terms of the instruments, and the circumstances under which they were made, this transaction was not a contract of mortgage, but evidence of a sale and acquittance of a debt with power reserved to the vendor to repurchase under certain conditions personal to him. SITUL PURSHAD *v.* LUCHMI PURSHAD [I. L. R., 10 Calc., 30: 13 C. L. R., 382 L. R., 10 I. A., 129

53. ———— **Mortgage by conditional bill of sale.**—*Joint property held benami in name of co-sharers.—Interest of mortgagee.*—An estate was

**MORTGAGE**—*continued.*

1. FORM OF MORTGAGES—*continued.*

**Mortgage by conditional bill of sale**—*continued.*

bought benami in the name of *A.* by the father of *A.* After the father's death a sum of money was raised by conditional bill of sale signed by *A.* as proprietor and by his brother *B.* as motullah. Afterwards, and after the death of *B.*, and after *B.*'s heirs had separated from *A.*, *A.* raised a further sum by a bill of sale, reciting the former conditional bill of sale, and that the additional sum was raised to discharge the same. *Held* that if the grantee took with notice that he was entitled to a half share only of the estate the additional charge would operate as a mortgage of such half share only; but that portion of the money for which the original bill of sale was given was a charge on *B.*'s share as well as on the possession of his heirs. KISHEN CHUNDER GHOSE *v.* NUND KISHORE SINGH . . . . . Marsh., 651

2. CONSTRUCTION.

54. ———— **Rights of mortgagee.**—*Proviso in case of alienation of mortgaged property.*—Certain words in a mortgage-deed stipulating that in the event of the property mortgaged being sold in execution of a decree, or otherwise alienated, the mortgagee should recover from any other property in the possession of the mortgagor, whose person should also be liable for debt, were construed as merely intended to give some supposed further security to the mortgagee, but not to take away his right to issue notice of foreclosure and obtain possession by a suit, even though the mortgaged property were sold away. ACHUMBIT MISSER *v.* LALLA NUND RAM [11 W. R., 544

55. ———— *Construction of instrument of mortgage*—An instrument, mortgaging villages for a sum payable within a certain period by instalments, and making distinct provision that, upon default in payment of an instalment, the mortgagee by his servants was to take possession, and after paying the revenue and the expenses of collection, to credit the balance towards payment of the instalment, also contained the following: "Should on the expiration of the term of this instrument, any money remain due then, till payment thereof, possession will continue according to the terms herein set out. If I do not accept this, then, as soon as the breach of promise occurs, they will at the end of the year realise the whole amount of instalment by sale of the villages and of other moveable and immoveable property belonging to me." *Held* that such an instrument must be taken as a whole, and that the true construction to be put on it should be that which, being reasonable, would also give effect to all parts of it. *Held*, accordingly (on the contention that these words negatived the mortgagee's right to take possession upon default in payment of an instalment, leaving him only a right to proceed to sale) that, as this construction would not give due effect to the first part of the instrument, it must yield to a construction which, not only would give such effect, but would also be the more reasonable one,—*viz.*, that the

**MORTGAGE**—*continued.*

2. CONSTRUCTION—*continued.*

**Rights of mortgagee**—*continued.*

mortgagee should take possession upon such a default, and also might sell if the mortgagor objected to his applying the rents in reduction of the principal and interest due. DEPUTY COMMISSIONER OF RAE BARELI *v.* RAMPAL SINGH

[I. L. R., 11 Calc., 237: L. R., 12 I. A., 1

**56.** ——— **Arrangement for repayment by lease.**—*Set-off of rent.*—On the 1st of November 1866, *A.* covenanted to pay to *B.* R80,351 with interest, on the 16th of May 1870, and pledged certain property for repayment thereof. At the time of the mortgage this property was held by *B.*, the mortgagee, under a lease which expired on the 10th of September 1870. On the 5th of November 1866 *A.* granted to *B.* a lease of the property hypothecated for a term of seventeen years from the 10th of September 1870, at a rent of R20,541 a year. The lease recited the mortgage-debt, and the necessity of providing for payment of it, and contained an agreement that, out of the annual rent *B.* should retain R16,500 on account of the debt, and pay the remainder to *A.* In a suit to redeem and cancel the bond and lease,—*Held* that they did not form one mortgage transaction, but were separable and separate, and that *A.* would only be entitled to set off the rent retained against the mortgage-debt and interest, and thenceforth to receive the full rental of R20,351 a year for the term of the lease yet unexpired. JOOMNA PERSHAD SOOKOOL *v.* JOYRAM LAL MAHTO

[2 C. L. R., 26

**57.** ——— **Conditional sale.**—*Karanamah.*—The appellant became security for the payment by the respondent of the Government dues in respect of a mootah then about to be sold for those dues, and by the first karanamah entered into by the parties it was stipulated that, on default of the respondent to pay any part of the instalments, the appellant was to obtain a transfer of the property, and to retain it, after returning to the respondent the money which may have been paid by him. By a second karanamah entered into on the same day, the plan of a conditional sale provided by the first karanamah was reduced to a mortgage, with a covenant between the parties that whenever the appellant should take possession of the mootah for the purpose of enabling him to discharge the amount for which he became security, he should restore the mootah to the respondent as soon as he was reimbursed all that he had advanced out of the rents and profits of the mootah. *Held* that the transaction was in the nature of a mortgage, and that there was no such inconsistency between the two instruments as to make the second invalid. KAKERLAPOODY JAGGANADHA RAZ *v.* VUTSAVOY JAGGANADHA JAGAPUTTY RAZ

[5 W. R., P. C., 117: 2 Moore's I. A., 1

**58.** ——— *Relief after time named in conveyance.*—Plaintiff executed to defendant a document of which the following is a translation:—"The muddata kriyam executed on the 10th April 1835 by the Madugula zemindar to the zemindar of Bobbili. As I have conveyed to you as sale for R6,000 the Papuchetti Seri adjoining the land of kasbah Jagganantha-puram in the zemindari of Madhugula, they are given you for absolute sale, so the said sale money has been received at the time of sale. In the event of my paying you the principal R6,000 within six months from this date, you must give back the said land Papuchetti Seri to me. In the event of our not being able to pay according to the said stipulation, you should hereditarily from son to grandson enjoy the produce of the said land, yourself paying to Government the assessment fixed on a sub-division, reckoning this sale money to be a pure sale. This muddata kriyam has been executed with my consent." *Held* that this document was a sale with a condition for re-purchase. The decisions of the late Sudder Court of Madras have carried the doctrine of relief after the time named in the conveyance so far as to say that wherever the security for money is an object of the transaction, no sale can become absolute. The High Court have followed the English rule and have held the question one of construction, admitting however, for the purpose of the construction, other documents and oral evidence. LAKSHMI CHELLIAM GARU (ZEMINDAR OF BOBBILI) *v.* KRISHNA BHUPATI DEVU MAHARAZ GARU (ZEMINDAR OF MADUGULA) . 7 Mad., 6

**59.** ——— *Construction of deed.—Suit for possession.*—The defendants borrowed money from the plaintiff without interest but executed a deed stipulating that the sum borrowed was to be repaid on a given date, and that if not paid then the defendants should execute a putni lease of certain properties set forth in the deed, the sum borrowed being considered as a bonus for such lease; and that if the borrowers did not execute such a lease, this deed should be counted as a putni patta. The money not having been paid, and the lease not executed, the plaintiffs sued for possession,—*Held* that they were entitled to possession on the footing of a putni, from the date of suit, and that the transaction was not a conditional sale, but a contract to create a putni, for a certain consideration unless that sum was paid on a particular date. JUSEEMOODDEEN BISWAS *v.* HURO SOONDUREE DOSSEE

[19 W. R., 274

**60.** ——— *Mortgage.—Redemption, Right of.—Interest.—Construction of deed.*—In Chait 1275, Fasli (March 1868), *M.*, having borrowed R11,200 from *S.*, gave him a mortgage by way of conditional sale of certain immoveable property for a term of seven years, that is to say, extending over the years 1276, 1277, 1278, 1279, 1280, 1281, and 1282 Fasli. The sum payable as the interest of each of these years was fixed at R1,680. The mortgagee obtained payment of his interest for four years from 1276 to 1279 Fasli inclusive by bringing suits against the mortgagor. The interest for 1280, 1281, and 1282 Fasli, as well as the principal sum, remaining unpaid, the mortgagor sued for redemption of the mortgaged property on payment of the principal sum, and the interest of the last year, 1282 Fasli, only, contending that the interest of the other years, 1280

**MORTGAGE**—*continued.*

2. CONSTRUCTION—*continued.*

**Conditional sale**—*continued.*

and 1281 Fasli, was not secured on the mortgaged property, but was, under the terms of the instrument of mortgage, realisable by suit from his non-hypothecated property and person. *Held*, on the construction of the instrument of mortgage, that the mortgage was not redeemable on payment of the last year's interest only, but on payment of the interest of the other years as well. SURJU PRASAD *v.* MANSUR ALI KHAN . . . . I. L. R., 5 All., 463

61. ——————— *Redemption.—Condition precedent.*—In a mortgage-deed executed by a Mahomedan to a Hindu in 1820, it was stipulated that the principal and interest were to be repaid within five years, that an account was to be taken at the end of five years of the profits of the lands and any sum found due to the mortgagee, after deducting the profits of the lands from the debt, was to be paid to the mortgagee, and that the payment was to be endorsed on the bond and the lands resumed; and it was provided that, if the amount due to the mortgagee at the expiry of the said term was not paid, the lands were to be treated as sold and delivered, instead of mortgaged. *Held* that, no account having been taken as provided, the mortgage was redeemable within sixty years. MAVULALI AMIRUDIN SHARIF *v.* GUNDU SOBHANADRI . I. L. R., 6 Mad., 339

62. ——— **Usufructuary lease.**—*Conditions of huq-i-ijara to be reserved to mortgagor.—Construction of mortgage-deed.*—The defendant advanced a sum of money to *R.* and *T.* who granted him as security for repayment an ijara lease of a mouzah (representing that they were entitled to 16 annas), in which lease a jumma was reserved, a portion whereof was to be applied to the discharge of interest to the defendant and a small sum to go to the mortgagors as huq-i-ijara. After execution of the ijara the defendant was dispossessed of 8 annas by a third party who claimed to be a sharer, and he had to sue for and obtain a partition of the remaining 8 annas which he retained, for what it was worth, as security. The plaintiffs bought the mortgagors' share, and now sued for the huq-i-ijara originally reserved,—*Held* that the mortgagors could not claim any benefit under the ijara lease until all the benefits which it pretended to secure to the defendant were realised by him. ACHUMBIT SINGH *v.* KESHO LALL [20 W. R., 128

63. ——— **Usufructuary mortgage.**—*Condition for reconveyance of property.*—In a usufructuary mortgage it was stipulated that the property was to be reconveyed on repayment of the principal sum lent, but nothing was said as to interest,—*Held* that the condition implied that the usufruct was intended to be received by the mortgagee in lieu of interest, and therefore the mere fact that the amount of the principal had been received from the usufruct was no ground for the mortgagor being entitled to re-possession of the property. BUNWAREELAL *v.* MAHOMED HOSSEIN KHAN . . 2 Hay, 150

**MORTGAGE**—*continued.*

2. CONSTRUCTION—*continued.*

**Usufructuary mortgage**—*continued.*

64. ——————— *Power to cancel zur-i-peshgi lease.*—The words in a zur-i-peshgi lease, "after the expiry of the term it will be competent to me (the mortgagor) in the month of Jeit of any year I can to pay the zur-i-peshgi and cancel the lease," were held to do no more than bar the mortgagor's re-entering in the middle of any year, in the event of the mortgagee's occupation continuing after the expiry of the lease, owing to the mortgagor's default to pay off the loan, and that it contained no undertaking by the mortgagee to hold on until it suited the mortgagor to pay him off. ROY GOWREE SUNKUR *v.* BHOLEE PERSHAD . 17 W. R., 211

65. ——————— *Construction of.—Arrears of rent from tenants and mortgagors, Right to.*—By the terms of a deed of usufructuary mortgage the mortgage was redeemable at the end of the term by payment of the principal and the arrears of rent due from the mortgagors and the tenants. It was held, in a suit by the mortgagee (who was in possession of the mortgaged property at the time of suit), to recover the mortgage-money and arrears of rent, with regard to the rents due by tenants, that it was clearly the intention of the parties that arrears reasonably due were to be paid and not such as arose from the negligence of the mortgagee, and as it was not shown that the arrears due by tenants could not have been realised by due diligence, and the mortgagee had it in his power to realise the rents, the mortgagee was not entitled to recover such arrears. CHOTI LAL *v.* KALKA PARSHAD . . . . 7 N. W., 100

66. ——————— *Suit for excess of Government revenue paid under.*—By the terms of a deed of usufructuary mortgage the mortgagor accepted the liability on account of any addition that might be made tot he demand of the Government at the time of settlement. During the currency of the mortgage tenure the mortgagees, averring that they had to pay a certain sum in excess of the amount of Government revenue entered in the deed of mortgage from 1279 to 1281 Fasli, sued the mortgagor to recover such excess. *Held* that, inasmuch as no settlement of accounts was contemplated or was necessary under the provisions of the deed of mortgage, and such deed did not contain a provision reserving the adjustment of any sums paid by the mortgagees in excess of the amount of the Government demand at the time of the execution of such deed to the time when the mortgage tenure should be brought to an end, the suit was not premature and could be entertained. NIKKA MAL *v.* SULAIMAN SHIKOH GARDNER . . I. L. R., 2 All., 193

67. ——— **Mortgagor and mortgagee.**—*Acts of mortgagor prior and subsequent to mortgage.*—A mortgagor's acts prior to the date of the mortgage bind the mortgagee; but his subsequent acts do not bind the latter, unless they are done by the mortgagor as agent for the mortgagee. KRISHNAJI LAKSHMAN RAJVADE *v.* SITARAM MURARRAV JAKHI . . . I. L. R., 5 Bom., 496

MORTGAGE—*continued.*

3. POSSESSION UNDER MORTGAGE.

68. ——— **Rights of mortgagee in possession.**—A mortgagee taking possession under the terms of the mortgage is entitled to have the property in the same condition as it was in when it was mortgaged. GOBIND CHUNDER BANERJEE *v.* WISE . . . . . **12 W. R., 19**

69. ——— **Covenant for possession by mortgagee.**—*Omission to give possession.—Right to sue for mortgage-money.*—A deed of mortgage and conditional sale contained a covenant for possession by the mortgagee during the mortgage term. Possession was withheld though the mortgagor received the mortgage money. *Held* that an action would lie by the mortgagee against the mortgagor for recovery of the principal and interest, money advanced. OODIT PURKASH SINGH *v.* MARTINDELL **[4 Moore's I. A., 444**

70. ——— **Obstruction in getting possession.**—*Usufructuary mortgage.—Right of mortgagee to sue for mortgage-money.—Transfer of Property Act (IV of 1882), s. 68 (b) and (c).*—A usufructuary mortgagee, to whom possession of the mortgaged property had been delivered, sued the mortgagor for the mortgage-money on the ground that the mortgagor had sold a part of the mortgaged property, and the purchaser had deprived him of possession of such part. One of the conditions inserted in the deed of mortgage was that, if "on the part of the mortgagor, or other persons, any kind of dispute or any interference or obstruction took place in obtaining of possession by the mortgagee of the mortgaged property," the mortgagee should be entitled to sue for the mortgage-money. *Held* that such condition contemplated the case of the mortgagor, in the first instance, in breach of the conditions of the mortgage, failing to deliver possession to the mortgagee, or to secure his possession from any obstruction or disturbance by other persons, but not the case of the mortgagee being deprived of possession after it had been once obtained and secured, and therefore the mortgagee was not entitled by virtue of such condition to sue for the mortgage-money. *Held*, further, that the mortgagee's case being that he had been deprived of possession of a part of the mortgaged property, he would be entitled to sue for the mortgage-money only if he had been deprived thereof by or in consequence of the wrongful act or default of the mortgagor, and not if he had been deprived thereof by or in consequence of the wrongful act or default of other persons; that the sale by the mortgagor was not a wrongful act, there being no condition against alienation, and the sale by a mortgagor of his equity of redemption not being rendered wrongful or unlawful by any rule of law, nor being in itself a wrongful act; that a wrongful act by the purchaser, though committed under colour of the purchase, could not be said to have taken place "in consequence of the wrongful act or default of the mortgagor;" and that therefore the mortgagee had no cause of action. JHABBU RAM *v.* GIRDHARI SINGH . . . . **I. L. R., 6 All., 298**

MORTGAGE—*continued.*

3. POSSESSION UNDER MORTGAGE —*continued.*

71. ——— **Dispossession of mortgagee.** —*Usufructuary mortgage.—Construction of deed.—Suit for money lent on dispossession.*—The plaintiff sued to recover money due on a mortgage-bond alleged to have been executed by the defendant's late husband *S.*, and by his brother *J.*, who, however, was relieved by the plaintiff from the debt. The conditions of the bond were that the plaintiff's father should possess the mortgaged property in consideration of interest only accruing upon the principal sum lent, and that the mortgagor should take back the property whenever he should pay the principal sum to the mortgagee. The present suit was brought by reason of the plaintiff having been dispossessed of the property by the shareholder brothers *A.* and *J.* *Held* that the money lent was recoverable notwithstanding there was no express condition in the bond to the effect that it would be recoverable in the event of dispossession by a third party. But as the money was found to have been borrowed by the defendant's husband on behalf of the family with the tacit consent of the other members, the plaintiff could recover from the present defendant only her share of the debt. GYARAM CHUCKERBUTTY *v.* BURODA DABEE **[20 W. R., 484**

72. ——— *Mortgagee dispossessed of portion of property by wrongful act of mortgagor.—Right to return of portion of loan.*—Where a mortgagee was deprived by the wrongful acts of the mortgagor of a portion of the land which constituted the only security for the mortgage-loan, —*Held* that he was entitled to recover from the mortgagor so much of the consideration-money as was in proportion to the land of which he had been deprived. PITAMBUR MISSER *v.* RAM SURUN SOOKOOL **[25 W. R., 7**

73. ——— **Right of mortgagee in possession to proceeds of sale.**—*Sale for arrears of revenue.*—A mortgagee in possession is not entitled to recover any share of the sale-proceeds of the mortgaged property sold for arrears of Government revenue, except to the extent that he shows that the usufruct of the property, while he held the mortgage, has not satisfied his debt. HURDEO NARAIN SINGH *v.* FUZLA HOSSEIN . . . **1 W. R., 270**

74. ——— **Mortgagee in possession under an agreement to pay rent to mortgagor.**—*Usufructuary mortgage.—Accidental destruction of mortgaged premises by fire.—Right of mortgagor to rent.*—The plaintiff borrowed R1,400 from the defendant and mortgaged to the latter for eight years a piece of ground with a warehouse standing thereon. There was an agreement between the parties that the rent of the warehouse should be R16-12-0 per mensem, and that out of this amount the mortgagee should appropriate R14 towards the payment of the interest on the principal sum, and pay R2-12-0 as rent to the mortgagor. Within four years from the date of the mortgage the warehouse was destroyed by fire, and thereupon the mortgagee

MORTGAGE—*continued.*

3. POSSESSION UNDER MORTGAGE —*continued.*

**Mortgagee in possession under an agreement to pay rent to mortgagor**—*continued.*

ceased to pay rent to the mortgagor. The latter sued to recover the site together with arrears of rent. The District Judge was of opinion that the defendant should lose the interest on the loan up to the date of the term for the redemption of the mortgage, and that he was bound to pay to the plaintiff the rent claimed by him. *Held* by INNES, *J.*, that the loss of the premises, which had arisen from accidental causes, could not affect defendant's right to recover the full amount due to him on the mortgage. There was no alteration in the liability, but merely in the source and mode of discharge. The premises having ceased to exist, nothing arising from the income could be credited towards the mortgage, and there was no residue available to pay plaintiff. *Held* by MUTTUSAMI AYYAR, *J.*, that defendant's right of possession rested on the usufructuary mortgage and not on tenancy, and his right to recover his debt with interest thereon could not be extinguished or modified by the destruction of the warehouse. As to the surplus payment, the existence of the warehouse, which produced the income of R16-12-0 a month, was the basis of the contract to make it; and the basis having failed, the obligation resting thereon must likewise fail. VENKATESHWARA *v.* KESAVA SHETTI . . . . **I. L. R., 2 Mad., 187**

75. ——— **Deprivation of security by wrongful act of mortgagor.**—*Right to return of consideration.*—Where money is lent on a mortgage-deed on the condition that if returned with interest within a given period, the property pledged shall revert to the mortgagor, and the mortgagee finds afterwards that the property in question is subject to a prior mortgage as to which he was not informed, and that he is therefore without the supposed security, he is at liberty to sue for the return of the money advanced with interest without waiting for the expiry of the stipulated period. RADHA CHURN SHAHA *v.* PARBUTTEE CHURN DUTT **[25 W. R., 52**

76. ——— **Mortgagee deprived by diluvion of subject of mortgage.**—*Usufructuary mortgage.*—Where a mortgagee is deprived by diluvion of the possession of land over which he holds an usufructuary lease before he has repaid himself the amount advanced, he has a right, unless the terms of the lease are very special, to call upon the lessor for the unpaid balance of the loan. SHEO GOLAM SINGH *v.* ROY DINKER DYAL . . . **21 W. R., 226**

77. ——— **Liability to mortgage lien of lands allotted under partition in lieu of share mortgaged.**—*Land allotted in severalty to co-sharers of mortgagor.*—A mortgage of an undivided share in land may be enforced against lands which under a batwara or revenue partition have been allotted in lieu of such share whether such lands be in the possession of the mortgagor or of one who

MORTGAGE—*continued.*

3. POSSESSION UNDER MORTGAGE —*continued.*

**Liability to mortgage lien of lands allotted under partition in lieu of share mortgaged**—*continued.*

has purchased his right, title, and interest. Lands allotted in severalty by the batwara to the co-sharers of the mortgagor are not subject to the mortgage. The case of *Sidhee Nuzur Ali Khan* v. *Ojoodhyaram Khan, 10 Moore's I. A., 540,* approved. BYJNATH LALL *v.* RAMOODEEN CHOWDRY **[L. R., 1 I. A., 106 : 21 W. R., 233**

78. ——— **Transfer of mortgaged property by mortgagee in exchange for similar property.**—*Right of mortgagor to property acquired by exchange.*—In 1865, *N.* was in possession of six shops in a market-place at Etawah. He was in possession of two as mortgagee, and of the remaining four as proprietor. The Municipal Committee of Etawah, having decided to establish the market in a fresh place, and to use the site of the old market for other purposes, arranged with *N.* to take the sites of his six shops in the old market-place, and to give him in lieu of them sites for six shops in the new. Under this arrangement, he built six shops in the new market-place. Subsequently, the mortgagor of one of the old shops claimed possession of one of the six new ones on payment of the mortgage-money, and cost of constructing the shop. *Held* that the claim could not be allowed, inasmuch as it could be justified only by proof of an agreement binding upon the parties at the time when the transaction occurred that some specific one among the new shops should be substituted for the old one which was the subject of the mortgage, and it had not been found that any such agreement was made. NIDHI LAL *v.* MAZHAR HUSAIN . . . . **I. L. R., 7 All., 436**

79. ——— **Sale to mortgagee of portion of mortgaged property.**—*Resale to mortgagor.—Decree.—Equitable right to whole of property mortgaged.*—*A.* mortgaged a 14-anna share in a certain mouzah to *B.* *B.* obtained a decree on his mortgage-bond. Subsequent to this decree *B.* bought from *A.* a 2-anna share in the mouzah, but at a later period resold the share to *A.* In execution of another decree which *B.* had obtained against *A.*, the 12-anna share in the mouzah belonging to *A.* was put up for sale and purchased by *B.* *B.* next applied for execution of the decree he had obtained on the mortgage-bond, seeking to sell the 2-anna share which remained in the mouzah as part of the property mortgaged to him,—*Held* that, so long as *A.* had only a 12-anna share of the property in his possession, *B.'s* security was of necessity reduced to that amount, but on *A.'s* again becoming the owner of the whole 14 annas, *B.* had an equitable right to demand that the 14 annas should be held subject to his mortgage. DEOLIE CHAND *v.* NIRBAN SINGH . **I. L. R., 5 Calc., 252 : 4 C. L. R., 150**

80. ——— **Mortgage of property of which mortgagor is not but afterwards becomes owner.**—If a person mortgages property, of

MORTGAGE—*continued.*

3. POSSESSION UNDER MORTGAGE —*continued.*

**Mortgage of property of which mortgagor is not but afterwards becomes owner—*continued.***

which he has no present ownership, and subsequently becomes the owner of the mortgaged property, the lien created by the mortgage attaches to such ownership, and subsequent purchasers from the mortgagor take subject to the equities which affected the property in the hands of the mortgagor. MAHOMED ASSUDOOLLAH KHAN *v.* KARAMUTOOLLAH [4 N. W., 11

81. ——— **Mortgage of moiety of property in reversion.**—*Mortgagor subsequently inheriting moiety.—Rights of mortgagee in execution of his decree.—A.* having mortgaged an 8-anna share of certain property which he had inherited from his father, subsequently succeeded to the remaining 8-anna share in the same property. It appeared that in respect of the property mortgaged *A.* was entitled only to a reversion on the death of his mother. *Held* that the holder of a mortgage decree on the mortgage was not at liberty to proceed against the other 8-anna share. NISTARINI DEBI *v.* BROJO NATH MOOKHOPADHYA [10 C. L. R., 229

4. POWER OF SALE.

82. ——— **Sale of mortgaged land in mofussil.**—*Deed in English form.*—A sale, without the intervention of a Court of Justice, of mortgaged lands situate in the mofussil of Bombay, under a power of sale contained in an indenture of mortgage in the ordinary English form, is valid, if due notice be given to the mortgagor of the mortgagee's intention to sell, and the sale be fairly conducted. Position of a mortgagee selling under his power of sale explained. PITAMBER NARAYANDAS *v.* VANMALI SHAMJI . . I. L. R., 2 Bom., 1

83. ——— *Redemption, Suit for.—Injunction.*—When property mortgaged is situated in the mofussil, but the parties to the mortgage are resident in Bombay, and the instrument of mortgage is in the English form, the parties must be held to have contracted according to English law, and to be entitled to enforce their rights according to that law. In such a case the mortgagee can exercise a power of sale contained in the mortgage-deed, and cannot be restrained from exercising such power merely because the mortgagor has filed a suit for redemption. The mortgagor can only stay the sale *pendente lite* by paying the amount due into Court, or by giving *primâ facie* evidence that the power of sale is being exercised in a fraudulent or improper manner, contrary to the terms of the mortgage. JAGJIVAN NANABHAI *v.* SHRIDHAR BALKRISHNA NAGARKAR [I. L. R., 2 Bom., 252

84. ——— **Sale to mortgagee under power of sale.**—*Effect of such purchase by mortgagee.—Title acquired by him.*—A mortgagee pur-

MORTGAGE—*continued.*

4. POWER OF SALE—*continued.*

**Sale to mortgagee under power of sale —*continued.***

chasing the mortgaged property with the consent of the mortgagor, under the power of sale contained in the mortgage-deed, acquires an unimpeachable title derived from the power of sale, which is altogether distinct from and overrides his title as a mere incumbrancer: the effect of such purchase being to vest the ownership of, and the beneficial title to, the property for the first time in himself, who had been previously a mere incumbrancer. PURMANANDDAS JIWANDAS *v.* JAMNABAI . I. L. R., 10 Bom., 49

85. ——— **Private sale without intervention of Court.**—*Semble* (*Per* MELVILL, *J.*),—That a private sale effected by a mortgagee in the mofussil without the intervention of a Court, in pursuance of a power of sale given to him under his instrument of mortgage, is invalid. KESHAVRAM KRISHNA JOSHI *v.* BHAVANJI BIN BABAJI [8 Bom., A. C., 142

86. ——— **Exercise of power of sale.**—*Mortgagee with lease which he has the option of terminating on sale.—Notice to mortgagee.*—Where a mortgage-deed gave to the mortgagee an option, in the event of a sale of the interests of the mortgagors, to throw up a lease which he held from them for the mortgaged jote and claim immediate payment from the surplus sale-proceeds,—*Held* that, before the mortgagors could withdraw the surplus proceeds from the Court, it would be necessary for them to give notice to the mortgagee of their intention to do so. BHOOBUN JOY ACHARJEA *v.* ANUND LALL CHOWDHRY . . . 22 W. R., 47

5. SALE OF MORTGAGED PROPERTY.

(*a*) RIGHTS OF MORTGAGEES.

87. ——— **Right of mortgagee.**—*Remedy on non-satisfaction of claim after sale.*—The right accruing to a lender of money under a mortgage-bond hypothecating land is to have his mortgage lien on the land declared and the property sold in satisfaction; and if after sale the debt is not satisfied, to proceed against the debtor for the balance. WEBB *v.* RINCHIDEN . . . . 14 W. R., 214

LALLA MITTERJEET SINGH *v.* SCOTT [17 W. R., 62

88. ——— **Sale of whole property for portion of debt.**—*Sale of mortgaged property for instalment of bond.—Right to, or lien on, surplus proceeds.*—Where money is lent upon the security of immoveable property of a nature incapable of division, and the mortgagee, on one of the instalments becoming due, has to sell the entire property, he does not thereby lose all lien over the surplus proceeds. It seems to make no difference that the property is capable of division. RAM KANT CHOWDRY *v.* BRINDABUN CHUNDER DOSS . 16 W. R., 246

89. ——— **Right to elect property to be sold.**—*Sale of portion of property pledged.*—

MORTGAGE—*continued.*

5. SALE OF MORTGAGED PROPERTY—*continued.*

(*a*) RIGHTS OF MORTGAGEES—*continued.*

**Right to elect property to be sold**—*continued.*

Where a plaintiff's bond gives him a separate lien on each and all of several mouzahs pledged as security, he is free to elect for sale whichever of the mouzahs he thinks most likely to satisfy his claim. When a portion of property pledged as security in a bond is sold in satisfaction, there is nothing to prevent the obligee from purchasing such portion. HOOLAS KOOEREE *v.* SUFEEHUN. SUFEEHUN *v.* MAHOMED HUBEEBOOLLAH KHAN . . 8 W. R., 379

90. ——— **Right to surplus sale-proceeds.**—*Election to proceed against mortgaged property.*—Where a creditor sued upon a bond and got a decree declaring his debt leviable from certain landed property on which the bond gave him a mortgage lien, as well as for any other property found in possession of the debtor, but having elected to satisfy his mortgage lien and procured the sale of the landed property subject to that lien,—*Held* that he was bound to recoup himself from the mortgaged property, and that he could not get any part of the surplus sale-proceeds, unless it were shown that the mortgaged land had not produced enough to satisfy his claim. KALEE DASS GHOSE *v.* LAL MOHUN GHOSE [16 W. R., 306

*See* FUTEH ALI *alias* NANNA MEAH *v.* GREGORY [6 W. R., Mis., 13

91. ——— **Rights of successive mortgagees.**—*Prior sale under second mortgage.—Right of purchaser.*—A property was mortgaged in succession to two different persons. Under the latter of the two deeds a money-decree was obtained and the property sold. Subsequently the earlier mortgagee obtained a money-decree, and caused the mortgagor's rights and interests to be again sold. *Held* that the purchaser at the second sale purchased, not the estate, but the mortgagor's (extinct) right, title, and interest, and could not sue for possession of the property itself. DURPO NARAIN MAHATAH *v.* NULEETA SOONDUREE DOSS . . . 11 W. R., 332

92. ——— **Right of prior lien.**—*Sale of hypothecated property for money-decree.—Lien of subsequent mortgagee with order directing sale.—Right of purchaser.*—Where property hypothecated for a debt is sold in execution of a money-decree passed under the bond hypothecating it, without any additional order in the decree for enforcing the lien on the property, and the holder of a subsequent similar bond, who has obtained an order on his decree directing the sale of the property, seeks to enforce *his* lien upon the property so purchased, the purchaser is entitled to go on the previous lien, as he not only stands in the shoes of the debtor, but has purchased all rights in the property hypothecated by the debtor when his hypothecation was made, and has thus also acquired the rights of the decree-holder to satisfy whose due the property was sold when this

MORTGAGE—*continued.*

5. SALE OF MORTGAGED PROPERTY—*continued.*

(*a*) RIGHTS OF MORTGAGEES—*continued.*

**Right of prior lien**—*continued.*

purchaser purchased. SHEO PROSUN SINGH *v.* BROJOO SAHOO . . . . 7 W. R., 232

93. ——— *Right of holder of money-decree against subsequent mortgagee after foreclosure.*—*A.* executed a bond in favour of *B.*, hypothecating certain immoveable property. *B.* recovered a money-decree against *A.* and caused the mortgaged property to be sold. *B.* became the purchaser at the sale in execution, and was put in possession. *C.*, who held possession of the property under a decree for foreclosure of a subsequent mortgage of the same property to him by *A.*, brought a suit against *B.* for recovery of possession, and obtained a decree. *B.* then brought a suit against *C.* to enforce his lien under the mortgage-bond, but it was held that the suit was not maintainable. KASIMANNISSA BIBI *v.* HURANNISSA BIBI [7 B. L. R., Ap., 8

S. C. KUSEEMOONISSA BIBEE *v.* HUROONNISSA BIBEE . . . . 15 W. R., 195

94. ——— *Right of holder of money-decree against subsequent mortgagee after foreclosure.*—*A.* executed in favour of *B.* a simple mortgage of certain property. He afterwards executed in favour of *C.* a mortgage by bi-bil-wafa, or conditional sale, of the same property. *C.* obtained a decree for foreclosure, and got possession thereunder. *B.* then obtained a money-decree against *A.*, and in execution seized and sold and became the purchaser of the said property, and was put into possession of it. On *C.* suing *B.* to recover possession, *B.* claimed to be entitled to hold the property by reason of the prior lien which he had under the simple mortgage. *Held* that as *B.* had only got a money-decree and no declaration of his rights as mortgagee he could not set up a prior lien against *C.* KASIMANNISSA BIBI *v.* HURANNISSA BIBI . 2 B. L. R., Ap., 6

KUSSEEMOONISSA BEEBEE *v.* HOORUNISSA BEEBEE [10 W. R., 468

95. ——— *Suit for money-decree on mortgage.*—An application was made for leave to file a suit brought to recover the sum of R2,300 on a Bengali deed of mortgage, containing a provision that, "if I should fail within the term of six months to pay off the whole of your money with interest, in that case you will have recourse to law, and by sale of the said huts, recover with interest the whole of your money. Should the whole of your money be not thereby realised, in that case you will get it by sale of whatever other property I may have elsewhere. Should even then all the money be not realised, I shall in that case be held responsible for the remainder, that is to say, I shall myself pay: if I should make any objection, it shall be false and inadmissible." The plaint asked for a money-decree. PHEAR, *J.*, refused to admit the plaint. UMASUNDARI DASI *v.* UMACHARAN SADKHAN [6 B. L. R., Ap., 117

**MORTGAGE**—*continued.*

5. SALE OF MORTGAGED PROPERTY—*continued.*

(*a*) RIGHTS OF MORTGAGEES—*continued.*

**Right of prior lien**—*continued.*

**96.** ——————— *Attachment.—Notice.—Fraud.*—The plaintiffs advanced a sum of money on the security of a simple mortgage of a share in four talooks, and obtained a simple money-decree. They then caused the mortgaged premises to be attached, but did not proceed to sale. Afterwards they negotiated a loan to the judgment-debtors from a third party, the present appellant, upon a simple mortgage of one of the same talooks, concealing the existence of their prior lien, and appropriated the money so obtained in discharge of other debts due to themselves from their judgment-debtors. The appellant obtained a simple money-decree, and caused the premises to be attached and sold. Before the sale the plaintiffs gave notice of their lien, and in consequence the appellant purchased for a trifle. The plaintiffs brought the present suit for a declaration of their prior lien, and for a re-sale of the premises in satisfaction of their mortgage. The appellant contended in his defence that, as fraud was perpetrated by the plaintiffs in inducing him to make the loan without disclosing their prior lien, his mortgage should have priority over theirs. *Held* that the appellant must be considered as having the first incumbrance; that the notice of the plaintiffs' mortgage given at the execution-sale could only affect the appellant's title as purchaser. Priority as between the appellant and the plaintiffs in respect of incumbrances already existing could not be affected by such notice. BHARAT LAL BHAGAT *v.* GOPAL SARAN LAL BHAGAT . **3 B. L. R., A. C., 1 : 11 W. R., 286**

**97.** ——————— *Partnership.—Attachment, Right of proceeds of.*—A mortgage of the revenues of a village was executed by a firm, and the deed stipulated that the mortgagees should station a mehta or clerk of their own in the village to make the collections, who was to receive his monthly salary and daily food from the mortgagors whilst the property remained on mortgage. A mehta was accordingly appointed, who received the rents and profits of the village for a year or two, but afterwards permitted the mortgagors to receive them for four or five years. The respondent, who was one of the partners of the firm, did not execute the mortgage, but was cognisant afterwards of the execution of it, and he sued his co-partners, and obtained a decree for his share of the assets of the firm. In execution of his decree an attachment issued against the estate. In a suit by the mortgagee for the removal of the attachment,—*Held* that the mortgage was valid up to the time of the notice of the respondent's claim (*i.e.*, when he proceeded to enforce that claim by attachment and when he became in the situation of a second incumbrancer); and that if after that time he permitted the mortgagors to receive any portion of the produce of the estate he ought, with respect to the moneys so received, to be postponed to the subsequent incumbrancer. JUGJEEWUN DAS KEEKA SHAH *v.* RAM DAS BRIJBOOKUN DAS

**[6 W. R., P. C., 10 : 2 Moore's I. A., 487**

**MORTGAGE**—*continued.*

5. SALE OF MORTGAGED PROPERTY—*continued.*

(*a*) RIGHTS OF MORTGAGEES—*continued.*

**Right of prior lien**—*continued.*

**98.** ——————— *Lien on properties pledged by mortgage-bond and transferred by heirs for commuted allowance.*—Where a Mahomedan widow, her two minor sons, and six relatives were entitled by inheritance to certain property originally belonging to a paternal ancestor of the sons, and the six relatives received instead of their shares a commuted allowance,—*Held* that the holder of a money-decree on a mortgage-bond in which the widow and the six relatives had jointly pledged their interest in the property for the payment of money, could, as against the sons, sell the seven shares in execution of his decree; it not appearing that the agreement to accept the commuted allowance was irrevocable, or that the agreement had not been entered into with the widow alone. KALLY PROSAD ROY *v.* SARFERAZ ALLI . . **1 C. L. R., 399**

**99.** ——————— *Suit to enforce mortgage lien on property in the possession of a third party.—Properties situate in different districts.—Money-decree.—Execution of decree.—Code of Civil Procedure (Act VIII of 1859), s. 12.*—*A.*, the mortgagee, under a bond, of properties situated in districts B. and C., sued in the B. Court on his bond, and obtained a decree for the mortgage-money and interest, with a declaration that the decree should be satisfied by sale of all the mortgaged property. *A.* had not obtained the permission of the High Court under section 12, Act VIII of 1859, which was necessary to enable him to proceed against the property in the C. district. Having attached and sold all properties comprised in his decree situate within the jurisdiction of the B. Court, *A.*, under a certificate issued by such Court, obtained an order from the C. Court attaching lands included in his decree situate in that district. *D.* intervened, on the ground that he had purchased the same property in execution of another decree of the C. Court against the same judgment-debtor, and the property was released from attachment. *A.* then sued *D.* and the mortgagor to enforce his mortgage lien against the property in the C. district. *Held* that the B. Court had jurisdiction to give *A.* a decree for the amount of the mortgage-money and interest, though it had not power to enforce the decree against the property in the C. district; that the only effect of the decree was to change the nature of the original debt, which was a bond-debt, into a judgment-debt for the mortgage-money and interest; and that though *A.* could not enforce his lien against the property in the C. district under the decree of the B. Court, yet, as that property had been sold to a third person, *D.*, he was at liberty to sue *D.* to establish his lien for the mortgage-debt and interest. BOLAKEE LALL *v.* THAKOOR PERTAM SINGH . **I. L. R., 5 Calc., 928 : 6 C. L. R., 370**

**100.** ——————— *Mortgaged property, Conveyance of, to mortgagee.—Attachment and sale of same property under another decree.*—

**MORTGAGE**—*continued.*

5. SALE OF MORTGAGED PROPERTY—*continued.*

(*a*) RIGHTS OF MORTGAGEES—*continued.*

**Right of prior lien**—*continued.*

*Suit by mortgagee to recover money advanced on mortgage-bond.—Avoidance of conveyance.—Lien.*—In 1874 the plaintiff advanced money to *F.* and *Z.* on the security of a mortgage of certain properties. In 1875 the plaintiff took a conveyance of the properties mortgaged to him, setting off the money due to him under the mortgage against the consideration-money. At the time of this conveyance, the same property was under attachment under a decree obtained by another person, and the property was, in execution of this decree, put up for sale, and purchased by one *G.* In a suit brought by the plaintiff on the mortgage-bond (to recover the money lent, and asking that the properties might be made liable to satisfy the debt) against *F.*, *Z.*, and *G.*, it was held that the conveyance of 1875 being void against *G.*, the plaintiff was entitled to fall back upon the lien created by the mortgage-bond. *Bissen Doss Singh v. Sheo Prosad Singh, 5 C. L. R., 29,* followed. GOPAL SAHOO *v.* GUNGA PERSHAD SAHOO . . . . **I. L. R., 8 Calc., 530**

**101.** ——————— *Money-decree.—Sale under mortgage-decree. — Prior sale under money-decree.—Suit for possession.*—On the 21st of April 1864 *A.* mortgaged a certain talook, and on the 13th of December 1865 the mortgagee obtained a mortgage-decree on his mortgage. On the 5th of April 1867 (in execution of a money-decree obtained against *A.* by a third party on the 20th of September 1864) the right, title, and interest of *A.* in the talook was purchased by the defendant who entered into possession. On the 1st of July 1868 the right, title, and interest of *A.* in the talook was sold in execution of the mortgage-decree and purchased by the plaintiff. In these execution proceedings the defendant intervened, but his claim was disallowed. On the 28th of June 1880, the plaintiff brought the present suit for possession of the talook. *Held* that the plaintiff was not entitled to possession, but should have brought his suit to enforce the mortgage lien against the defendant. BIR CHUNDER MANIKYA *v.* MAHOMED AFSAROO . **I. L. R., 10 Calc., 299**

**102.** ——————— *Right of purchaser of mortgaged property.—Mortgagee purchasing right, title, and interest of debtor.*—Plaintiff in 1862 purchased a house of first defendant, which was already hypothecated to second defendant. In 1863 second defendant sued first defendant in the Small Cause Court for the debt on account of which the hypothecation had been made, and got a judgment. He then had the house attached and put up to auction, bought the right, title, and interest of the judgment-debtor in the premises, and entered and continued in possession. Plaintiff claimed in the present suit to recover possession in right of his purchase in 1862. *Held* that, as first defendant had no interest whatsoever in the property at the date of the plaintiff's purchase, second defendant's purchase was not a purchase from the debtor in part satisfaction of his debt. Second defendant's claim still existed, and he could pursue his remedy, either against the person or the property; and that as he was in possession, he had a right to demand the liquidation of the debt due to him before submitting to be turned out. *Held,* also, that the obligation of the first defendant gave the second defendant a two-fold remedy: one against the person, and the other against the thing. MUNI REDDI *v.* VENKATA REDDI . . **3 Mad., 241**

(*b*) MONEY-DECREES ON MORTGAGES.

**103.** ——————— **Suit to enforce a lien on land.**—*Sale of mortgaged premises.—Money decree.*—A suit to enforce a lien on land which has been mortgaged will lie, and the land as it stood at the time of the mortgage free from subsequent encumbrances may be sold, although a decree for money due upon the mortgage has been obtained, and the right, title, and interest of the mortgagor thereto has under such decree been once sold. BISWANATH MUKHOPADHYA *v.* GOSSAIN DASS BARAMADAK **[3 B. L. R., Ap., 140**

**104.** ——————— *Right of suit against purchaser of moveable property on which there is a lien.*—A suit will not lie against the purchaser of property subject to a lien to recover from him personally the amount of the lien, but the lien is not lost by the sale, and a suit may be brought against the purchaser with the object of obtaining a decree for the realisation of the lien by the sale of the hypothecated property. JUGERNATH *v.* ILAHI **[3 N. W., 207**

**105.** ——————— *Mortgage-bond with covenant to repay money: in default, agreement to put mortgagee in possession of land.*—Where a mortgage-bond contained an agreement to repay the money with interest by a certain day, and proceeded thus: "If I, the mortgagor, fail to pay the amount, then I will put you in possession of the land, and you may enjoy it, and when I have the means I will redeem the land and pay the debt with interest, and take back the bond,"—*Held* that on the mortgagor's default the mortgagee might sue for the money, and that he was not bound to accept the land and forego his right of action. ANNASVAMI *v.* NARRANAIYAN . . . . **1 Mad., 114**

**106.** ——————— *Pledge of mortgage-bond.—Fraudulent sale by mortgagor.—Suit to enforce mortgage against bonâ fide purchaser.*—A prior encumbrancer will not be postponed to a subsequent encumbrancer, unless he has been guilty of gross negligence. *A.* mortgaged land to *B.* *B.* having bought certain land from *C.*, pledged his mortgage-deed to *C.* to secure the unpaid purchase-money. *C.* gave the bond to *A.*, who was his brother-in-law. *A.* representing to *D.* that the mortgage was redeemed, sold the land to him, giving

MORTGAGE—*continued.*

5. SALE OF MORTGAGED PROPERTY—*continued.*

(*b*) MONEY-DECREES ON MORTGAGES—*continued.*

**Suit to enforce a lien on land**—*continued.*

him the bond as a title-deed. In a suit by *B.* against *D.* to recover the mortgage amount by sale of the land,—*Held* that *D.*, even although a *bonâ fide* purchaser, could not resist the claim. MUTHA *v.* SAMI . . . . . I. L. R., 8 Mad., 200

107. ——— **Sale under money-decree.**—*Lien on property mortgaged.—Purchase by mortgagee.*—When a creditor who holds a bond whereby property is mortgaged, elects to take a money-decree, and in execution thereof brings the mortgaged property to sale, he by that sale transfers to the purchaser the benefit of his own lien and also the right of redemption of his debtor. When, therefore, the decree-holder is himself the auction-purchaser, he obtains the right to have his lien on the mortgaged land satisfied. ARUTH SOAR *v.* JUGGUNNATH MOHAPATTUR . . . . . 23 W. R., 460

108. ——— *Suit on mortgage bond.—Transfer of lien—Third parties.*—Where a mortgagee sues on his bond and takes a money-decree, in execution of which he attaches and sells the mortgaged property, he transfers to the purchaser the benefit of his own lien and the right of redemption of his debtor; but the transfer does not include ticcadari rights, if the ticcadar was not made a party to the suit on the bond. BYJNATH SINGH *v.* GOBURDHUN LALL MOHASOHREE [24 W. R., 210

109. ——— *Lien on mortgaged property.—Advance to save property from sale.*—A mere money-decree upon a mortgage bond gives the judgment creditor the power of selling the mortgaged property with the lien, in the same way as a decree with express power to sell the mortgaged property. MOHUN BAGCHI *v.* GIRISH CHUNDER BUNDOPADHYA . . . . . 1 C. L. R., 152

MUNBASI KOER *v.* NOWRUTTUN KOER [8 C. L. R., 428

110. ——— *Effect of, on lien.*—The fact that a money-decree has been obtained on a bond by which property has been mortgaged, does not destroy the lien on that property. It is open to a plaintiff to establish his right on the bond as well as on the decree. HASOON ARRA BEGUM *v.* JAWADOONNISSA SATOODA KHANDAN [I. L. R., 4 Calc., 29

111. ——— *Lien.—Priority.*—The plaintiff had lent money to a Court Ameen, who mortgaged, as security for the repayment of the amount, certain fees due to him then in deposit, and certain fees which might hereafter be deposited on his account. Those fees were subsequently attached by the defendant, who had obtained a decree for rent against the Ameen. After that the plaintiff obtained a simple money-decree against the Ameen, and applied, in execution of his decree, to have the fees

MORTGAGE—*continued.*

5. SALE OF MORTGAGED PROPERTY—*continued.*

(*b*) MONEY-DECREES ON MORTGAGES—*continued.*

**Sale under money-decree**—*continued.*

paid out to him, but his application was refused on the ground of the defendant's attachment. In a suit to recover the sums in deposit, and to have it declared that the plaintiff's lien on them was prior to that of the defendant,—*Held* that the plaintiff's mortgage gave him priority, and that he was not barred from bringing the present suit by his having already sued to recover the amount and obtained a mere money-decree. LALA TILAKDHARI LAL *v.* FURLONG [2 B. L. R., A. C., 230

S. C. LALLA TEELUCKDAREE LALL *v.* COURT OF WARDS . . . . . 11 W. R., 149

112. ——— *Lien on mortgaged property.—Form of decree.*—A mortgagee by way of simple mortgage cannot assert his lien on the property mortgaged, as against a subsequent mortgagee by way of conditional sale who had foreclosed, if the decree passed in favour of the former on his mortgage-bond does not provide for its satisfaction from the sale of the mortgaged property. RAM CHUNDER MISSER *v.* KALLY PROSONNO SINGH [2 Hay, 625

113. ——— *Sale in execution of decree on mortgage-bond.—Lien on mortgaged property.*—In a suit for possession of property which plaintiff's vendor (*K.*) had purchased from one *A.*, *R. K.*, the defendant in possession, claimed to be entitled to retain possession as purchaser under a sale in execution of a decree against *A.*, which had been obtained on bonds which pledged the property, although the mortgage was not declared in the decree. *Held* that, if *R. K.* could prove that by the bonds in question this property was pledged as security for the debts covered by them, he would be entitled to remain in possession. RAM KANT ROY *v.* RAJ KISHORE DEB . . . . . 24 W. R., 94

114. ——— **Effect of taking money-decree on mortgage-bond.**—*Execution of decree—Subsequent purchaser.*—When a person to whom property is pledged for a debt obtains a simple money-decree against his debtor in respect of the debt, he cannot execute that decree against the property pledged, where it is in the possession of a subsequent *bonâ fide* purchaser. GUPINATH SINGH *v.* SHEO SAHAI SINGH [B. L. R., Sup. Vol., 72: 1 W. R., 315

Distinguished in BECKWITH *v.* UMESH CHUNDER ROY . . . . . 3 W. R., 110

Followed in BHUGWAN DOSS *v.* NUBEE BUKSH [7 W. R., 31

GOUREE SINGH *v.* FUZL HOSSEIN [15 W. R., 313

RADHA GOBIND SURMAH *v.* UMEER ALI [15 W. R., 27

AKBUR ALI *alias* AGA MIRZA *v.* AMEEROONISSA [11 W. R., 225

MORTGAGE—*continued.*

5. SALE OF MORTGAGED PROPERTY—*continued.*

(*b*) MONEY-DECREES ON MORTGAGES—*continued.*

**Effect of taking money-decree on mortgage-bond—*continued.***

ACHUMBIT THAKOOR *v.* CHOONEE LALL CHOWDHRY . . . . . 10 W. R., 27

FRENCH *v.* BARANASHEE BANERJEE [8 W. R., 29

BINDABUN CHUNDER SHAHA *v.* JANEE BEEBEE [6 W. R., 312

RAMNATH RAM *v.* DEEN DYAL RAM [W. R., 1864, 311

115. ——————— *Right of lien.—Purchasers.*—A mortgagee who obtains a simple money-decree upon a bond by which property is mortgaged to him as a collateral security, does not retain his lien on the property mortgaged after it has passed into the hands of third persons. SAWRUTH SING *v.* BHEENUCK SAHOO [14 B. L. R., 422, note: 12 W. R., 522

GOLUCK MONEE DEBIA *v.* RAM SOONDUR CHUCKERBUTTY . . . . . 9 W. R., 82

RADHA GOBIND SURMAH *v.* UMBER ALI *[15 W. R., 27

116. ——————— *Effect of assignment of judgment-debt.—Sale on property on which there is a lien.—Civil Procedure Code, 1859, s. 270.*—A simple decree for money upon a bond by which immoveable property is mortgaged, carries with it a lien upon the property mortgaged, and that lien continues as an incident to the debt when it passes from a contract-debt into a judgment-debt, and it continues when such judgment-debt is subsequently assigned to a purchaser. An attachment under a money-decree on a mortgage-bond and a mortgage-lien cannot co-exist separately in the property hypothecated, and such an attachment must be treated when existing as an attachment for enforcing the lien. And if property subject to such lien is sold in execution of a decree while it is under attachment under the decree upon the mortgage-bond, the lien existing upon the property is transferred from the property to the purchase-money, and thereupon the property becomes thenceforth discharged from the lien. If after the rejection of a claim preferred by the mortgagee, or person claiming the lien, no regular suit is brought under section 270 of Act VIII of 1859 to enforce the lien, that lien is lost, and the decree becomes thenceforth a mere money-decree discharged from any incidental lien. NADIR HOSSEIN *v.* PEAROO THOVILDARINEE [14 B. L. R., 425, note: 19 W. R., 255

RAJ CHUNDER SHAHA *v.* HUR MOHUN ROY [22 W. R., 98

117. ——————— *Rights of purchaser.*—The purchaser of a simple money-decree passed on a bond hypothecating property does not merely by his purchase acquire a lien upon the property. GANPAT RAI *v.* SARUPI [I. L. R., 1 All., 446

MORTGAGE—*continued.*

5. SALE OF MORTGAGED PROPERTY—*continued.*

(*b*) MONEY-DECREES ON MORTGAGES—*continued.*

**Effect of taking money-decree on mortgage-bond—*continued.***

118. ——————— *Sale of property for money-decree.—Lien for prior hypothecation.*—The fact that property is sold under a decree obtained by a plaintiff in respect of a debt due to him, does not of itself prevent such plaintiff from insisting upon the lien to which he is entitled under a prior hypothecation to him, for another debt of the same property. A decree obtained under the summary procedure prescribed by the Registration Act can be for money only, and not for the enforcement of a lien. JUGGUN NATH *v.* KOMUL SINGH . . [3 N. W., 123

119. ——————— *Registration Act, 1866, s. 53.—Loss of lien.*—The taking a money-decree on a specially-registered mortgage-bond under section 53, Act XX of 1866, does not extinguish the mortgagee's lien on the property mortgaged by the bond. There is no substantial difference between the effect of an ordinary money-decree on the bond and a decree on the bond for sale of the mortgaged property, so that the remedy of the mortgagee is the same, so far as the parties to the suit are concerned, whether the decree be made under section 53 or in a regular suit. Where the property mortgaged has passed into the hands of third parties, there is nothing in the fact that the mortgagee had obtained a decree on the bond to prevent him from bringing a separate suit against the transferees. EMAM MOMTAZOODDEEN MAHOMED *v.* RAJCOOMAR DAS. HARANCHUNDER GHOSE *v.* DINOBUNDHOO BOSE [14 B. L. R., F. B., 408: 23 W. R., 187

120. ——————— *Sale of hypothecated property for money-decree.—Rights of incumbrancers.*—*R. N.* executed in 1864 a security-bond in favour of *K. L.*, in 1855 a second bond in favour of the defendant, in 1866 a third bond in favour of *K. L.*, and in 1867 a fourth bond in favour of the defendant; all the bonds being registered and including as security the property in dispute. Both bond-holders took proceedings under Act XX of 1866, section 53, and obtained decrees. In 1868 *K. L.* arranged with *R. N.* to be paid by monthly instalments at interest higher than was allowed by the decrees. In 1869 he put up the property to sale in execution of his decrees, and it was purchased by the plaintiff. Shortly after it was again put up to sale in execution of the defendant's decrees and purchased by the defendant, who got into possession. In a suit to recover possession,—*Held* that although *K. L.* in his execution proceedings referred to his kistbundee, as well as to his decrees, and irregularly included in the amount to be levied what was not given by the decrees, yet as the proceeds did not cover the decrees, the proceedings could not be held to be void, nor the plaintiff's purchase a nullity. *Held* that what passed to the plaintiff was the property hypothecated, of which he became owner and *primâ facie* entitled to possession, having purchased at the instance of a first incumbrancer, and

MORTGAGE—*continued.*

5. SALE OF MORTGAGED PROPERTY—*continued.*

(*b*) MONEY-DECREES ON MORTGAGES—*continued.*

**Effect of taking money-decree on mortgage-bond—*continued.***

that defendant's lien could not protect him in possession. KAMESSUR PERSHAD *v.* DOWLUT RAM [19 W. R., 83

121. ——— *Sale in execution of decree on mortgage-bond.—Purchaser, Right of.*—Nothing passes to the auction-purchaser at a sale in execution of a money-decree, but the right, title, and interest of the judgment-debtor at the time of the sale. Where, therefore, a decree given under section 53, Act XX of 1866, declared the right of the obligee of a simple mortgage-bond to bring to sale the hypothecated property, and such property was sold in execution of the decree, the auction-purchaser could not claim in virtue of the lien created by the bond to defeat a second mortgage. AKHE RAM *v.* NAND KISHORE . . I. L. R., 1 All., 236

122. ——— *Mortgagee's lien.—Registration Act (XX of 1866), s. 53.—A.* and *B.*, co-mortgagees, obtained a summary decree under the Registration Act, XX of 1866, section 53, on the 6th May 1868, in respect of certain property which was again mortgaged by the owner to *C.* and *D.* in March 1869. *C.* and *D.* having also obtained a decree on their mortgage, brought the property to sale in execution of their decree and purchased it themselves in December 1874. *A.* not having had the whole of his mortgage-debt satisfied, instituted a suit on the 13th December 1879 against *C.* and *D.*, and the representatives of *B.* (*B.* having meanwhile died and his representatives not joining in the suit), to enforce his lien against the mortgaged property in the hands of *C.* and *D.*, and to recover the share of the mortgage-debt still due to himself alone. *Held* that *A.* did not acquire a better right to proceed against the property by reason of its having come into the hands of *C.* and *D.*, nor did *C.* and *D.* take subject to a greater burden than the mortgagor himself; and that as *A.* had allowed his decree against the mortgagor to be barred by limitation, he had lost all right to proceed against the property by execution were it in the hands of the mortgagor, and consequently he could not be allowed to proceed against it by suit merely because it was in the hands of third parties. *Emam Momtazooddeen Mahomed* v. *Raj Coomar Dass, 14 B. L. R., 408: 23 W. R., 187;* and *Jonmenjoy Mullick* v. *Dossmoney Dossee, I. L. R., 7 Calc., 714: 9 C. L. R., 353,* referred to. CALLY NATH BUNDOPADHYA *v.* KOONJO BEHARY SHAHA [I. L. R., 9 Calc., 651

123. ——— *Sale in execution of decree.—Purchaser, Right of.—Condition against alienation.*—Where the holder of a simple mortgage-bond obtained only a money-decree on the bond, in execution of which the property hypothecated in the bond was brought to sale and was purchased by him, he could not resist a claim to foreclose a second mortgage of the property created prior to its attachment and sale in execution of his decree. The view of the Full Bench of the Calcutta High Court in *Emam Momtazooddeen Mahomed* v. *Rajcoomar Dass, 14 B. L. R., 408;* and the decision in *Ramu Naikan* v. *Pubbaraya Mudali, 7 Mad., 229,* dissented from. *Held,* further, that the holder of the money-decree in this case could not avail himself of a condition against alienation contained in his bond to resist the foreclosure. *Rajah Ram* v. *Bainee Madho, 5 N. W., 81,* impugned. KHUB CHAND *v.* KALIAN DAS [I. L. R., 1 All., 240

124. ——— *Lease granted by obligor, Avoidance of.—Sale in execution of decree.*—An obligee under a bond giving him a charge upon land who sues for and obtains only a money-decree, under which he himself purchases the land, the sale-proceeds being sufficient to discharge the debt, cannot fall back on the collateral security for a debt which no longer exists. *Semble,*—That even if the sale-proceeds were not sufficient to discharge the debt, the obligee could not, according to the principle laid down in *Khub Chand* v. *Kalian Das, I. L. R., 1 All., 240,* avail himself of his collateral security to avoid a lease granted by the obligor after the date of the bond. BULWANT SINGH *v.* GOKARAN PRASAD [I. L. R., 1 All., 433

125. ——— *Usufructuary mortgage.—Execution of decree on money-bond.—Lien.*—A party who had obtained a farming lease for a period of years on the understanding that he was to repay himself the amount of a loan made to the lessor out of the surplus usufruct of the estate, not being satisfied with his security, sued on the bond executed by the lessor and obtained a decree, by executing which he realised from time to time nearly the whole sum due. *Held* that the decree substituted another means of recovery for the one previously given, and if he chose to recover the greater part of his due under a decree which, in the place of his farming lease, gave him power to sell the property leased to him, he could not retain his former status as well. ISSUR CHUNDER SEIN *v.* KENARAM GHOSE [14 W. R., 463

126. ——— *Money-decree, Sale under.—Purchaser of property subject to mortgage.*—Plaintiff and defendant No. 5 had mortgages over the same property, the mortgage of the latter being prior to that of the former. Defendant sued for the money covered by the kistbundee, and obtained a money-decree, in execution of which the rights and interests of the mortgagor were purchased, after notice of plaintiff's lien by defendant No. 5, who entered into possession. *Held* that, under the circumstances, the mortgagor's rights and interests sold as above amounted only to the equity of redemption, and the sale did not extinguish plaintiff's right under the subsequent mortgage; and that the purchaser

MORTGAGE—*continued.*

5. SALE OF MORTGAGED PROPERTY—*continued.*

(*b*) MONEY-DECREES ON MORTGAGES—*continued.*

**Effect of taking money-decree on mortgage-bond—*continued.***

could be entitled to retain possession only in case of his paying off plaintiff's lien. DEO CHAND SAHOO *v.* TEELUCK SINGH . . . **14 W. R., 238**

**127.** ——————— *Suit for possession by purchaser at sale in execution of decree on a mortgage, against mokurrari tenure-holder of later date.*—At a sale in 1871, in execution of a decree upon a mortgage, dated 3rd May 1867, *A.* purchased the mortgaged lands, the existence of a mokurrari granted in 1868 having been notified at the sale. *Held* that a suit by *A.* against the mokurraridars for possession would not lie, the existence of the mortgage being no bar to the creation of a subsequent incumbrance carrying with it the right of possession. *Emam Momtazooddeen* v. *Raj Coomar Doss, 14 B. L. R., 408: 23 W. R., 187; Gopee Bundhoo Shantra Mohapatter* v. *Bheenuck Sahoo, 12 W. R., 522; Sarawan Hossein* v. *Shahazadah Golam Mahomed, 9 W. R., 171; Gopeenath Singh* v. *Sheo Sahoy Singh, 1 W. R., 315,* discussed. KOKIL SINGH *v.* DULI CHUND. MITTERJEET SINGH *v.* DULI CHUND **[5 C. L. R., 243**

**128.** ——————— *Execution of decree on mortgage.—Sale in execution of mortgage-decree.*—On the 9th June 1868, *A.*, the mokurraridar of a certain mouzah, mortgaged 8 annas of the mokurrari to *B.*, and also gave him a dur-mokurrari lease of the remaining 2 annas. On the 26th November 1870 *A.* mortgaged the whole 10 annas to *C.*, and on the 14th December 1875 sold a 1-anna share of the mokurrari to the predecessor in title of the appellants. On the 11th June 1877 *B.* obtained a decree on his mortgage which he assigned to the plaintiff, who in execution of the decree sold 6 annas of the mortgaged property and himself became the purchaser. On the 2nd August 1877 *C.* obtained a decree upon his mortgage, and in execution thereof he sold the remaining 4 annas of the mokurrari to the plaintiff. Two annas of the 10 annas share of the mokurrari mortgaged to *C.* being subject to the dur-mokurrari lease to *B.*, the plaintiff brought a suit for the rent of the remaining 8 annas, and in that suit the appellants, who were no parties to any of the previous suits, intervened, on the ground that the plaintiff was not entitled to the 1-anna share which had been purchased by their predecessor in title on the 14th December 1875. *Held,* reversing the decision of the Court below, that the plaintiff was not entitled as against the appellants to the 1-anna share, the subject of the sale of the 4th December 1875; but that if the lower Court on remand should find the plaintiff to be in possession of such share, then a decree for rent should be passed in the plaintiff's favour, leaving the appellants to take any steps which they might be advised. *Phool Chand* v. *Kalian Dass, I. L. R., 1 All., 240,* disapproved of. *Haran Chunder Ghose* v. *Dinobundoo Bose, 14 B. L. R., 408: 23 W. R., 187;* and *Narsidas Jitram* v. *Joglekar, I. L. R., 4 Bom., 57,* followed. MADHU SINGH *v.* ACHRAJ SINGH **[9 C. L. R., 369**

**129.** ——————— *Money-decree, Effect of sale by mortgagee of mortgaged property under.—Assignment.—Purchaser at sale in execution of decree, Right of.—Lien.*—*A.* mortgaged property to *B.*, who assigned his mortgage to *U. U.*, under an unregistered instrument, assigned his interest to the plaintiff. The plaintiff then obtained a money-decree against *A.* personally and put up the property for sale, and it was purchased on the plaintiff's behalf. On going to take possession, the plaintiff was successfully obstructed by *N.*, a person who had already purchased it at an auction sale in execution of a money-decree obtained against *A.* by another creditor. The plaintiff having, before the date of his decree, obtained a second assignment duly registered from *C.*, sued upon it, and obtaining a decree against the mortgaged property, put it up for sale, and became the purchaser in his own name. On going to take possession he was obstructed by the defendant, who had bought it in execution of a money-decree against *D.*, the former successful purchaser and obstructor. *Held* that, although the mere taking of a money-decree for a mortgage-debt does not extinguish the lien, still, when the mortgagee proceeds to satisfy such decree by the sale of his security, the interests of both himself and his judgment-debtor in the said security pass to the auction-purchaser. The particular nature of the right acquired by the purchaser at a sale does not depend on the form of the decree on which the mortgagee has proceeded to satisfy his judgment-debt. What the mortgagee really seeks when he proceeds to sell, whether under a decree for sale or a simple money-decree, is to obtain satisfaction out of his security,—in fact, to enforce his lien; and although the proceeding may be in execution of a money-decree only, he cannot retain his lien for enforcement *qud* mortgagee, if the debt be not discharged by a second sale of the same property. *Emam Momtazooddeen Mahomed* v. *Rajcoomar Doss, 14 B. L. R., 408; Bhugobutty Dossee* v. *Shama Churn Bose, I. L. R., 1 Calc., 337;* and *Ramu Naikan* v. *Subbaraya Mudali, 7 Mad., 229,* followed. *Khubchand* v. *Kaliandas, I. L. R., 1 All., 240,* dissented from. NARSIDAS JITRAM *v.* JOGLEKAR . . . **I. L. R., 4 Bom., 57**

**130.** ——————— *Money-decree.—Difference between execution on money-decree on a mortgage and one not on mortgage.—Right of purchaser.*—Where a mortgagee is entitled to a personal decree against the mortgagor, or his heir, or representative, and takes a mere money-decree against him upon the mortgage, without any direction that the amount of the decree shall be recovered by sale or otherwise from the mortgaged property, the mortgagee has nevertheless the right to attach and sell

MORTGAGE—*continued.*

5. SALE OF MORTGAGED PROPERTY—*continued.*

(*b*) MONEY-DECREES ON MORTGAGES—*continued.*

**Effect of taking money-decree on mortgage-bond—*continued.***

that property under the money-decree, and such sale transfers to the purchaser the interest both of mortgagor and mortgagee in the same manner as if the sale had been made under an express direction in the decree. Even though the officer of the Court should mention merely the right, title, and interest of the mortgagor as what is sold, the interest of the mortgagee who has promoted the sale passes by way of estoppel, although the mortgagee executes no conveyance to the purchaser. The only difference in execution between a money-decree upon a mortgage and one not upon a mortgage is that where the mortgaged lands are attached under the former, their sale is deferred until six months or some other reasonable period expires, in order to give the mortgagor an opportunity to redeem, which he would have in a suit for foreclosure or redemption. HARI *v.* LAKSHMAN **[I. L. R., 5 Bom., 614**

**131.** ——————— *Mortgage-decree.—Lien.—Sale in execution.—Purchaser.*—Where a mortgagee obtains a decree against his mortgagor for sale of the mortgaged property to satisfy his debt, he cannot sell that property reserving his own rights over it, because it is for the very purpose of satisfying those rights that the sale is made. And if, instead of obtaining a decree for the sale of the mortgaged property, the mortgagee obtains only a simple money-decree and sells the mortgaged property under it, he is precisely in the same position as far as his own interest is concerned. In either case, the purchaser at the execution sale takes the property sold free from the mortgagee's lien. But where the mortgagee puts up the mortgaged property for sale at a time when the mortgagor has no longer any interest in the property, then nothing passes by the sale, and the execution-purchaser does not get any benefit from the fact that, previously to the sale, the mortgagee had a lien on the property. *Emam Momtazooddeen Mahomed* v. *Raj Coomar Dass, 14 B. L. R., 408; Gopee Bundhoo Shantra Mohapattur* v. *Kalee Pudoo Bonerjee, 23 W. R., 338; Ramkant Roy* v. *Rajkishore Deb, 24 W. R., 94; Khub Chand* v. *Kallian Das, I. L. R., 1 All., 240;* and *Dossmoney Dossee* v. *Jonmenjoy Mullick, I. L. R., 3 Calc., 363,* discussed and explained. RAMANATH DASS *v.* BOLORAM PHOOKUN **[I. L. R., 7 Calc., 677 : 9 C. L. R., 233**

**132.** ——————— *Mortgage-decree.—Sale in execution.—Mortgagee's lien.*—A mortgagee who elects to take a money-decree, and becomes himself the purchaser of the property mortgaged at a sale in execution of that decree, may bring a suit to enforce his lien against a person who purchased the right, title, and interest of the same debtor in the same property at a prior sale in execution of a prior money-decree. *Dossmoney Dossee* v. *Jonmenjoy Mullick, I. L. R., 3 Calc., 363,* overruled. JONMENJOY MULLICK *v.* DOSSMONEY DOSSEE **[I. L. R., 7 Calc., 714 : 9 C. L. R., 353**

MORTGAGE—*continued.*

5. SALE OF MORTGAGED PROPERTY—*continued.*

(*b*) MONEY-DECREES ON MORTGAGES—*continued.*

**Effect of taking money-decree on mortgage-bond—*continued.***

**133.** ——————— *Subsequent suit by mortgagee to enforce his lien on the property mortgaged.*—The plaintiff, a mortgagee of certain specific property, given as security for an advance, obtained a money-decree against the representatives of his debtor. A third person having a claim against the same debtor, seized and attached the specific property mortgaged to the plaintiff, and sold it to *A.*, who had notice of the plaintiff's lien. The plaintiff then brought a suit against *A.* and the representatives of his debtor to have his lien declared and debt satisfied. *Held* that, notwithstanding the plaintiff's previous money-decree, he was still entitled to enforce his lien against the property pledged. RAJKISHORE SHAW *v.* BHADOO NOSHOO . **I. L. R., 7 Calc., 78**

**134.** ——————— *Purchase by mortgagee.*—*K. D*, a Hindu widow, by deed, appointed *R. S.* to be her general mooktear, for the conduct of certain suits in her name, which were pending in respect of the estate of her deceased husband. By this deed, dated September 25th, 1858, she covenanted to repay him, within two months of the successful termination of the suits, "all moneys properly disbursed by him on her account, &c.," and also to pay him an additional sum as remuneration to himself. *R. S.* entered on the conduct of her business, and advanced certain moneys on her account; and in October 1859 *K. D.* executed in his favour a second deed, by which she mortgaged to him her share in the estate of *R. H.*, deceased, which was in the hands of his executors, "and my decrees, 24 and 25, in the Zillah Court, and the decree in the Supreme Court, and the right and interest of all the said decrees and all other real and personal properties belonging to the said estate." By a decree of the High Court of 28th July 1862 in one of the suits brought by *K. D.*, the estate of *R. H.* was declared to consist of a share of a certain talook, of a share of a house in Calcutta, and of a certain sum of money; and *K. D.* was declared to be entitled to one moiety thereof. *K. D.* afterwards obtained an order for possession, and held possession of the said talook until August 1866. *R. S.* continued the conduct of *K. D.'s* business, and advanced more money on her account, in respect of which, on May 31st, 1865, he brought a suit against her; and on September 21st, 1865, obtained a decree in his favour. Under this decree he attached the right, title, and interest of *K. D.* in the estate of *R. H.*; and on 25th June 1866 it was put up for sale, and purchased by *R. S.* himself. In a suit brought by *K. D.* against *R. S.* among other things for an account,—*Held* that *R. S.* was a trustee for *K. D.* in respect of her share in the estate of *R. H.*, which he had purchased in execution of his decree. KAMINI DEBI *v.* RAMLOCHAN SIRKAR . . **5 B. L. R., 450**

**135.** ——————— *Lien of mortgagee on sale of right, title, and interest of mort-*

MORTGAGE—*continued.*

5. SALE OF MORTGAGED PROPERTY—*continued.*

(*b*) MONEY-DECREES ON MORTGAGES—*continued.*

**Effect of taking money-decree on mortgage-bond—*continued.***

*gagor.—Writ of fi. fa.—Purchase at Sheriff's sale at instance of mortgagee.*—*N.*, *M.*, and *G.* borrowed from *B.* a sum of ₹12,000, to secure repayment of which they executed in her favour a joint and several bond in May 1863 for payment of the said sum with interest on the 6th May 1864, and also a warrant to confess judgment on the bond on the 27th April 1864. *N.*, *M.*, and *G.* executed a mortgage, in the English form, of certain property to *B.*, purporting to do so in pursuance of an agreement alleged to have been entered into between them and *B.* at the time the money was advanced by *B.* in 1863; but the evidence was not sufficient to show that such agreement had been entered into. Under a writ of *fi. fa.* issued previously to the mortgage of 1864,—*viz.*, on the 23rd of March 1864,—in a suit against *M.* and *N.*, the Sheriff sold to *A.*, on the 7th July 1864, the right, title, and interest of *M.* and *N.* in the mortgaged property. Assuming that an agreement to mortgage had been entered into in 1863, *A.* had no notice of such agreement. After this, a writ of *fi. fa.* was issued by the Sheriff, at the instance of *B.*, in execution of a decree which *B.* had caused to be entered upon the bond of May 1863; and under that writ the Sheriff, on the 22nd February 1866, sold the right, title, and interest of *N.*, *M.*, and *G.* in the mortgaged property, and *A.* became the purchaser. The purchase-money at this sale was paid to *B.*, and *A.* entered into possession of the property. In a suit by *B.* against *A.* and others on the mortgage of the 27th of April 1864, for foreclosure or sale of the property, the Court below (PHEAR, *J.*) held that the *fi. fa.* issued on the 23rd of March 1864, previously to the mortgage, must be taken to have operated against the share of *M.* and *N.* from the date when it was issued; that even if there was an agreement to mortgage, as alleged, then, although as against *N.*, *M.*, and *G.* themselves, a Court of Equity would treat such agreement as equivalent to an actual mortgage, yet it would not do so as against a purchaser under the *fi. fa.* without notice; and that the sale of the 7th July 1864, therefore, passed the shares of *M.* and *N.* to *A.* free of any rights or equities of *B.* Further, that the sale by the Sheriff of the 22nd February 1866, having been effected at the instance of *B.* for the purpose of realising the mortgage-debt, was operative, as between *B.* and *A.*, to pass to *A.* the entire shares of *N.*, *M.*, and *G.* in the property free of *B.'s* mortgage lien. *Held* on appeal that no agreement to mortgage being established, the sale by the Sheriff to *A.* in 1864 overrode the mortgage to *B.*, and passed to *A.* the shares of *M.* and *N.* *Held*, further, that the sale by the Sheriff in 1866 being of the right, title, and interest of *N.*, *M.*, and *G.*, and made at the instance of *B.*, without notice of her mortgage, and *B.* having received the purchase-money, which would appear to have been estimated on the value of the unencumbered shares, and no objection having been made to the sale by the mortgagors, who had allowed *A.* to hold unchallenged possession ever since, the entire equitable estate in the share of *G.* must be taken to have passed to *A.* A mortgagee is not entitled by means of a money-decree obtained on a collateral security, such as a bond or covenant, to obtain a sale of the equity of redemption separately. To allow him to do so would deprive the mortgagor of a privilege which is an equitable incident of the contract of mortgage,—namely, a fair allowance of time to enable him to redeem the property. BHUGGOBUTTY DOSSEE *v.* SHAMACHURN BOSE . . **I. L. R., 1 Calc., 337**

MORTGAGE—*continued.*

5. SALE OF MORTGAGED PROPERTY—*continued.*

(*b*) MONEY-DECREES ON MORTGAGES—*continued.*

**Effect of taking money-decree on mortgage-bond—*continued.***

**136.** ——————— *Priority of mortgage.—Sale to enforce lien on land.*—On the 15th July 1864 two undivided brothers executed a mortgage of their joint property to the plaintiff for ₹500, and on the 8th January 1868 they executed another mortgage of the same property for ₹1,000 to the defendant, who registered it under Act XX of 1866. In August 1871 a suit was brought against the brothers by the plaintiff on the mortgage of 1864, and a decree for the sum due was made in October 1871, directing that if the sum due was not paid within two months the mortgaged property should be sold. In March 1872 the property was sold in execution of the above-mentioned decree and bought by the plaintiff, who was duly put into possession. In 1871 a suit was brought against the brothers on the mortgage of 1868 by the defendant; a decree was made similar to that in the above-mentioned suit, a sale of property was had, and it was bought by the defendant. The plaintiff was thereupon dispossessed and referred to a regular suit, and the defendant was put into possession. This suit was then brought by the plaintiff, the first mortgagee and purchaser, to eject the defendant, the second mortgagee and purchaser, and the lower Appellate Court making a decree in favour of the plaintiff the defendant filed this second appeal. *Held* that the plaintiff having bought the rights and interests of the mortgagors under a sale held prior to the sale to the defendant, the mortgagors had no right or interest to sell to defendant; but that as the purchase by plaintiff was subject to the mortgage to the defendant, and as defendant was not a party to plaintiff's mortgage suit, defendant's right as mortgagee was not affected by the sale to the plaintiff, though effect could not be given to that right in the present suit. VENKATANARASAMMAH *v.* RAMIAH **[I. L. R., 2 Mad., 108**

(*c*) PURCHASERS.

**137.** ——— **Effect of sale.**—*Mortgaged property sold subject to right to redeem.—Purchase as agent.*—When mortgaged property is sold at auction subject to a mortgagor's right to redeem,

MORTGAGE—*continued.*

5. SALE OF MORTGAGED PROPERTY—*continued.*

(c) PURCHASERS—*continued.*

Effect of sale—*continued.*

the mortgagor's equities follow the property even when it turns out that the purchaser bought as agent, and not as principal. MUNSOOR ALI KHAN *v.* OJOODHYA RAM KHAN . . **8 W. R., 399**

**138.** ——————— *Priority of debt on sale after hypothecation.*—Land subsequently sold is liable for a debt for which the land was previously hypothecated. SADAGOPA CHARIYAR *v.* RUTHNA MUDALI . . . . **5 Mad., 457**

**139.** ——————— *Lien.—Right of purchaser.—Purchase by mortgagee.*—*A.* being indebted to *B.*, bound himself by deed not to alienate his rights in certain property until his debt to *B.* was satisfied; if he did alienate, provision was made for a decree to issue and to be executed. *A.* subsequently gave a putni of the property to *C.* After the creation of the putni, *B.* obtained and executed the decree provided for in the deed between himself and *A.*, and purchased in execution the right of *A.* in the property, and afterwards sold the same rights to the plaintiff. *Held* that, in a suit against *C.* to set aside the putni, the plaintiff had no right to set it aside, it having been created prior to his purchase from *B.*, and the lien possessed by *B.* had not passed to him. ERSKINE *v.* DHUN KISHEN SEIN . **8 W. R., 291**

SOONEY RAM MARWAREE *v.* BYJNATH KOOER **[10 W. R., 88**

*See* SOUJHAREE COOMAR *v.* RAMESHUR PANDA. RAMESHUR PANDA *v.* SOUJHAREE COOMAR **[4 W. R., 32**

**140.** ——————— *Effect of subsequent mortgage.—Merger.*—A creditor holding a mortgage on the lands of his debtor does not necessarily surrender that mortgage, or lower its priority, by taking a subsequent mortgage, including the same lands with other lands, for the same debt. Whether the earlier mortgage becomes merged and extinguished or not is a question of intention. GOLUKNATH MISSER *v.* LALLA PREM LAL **[I. L. R., 3 Calc., 307**

**141.** ——————— *Sale in execution of decree.—Purchase subject to mortgage securities.—Extinguishment of lien on purchase by mortgagee.*—Defendant No. 1 (*G. C.*), on 9th August 1863, borrowed money from plaintiff upon a bond, hypothecating property by way of simple mortgage. On 27th August 1867, he executed a similar instrument in favour of defendant No. 2 (*G. B.*) on a further loan. On 13th May 1867, he executed a second bond in favour of plaintiff for the amount (principal and interest) due under the first bond. On 29th May 1869, plaintiff obtained a decree against defendant No. 1 for the money due under the bond of 13th May 1867, and on 30th July 1870 defendant No. 2 (*G. B.*) also obtained a decree upon his bond against the said debtor. In execution of plaintiff's decree, the property was sold and purchased by decree-

MORTGAGE—*continued.*

5. SALE OF MORTGAGED PROPERTY—*continued.*

(c) PURCHASERS—*continued.*

Effect of sale—*continued.*

holder on 25th August 1870. After this *G. B.* also executed his decree and attached the property, which, notwithstanding plaintiff's objection, was put up to sale and purchased by *G. B.*, who obtained possession. Plaintiff sued to have the sale to the latter set aside and his own purchase upheld. *Held* that plaintiff, on purchasing at the sale in execution, took subject to the defendant's security to this extent, that the defendant by paying off the prior debt might establish his own security. *Held* that the question whether plaintiff's first security was extinguished by his taking a second security, covering the original debt with interest, would depend upon the intention of the parties, which, in this case, was shown by the original bond having remained in the possession of the creditor. GOPEE BUNDHOO SHANTRA MOHAPATTUR *v.* KALEE PUDO BANERJEE . . . **23 W. R., 338**

**142.** ——————— *Extinction of charge.—Intention of parties.—Presumption.*—Whether a mortgage, paid off, has been kept alive or extinguished, depends upon the intention of the parties; the mere fact that it has been paid off not deciding the question whether or not it has been extinguished. Express declaration of intention will cause either the one result or the other, and in the absence of such expression the intention may be inferred, either one way or the other. A lender of money upon a mortgage, which, however, having been made by a person not having authority to charge the greater part of the property included in it, was to that extent invalid, relied upon a charge effected in a prior paid-off mortgage to another mortgagee of the same property. The balance due for the prior mortgage-debt had been paid out of the money advanced on the later, and the prior instrument had come into the possession of the present mortgagee. *Held* that it must be presumed, in the absence of any expression of intention to the contrary, that the borrower, who claimed to be the owner of the property which he attempted to charge, intended that the money should be applied in paying off and extinguishing the prior mortgage, there being no intermediate incumbrance. It being also presumable that the lender lent the money upon the security of the later mortgage, he did not become entitled to an additional security merely because that which he had taken had thus proved invalid in part. *Held*, therefore, that the prior mortgage had been extinguished. MOHESH LAL *v.* BAWAN DAS **[I. L. R., 9 Calc., 961: 13 C. L. R., 221 L. R., 10 I. A., 62**

**143.** ——————— *Two mortgages to same mortgagee.—Merger of first mortgage.—Intention.—Decree on second mortgage.—Other mortgagees not made parties to suit.—Purchaser at auction sale.—Priority.—Suit by purchaser for possession.—Right of other mortgagees to redeem.—Form of decree.*—On the 15th of July 1870 certain lands were mortgaged by their owners (*S.* and his

MORTGAGE—*continued.*

5. SALE OF MORTGAGED PROPERTY—*continued.*

(c) PURCHASERS—*continued.*

**Effect of sale**—*continued.*

sons) to *H.*, with possession under a registered mortgage. On the 11th of June 1871 the same lands were mortgaged without possession to the defendant; on the 10th of June 1873, a second mortgage, purporting to give possession, was executed to *H.*; on the 12th of June 1873 a second mortgage, also purporting to give possession, was passed to the defendant; on the 15th of November 1877 *H.* obtained a decree against the mortgagors upon his mortgage of 10th June 1873, and sold the lands, which were purchased by the plaintiff. The plaintiff sought to obtain possession, but was obstructed by the defendant. He thereupon brought this suit. The defendant contended that he had not been a party to the suit by *H.*, and was entitled to possession, and offered to pay to the plaintiff the amount of his purchase-money, or to vacate the lands on satisfaction of his own mortgage lien. *Held* that the question whether *H.'s* mortgage of the 15th July 1870 was to be regarded as merged in his second mortgage of 10th June 1873, so as to deprive him of priority of title over the defendant, depended on the intention of the parties to the said mortgage, and there was nothing in the second mortgage-deed to show an intention to forego the benefit of the security created by the prior mortgage-deed of 15th July 1870, which was neither given up to the mortgagor, nor cancelled at the time, but remained with *H.* until handed over to the plaintiff with the other title-deeds. Under these circumstances the decree passed on the 15th November 1877 conferred an absolute title on the plaintiff, who purchased at the auction sale free from all incumbrances created by the mortgagor subsequent to the mortgage of 15th July 1870. The defendant, however, not having been made a party to *H.'s* suit to enforce his security, did not lose his right of redemption, which still remained to him. The plaintiff, therefore, purchased the property subject to the defendant's right of redemption. The High Court passed a decree ordering the defendant to deliver up possession to the plaintiff, but that he (the defendant) should be at liberty to redeem by payment to the plaintiff within six months of the amount which would be due on the mortgage of the 15th July 1870, if the same had remained unaffected by the mortgage of 10th June 1873, or, in default, should remain for ever foreclosed. DULLABHDAS DEVOHAND *v.* LAKSHMANDAS SARUPCHAND

**[I. L. R., 10 Bom., 88**

**144.** ——————— *Merger of right of suit upon a mortgage in a subsequent decree thereon.—Questions as to execution between parties to a suit.—Act XXIII of 1861, s. 11.*—Upon a mortgage of land made little less than sixty years before the present suit, a decree followed in 1825 to the effect that an account having been taken of what was due on the mortgage, the mortgagor might at any time make a tender of such mortgage-money with interest up to date, and require that the land

MORTGAGE—*continued.*

5. SALE OF MORTGAGED PROPERTY—*continued.*

(c) PURCHASERS—*continued.*

**Effect of sale**—*continued.*

should be restored. The plaintiff, representing the interest of the original mortgagor, sued for redemption of the mortgage, treating the above decree as regulating the rights of the parties from the time when it was made. *Held* that the right of the plaintiff was a right to execute the above decree, subject to the law of limitation, and not a right to obtain a decree for redemption and possession; the law also providing that questions between the parties to a suit relating to execution of decree must be determined by the order of the Court executing it. HARI RAVJI CHIPLUNKAR *v.* SHAPURJI HORMASJI SHET . . . . **I. L. R., 10 Bom., 461**

**145.** ——————— *First mortgage paid off by third mortgagee in ignorance of second mortgage. — Registration. — Notice. — Intention to keep alive first mortgage presumed.*—*S.* mortgaged land to *P.* *G.* subsequently obtained a decree, by consent, against *S.*, creating a charge on the same and other land, and registered the decree. *A.*, in ignorance of *G.'s* decree, paid off *P.'s* mortgage, but took no assignment thereof, and took a mortgage from *S.* of all the land covered by *G.'s* decree. In a suit by *G.* against *S.* and *A.* to enforce payment of his mortgage-debt,—*Held* that *A.*, not having had notice of *G.'s* decree, was entitled to stand as first incumbrancer in respect of the money paid to discharge *P.'s* mortgage; and that, even if registration was legal notice, an intention to keep alive *P.'s* mortgage was to be presumed in favour of *A.*, in accordance with the ruling of the Privy Council in *Gokul Doss Gopal Doss* v. *Rambux Seochand, L. R., 11 I. A., 126.* GANGADHARA *v.* SIVARAMA

**[I. L. R., 8 Mad., 246**

**146.** ——————— *Condition against alienation.—Lis pendens.*—The proprietor of certain immoveable property mortgaged it in July 1875 to *K.*, and in September 1875 to *L.* In October 1878 he sold the property to *K.* In November 1878 *L.* obtained a decree on his mortgage-bond for the sale of the property. The suit in which *L.* obtained this decree was pending when the property was sold to *K.* *K.* sued *L.* to have the property declared exempt from liability to sale in the execution of *L.'s* decree, on the ground that the mortgage to *L.* was invalid, it having been made in breach of a condition contained in *K.'s* mortgage-bond that the mortgagor would not alienate the property until the mortgage-debt had been paid. *Held* that the purchase by *K.* of the equity of redemption did not extinguish his security, it being his intention to keep it alive; and that the purchase of the property by *K.* while *L.'s* suit was pending did not prevent *K.* from contesting the validity of *L.'s* mortgage, so far as it affected him, on the ground that it was an infringement of the stipulation in the contract between him and the mortgagor. LACHMIN NARAIN *v.* KOTESHAR NATH

**[I. L. R., 2 All., 826**

MORTGAGE—*continued.*

5. SALE OF MORTGAGED PROPERTY—*continued.*

(c) PURCHASERS—*continued.*

**147. ——— Rights of parties on sale.**—*Prior and puisne mortgagees.—Purchase by prior mortgagee of equity of redemption at a Court sale.—Evidence of intention to keep mortgage alive.*—Where a prior mortgagee purchased the equity of redemption at a Court sale,—*Held*, following the Full Bench ruling in *Mulchand Kuber* v. *Lallu Trikam, I. L. R., 6 Bom., 404*, that in a contest between himself and a puisne mortgagee he was entitled to fall back upon his original mortgage and to retain possession until his mortgage was paid off. Generally, slight evidence will suffice to show that the prior mortgagee intended to retain the benefit of his mortgage. The fact that the mortgage-deed remains with the mortgagee who purchases, is evidence that he intends to retain the benefit of his mortgage. SHANTAPA *v.* BALAPA . . **I. L. R., 6 Bom., 561**

**148. ——— *Sale under second of two mortgages.—Payment under order of Court without jurisdiction by purchaser to first mortgagee.—Extinguishment of mortgage lien.***—Where the former of two mortgagees, to whom a certain person hypothecates his estates, accepts from the auction-purchaser, who buys a portion of the estates when they are sold on foreclosure of the second mortgage, a sum of money assessed by a Civil Court as the equivalent of the former mortgagee's prior charge on the estates, no successor of the former mortgagee can again proceed to sell up the estates, even though the Court which assessed the money-value of the charge on the estates may not have had the jurisdiction to do so: for in accepting the money, the former mortgagee released the estate from all further liability under his bond. JANKEE PERSHAD *v.* AJOODHYA DOSS . . . **25 W. R., 257**

**149. ——— *Purchase by first mortgagee after second mortgage.—Set-off of first mortgage against purchase-money.—Priority.***—If the first mortgagee purchases the property mortgaged after a second mortgage is created upon it, he does not thereby lose the benefit of his first mortgage if the money due under the first mortgage be set off against the consideration of the sale. Accordingly, where a second mortgagee obtained a decree upon his mortgage subsequently to a sale of the mortgaged property to the first mortgagee, who had been allowed to set off the money due to him on his mortgage against the consideration, the latter is entitled, as against the auction-purchaser at the sale in execution of the decree, to priority in regard to his mortgage. BISSEN DOSS SINGH *v.* SHEO PERSHAD SINGH . . . . . **5 C. L. R., 29**

**150. ——— *First and second mortgagees.—Assignment by mortgagee.—Rights of assignees.***—In March 1865 the proprietors of a certain share in a certain village mortgaged the share to *R.*, giving him possession of the share, and stipulating that the mortgagee should take the profits of the share in lieu of interest, and that the mortgage

MORTGAGE—*continued.*

5. SALE OF MORTGAGED PROPERTY—*continued.*

(c) PURCHASERS—*continued.*

**Rights of parties on sale—*continued.***

should be redeemed on payment of the principal sum without interest. In April 1865 *R.* mortgaged his rights and interests under the mortgage of March 1865 to *S.*, retaining possession of the share. In February 1869 the proprietors of the share again mortgaged it to *R.* for a further loan. Under this mortgage *R.* was entitled to take the profits of the share in lieu of interest, and the mortgage was redeemable on payment both of the principal sum due thereunder and of that due under the mortgage of March 1865, without interest, or the mortgagors were entitled to redeem a certain portion of the share on payment of a proportionate amount of such sums, without interest, on a particular day in any year. In August 1872 *S.* obtained a decree on the mortgage of April 1865, directing the sale of *R.'s* rights and interests under the mortgage of March 1865 in satisfaction of such decree. In May 1874 *R.* assigned by sale to *N.* his rights and interests under the mortgage of February 1869, retaining possession of the share. In April 1877 *R.'s* rights and interests under the mortgage of March 1865 were sold in execution of the decree of August 1872, and were purchased by *S.*, who obtained possession of the share. *Held*, in a suit by *N.* against *S.* to obtain possession of the share in virtue of the assignment of May 1874, that, under the circumstances of the case, *S.* was entitled as against *N.* to the possession of the share as first mortgagee. SAHAI PANDEY *v.* SHAM NARAIN . . **I. L. R., 2 All., 142**

**151. ——— *First and second mortgagees.—Purchase of mortgaged property by first mortgagee.***—The first mortgagee of certain property purchased it at an execution sale. The second mortgagee of such property subsequently sued the mortgagor and the first mortgagee to enforce his mortgage by the sale of such property. *Held* that the first mortgagee was entitled to resist such sale, by virtue of being the first mortgagee, until his mortgage-debt was satisfied; and the fact that he had purchased the property mortgaged to him did not extinguish his mortgage, which must be held to subsist for his benefit. *Gaya Prasad* v. *Salik Prasad, I. L. R., 3 All., 682*, followed. HAR PRASAD *v.* BHAGWAN DAS . . **I. L. R., 4 All., 196**

**152. ——— *First and second mortgagees.—Purchase of mortgaged property by mortgagee.***—*G.*, the mortgagee of certain property, having purchased a portion thereof, sued (i) the mortgagor; (ii) *P.*, to whom another portion of such property had been mortgaged before such property had been mortgaged to *G.*, and who had purchased such portion subsequently to the mortgage of such property to *G.* and *G.'s* purchase; and (iii) *M.*, who had purchased a third portion of such property subsequently to *G.'s* purchase, for the enforcement of his lien on such property. *Held* by STUART, *C. J.*, OLDFIELD, *J.*, and STRAIGHT, *J.* (PEARSON, *J.*,

MORTGAGE—*continued.*

5. SALE OF MORTGAGED PROPERTY—*continued.*

(c) PURCHASERS—*continued.*

**Rights of parties on sale**—*continued.*

dissenting), that, inasmuch as it was the manifest intention of *P.* to keep his incumbrance alive, and for his benefit to do so, *P.'s* purchase did not extinguish his incumbrance, and he was entitled, as prior incumbrancer, to resist *G.'s* claim to bring to sale the portion of the mortgaged property purchased by him. *Held*, also, by OLDFIELD, *J.*, and STRAIGHT, *J.* (PEARSON, *J.*, dissenting), that *G.*, notwithstanding he had purchased a portion of the mortgaged property, might throw the whole burden of his mortgage-debt on the portions of the mortgaged property in the mortgagor's possession and in *M.'s* possession, but he could not have thrown it on the portion of such property in *P.'s* possession. GAYA PRASAD *v.* SALIK PRASAD. GAYA PRASAD *v.* GAYA PRASAD [I. L. R., 3 All., 682

153. ——————— *Condition against alienation.—First and second mortgagees.—Purchase by mortgagee of mortgaged property.*—A transfer of mortgaged property in breach of a condition against alienation is valid except in so far as it encroaches upon the right of the mortgagee, and, with this reservation, such a condition does not bind the property so as to prevent the acquisition of a valid title by the transferee. *Chunni* v. *Thakur Das, I. L. R., 1 All., 126; Mul Chand* v. *Balgobind, I. L. R., 1 All., 610;* and *Lachmin Narain* v. *Koteshar Nath, I. L. R., 2 All., 826,* observed on. A mortgage is not extinguished by the purchase of the mortgaged property by the mortgagee, but subsists after the purchase, when it is the manifest intention of the mortgagee to keep the mortgage alive, or it is for his benefit to do so. *Gaya Prasad* v. *Salik Prasad, I. L. R., 3 All., 682;* and *Ramu Naikan* v. *Subbaraya Mudali, 7 Mad., 229,* followed. It is not absolutely necessary for the first mortgagee of property, when suing to enforce his mortgage, to make the second mortgagee a party to the suit. If the second mortgagee is not made a party to the suit, he is not bound by the decree which the first mortgagee may obtain for the sale of the property, but can redeem the property before it is sold; but if he does not redeem, and the property is sold in execution of the decree, his mortgage will be defeated, unless he can show some fraud or collusion which would entitle him to defeat the first mortgage or to have it postponed to his own. The ruling of TURNER, *J.*, in *Khub Chand* v. *Kalian Das, I. L. R., 1 Mad., 240,* followed. In July 1874 a usufructuary mortgage of certain immoveable property was made to *D.* In July 1875 a portion of such property was again mortgaged to *D.* The instrument of mortgage on this occasion contained a condition against alienation. In July 1877 the whole property was mortgaged to *N.* In October 1877 it was again mortgaged to *D.* *N.* sued the mortgagor on his mortgage in July 1877, and on the 29th September 1879 obtained a decree against him for the sale of the property. In October 1879, the mortgagor sold the property to *D.* in satisfaction of his mortgages of July 1875 and October 1877. *D.* did not offer to redeem *N.'s* mortgage, and on the 20th November 1880 the property was put up for sale in execution of *N.'s* decree (*D.'s* objection to the sale having been previously disallowed), and was purchased by *A.* *D.*, who was still in possession under his mortgage of July 1874, then sued *A.* for a declaration of his proprietary right to the property, claiming by virtue of his mortgages and the sale of October 1879. *Held*, applying the rules stated above, that *N.'s* mortgage of July 1877 could not affect *D.'s* right under his mortgage of July 1875, but *N.* took subject to such mortgage; nor could the auction-sale of the 20th November 1880, which took place in enforcement of *N.'s* mortgage, affect *D.'s* prior mortgages; and therefore the condition against alienation made in *D.'s* favour had no prejudicial effect on the right of *A.* under his auction-purchase: that the purchase by *D.* of October 1879 did not extinguish his prior mortgages, but such mortgages were still subsisting, and *A.* purchased subject to them: that there having been no fraud or collusion on *N.'s* part, *A.* must be held to have purchased subject only to *D.'s* prior mortgages and not subject to *D.'s* mortgage of October 1877. *Held* also that, as *D.'s* purchase of October 1879 was made without *N.* having had an opportunity of redeeming *D.'s* prior mortgages, *D.'s* purchase was subject to *N.'s* mortgage of July 1877, and therefore could not deprive *A.* of what he had purchased at the auction-sale of the 20th November 1880. *Held*, therefore, that all the relief that *D.* was entitled to was a declaration that, as prior mortgagee under the mortgages of July 1874 and July 1875 he was entitled, as against *A.*, to retain possession of the property, until such mortgages were satisfied. ALI HASAN *v.* DHIRIA [I. L. R., 4 All., 518

154. ——————— *First and second mortgages.—Payment by purchaser of mortgaged property of first mortgage.—Right of purchaser to benefits of first mortgage.—Right of second mortgagee to bring to sale mortgaged property.*—The purchasers of the equity of redemption of land which had been mortgaged in 1866 and 1874 to different persons, paid off the prior mortgage. The second mortgagee sued to bring the property to sale in satisfaction of his mortgage. *Held* that the prior mortgage was not extinguished, and that the purchasers of the equity of redemption had, by paying off that mortgage, acquired an equitable right to its benefits, which they could use against the second mortgage. *Gokaldas Gopaldas* v. *Puranmal Premsukhdas, I. L. R., 10 Calc., 1035,* followed. *Per* OLDFIELD, *J.* (MAHMOOD, *J.*, dissenting), that the prior mortgage afforded a defence against the claim of the second mortgagee seeking to bring the property to sale. *Gokaldas Gopaldas* v. *Puranmal Premsukhdas, I. L. R., 10 Calc., 1035,* followed. *Per* MAHMOOD, *J.*, that the ruling of the Privy Council in *Gokaldas*

**MORTGAGE**—*continued.*

**5. SALE OF MORTGAGED PROPERTY**—*continued.*

(*c*) PURCHASERS—*continued.*

**Rights of parties on sale**—*continued.*

*Gopaldas* v. *Puranmal Premsukhdas, I. L. R., 10 Calc., 1035,* did not go beyond laying down the proposition that when the purchaser of the equity of redemption pays off a prior mortgage, which carries with it the right of possession of the mortgaged property, the mortgage is not extinguished for all purposes, but such purchaser, acquiring the benefits of the usufructuary mortgage, is entitled to remain in possession, and can successfully resist a suit by a subsequent usufructuary mortgagee seeking to disturb such possession. Also *per* MAHMOOD, *J.*, that although the persons who had paid off the prior mortgage were entitled to claim its benefits, they could not be understood to have acquired rights greater than those which the prior mortgagee himself possessed; that as holders of the equity of redemption they could not resist the suit which aimed at enforcing a valid security, and, as persons entitled to the benefits of the prior mortgage, they were at best in the position of assignees of that mortgage; that the union of the two capacities could not confer upon them rights higher than those which the mortgage they had paid off created; that a puisne incumbrancer is not prevented by the mere fact of the existence of a prior mortgage from enforcing his security without paying off the prior mortgage so long as such enforcement does not clash with the right secured by the prior mortgage; and that therefore the purchaser of the equity of redemption held that right subject to the plaintiff's mortgage of 1874, and the fact of their having redeemed the prior mortgage did not place the equity of redemption on a better footing, though it entitled them to the benefits of that mortgage secured to them in the same manner as to the original mortgagee whose rights they had acquired by subrogation. *Gaya Prasad* v. *Salik Prasad, I. L. R., 3 All., 682; Ramu Naikan* v. *Subbaraya Mudali, 7 Mad., 229;* and *Mul Chand Kuber* v. *Lallu Trikam, I. L. R., 6 Bom., 404,* referred to. SIRBADH RAI *v.* RAGHUNATH PRASAD . **I. L. R., 7 All., 568**

**155.** ——————— *First and second mortgages.—Payment by purchaser of mortgaged property of first mortgage.—Right of purchaser to benefits of first mortgage.—Right of second mortgagee to bring to sale mortgaged property.—Registered and unregistered instruments.—Optional and compulsory registration.—Act III of 1877, s. 50.*—At a sale in execution of a decree, *J.* purchased certain property which was at that time subject to two mortgages,—the first under an unregistered deed in favour of *M.* and dated in 1872, and the second under a registered deed in favour of *L.* and dated in 1880. The registration of both deeds was optional, the former under Act VIII of 1871, and the latter under Act III of 1877. *J.* subsequently satisfied the mortgage under the registered deed of 1880, which was delivered to him. *M.* then brought a suit to recover the money due to him under the mortgage-deed of 1872 by sale of the mortgaged property. *Held*



**MORTGAGE**—*continued.*

**5. SALE OF MORTGAGED PROPERTY**—*continued.*

(*c*) PURCHASERS—*continued.*

**Rights of parties on sale**—*continued.*

by OLDFIELD, *J.*, that, applying the rule laid down by the Privy Council in *Gokaldas Gopaldas* v. *Purnamal Premsukhdas, I. L. R., 10 Calc., 1035,* having paid off the mortgage under the registered deed of 1880, should have the benefits of that mortgage, and was entitled to set up the deed which he held against the unregistered deed of 1872, against which, under section 50 of the Registration Act (III of 1877), it would take effect, as regards the property comprised in it. *Lachman Das* v. *Dip Chand, I. L. R., 2 All., 851,* referred to. *Per* MAHMOOD, *J.*, that the word "unregistered" in section 50 of the Registration Act must, in reference to the circumstances of the present case, be read as "not registered under Act VIII of 1871," and that, so reading the section, the registered mortgage-deed of 1880 was entitled to priority over the unregistered mortgage-deed of 1872. *Lachman Das* v. *Dip Chand, I. L. R., 2 All., 851;* and *Sri Ram* v. *Bhagirath Lal, I. L. R., 4 All., 227,* distinguished. Also *per* MAHMOOD, *J.*, that the position of *J.* by reason of his having paid off the registered mortgage of 1880 could at best be that of an assignee of that mortgage having priority over the mortgage-deed on which the plaintiff was suing; that such priority could not enable him to place the equity of redemption upon a higher footing than it would have been had he not paid off the registered mortgage of 1880; and that, as a consequence, the sale of the property in enforcement of the mortgage of 1872 should be allowed to take place, but subject to the rights of priority which *J.* had acquired by reason of his having paid off the registered mortgage of 1880. *Sirbadh Rai* v. *Raghunath Prasad, I. L. R., 7 All., 568;* and *Gokaldas Gopaldas* v. *Puranmal Premsukhdas, I. L. R., 10 Calc., 1035,* referred to. JANKI PRASAD *v.* MAUTANGUI DEBIA

**[I. L. R., 7 All., 577**

**156.** ——————— *First and second mortgages.—Payment by purchaser of mortgaged property of first mortgage.—Right of second mortgagee to bring tos ale mortgaged property subject to first mortgage.*—In 1874 a plot of land, No. 111, which in 1866 had been mortgaged to *L.*, was with other property mortgaged to *R.* In 1878 the equity of redemption in plot No. 111 was purchased by *J.*, who paid off the mortgage of 1866. *R.* brought a suit against *J.* to bring to sale the whole of the property included in the mortgage of 1874. The Court of first instance decreed the claim in part, exempting from the decree plot No. 111, on the ground that the defendant, by reason of having purchased the equity of redemption in that plot and having paid off the mortgage of 1866, stood in the position of a first mortgagee of that plot, and his mortgage had priority over the plaintiff's mortgage of 1874. The Full Bench modified the decree of the Court of first instance by inserting after the words "land No. 111 be exempted from the hypothecation lien" the words "in that property the interest of the plaintiff

MORTGAGE—*continued.*

5. SALE OF MORTGAGED PROPERTY—*continued.*

(*c*) PURCHASERS—*continued.*

**Rights of parties on sale—*continued.***

as second mortgagee only to be sold." *Per* OLDFIELD, *J.*, that the second mortgagee could not bring the land to sale so as to oust the first mortgagee, whose mortgage was usufructuary, and get rid of the first mortgage without satisfying it; but that he had a right to sell such interest as he possessed as second mortgagee. *Per* STRAIGHT, *J.*, that the plaintiff was entitled to bring to sale the property charged to him under his mortgage of 1874, subject to the rights existing in favour of the first mortgagee of 1866: in other words, that a purchaser at a sale in execution of the decree would have no further right than a right to take the property subject to the right of the first mortgagee to possession of the property included in his instrument, and his other rights under that instrument, so long as it enured. RAGHUNATH PRASAD *v.* JURAWAN RAI **[I. L. R., 8 All., 105**

**157.** ——————— *Purchase by first mortgagee.—Right of, as against a subsequent one.*—A prior mortgagee, having purchased, may still use his mortgage as a shield against the claims of subsequent mortgagees. RAMU NAIKAN *v.* SUBBARAYA MUDALI . . . . . **7 Mad., 229**

**158.** ——————— *Sale subject to mortgage.—Prior mortgage redeemed.—Liability of purchaser.*—*S.* mortgaged his land to *B.* in 1875, then to *M.* in 1879, and then sold it to *K.* in order to pay off the mortgage to *B.* The purchase-money was paid to *B.*, but *K.* took no steps to keep *B.'s* mortgage outstanding. *Held* that *K.* could not use *B.'s* mortgage as a shield against *M.* KRISHNA REDDI *v.* MUTTU NARAYANA REDDI **[I. L. R., 7 Mad., 127**

**159.** ——————— *Bonâ fide purchase of property subject to mortgage without notice.*—*A.*, after mortgaging his property to *B.*, conveyed it by sale as unincumbered to *C.*, who took proceedings against the mortgagor, *A.*, and obtained a decree for possession. Meantime *B.* brought a suit upon his mortgage, and obtained a decree under which he sold the property to *D.* *B.* then sued *D.* for possession. *Held* that the Judge was right in finding that the defendant, being a *bonâ fide* purchaser for value without notice, was entitled to hold the property as against the plaintiff. MAHOMED ASHRUF *v.* KUREEMOODDEEN . . . . . **24 W. R., 468**

**160.** ——————— *Purchase of equity of redemption by first mortgagee.—Priority.—Notice.—Merger.*—On the 20th of August 1870, *M.*, the owner of a house in Gujarat, mortgaged it to the defendant's father with possession. On the 2nd of December 1871, he made a san-mortgage of the same house to the plaintiff. On the 20th of April 1872, *M.* sold the equity of redemption to the defendant's father, who became the purchaser without cancelling his first mortgage. The plaintiff subsequently sued *M.* to enforce his san-mortgage, and, obtaining a decree, placed an attachment on the house, which attachment, however, was removed on the application of the defendant's father. The plaintiff now sued to establish his right to levy the amount due on his san-mortgage. He claimed priority to the defendant on the authority of *Toulmin* v. *Steere, 3 Mer., 210*, where it was held that a purchaser of the equity of redemption could not set up a prior mortgage of his own against subsequent incumbrances of which he had notice. *Held* that the intention of the defendant's father when purchasing the equity of redemption having been to retain the benefit of all his rights, his son, the defendant, might properly require the redemption of his first mortgage as the condition of the plaintiff's enforcing the decree upon his mortgage against the property. A mortgagee purchasing the equity of redemption may indicate his intention to keep his charge upon the property alive otherwise than by express words. *Per* WEST, *J.*—The successive charges created by the owner of an estate may be regarded as fractions of the ownership, which embraces the aggregate of advantages that can be drawn from it. Each charge in its turn constitutes a deduction from the original aggregate, and the nominal ownership may itself then be reduced to a small fraction of what it once was. Still, be it small or great, it is a possible object of sale or purchase, and there is no ground or reason for saying that an incumbrancer who is already owner of one fraction of the property may not buy this other fraction without forfeiting the former fraction in favour of other fractional owners in the remainder left after deduction of his prior share. MULCHAND KUBER *v.* LALLU TRIKAM . . **I. L. R., 6 Bom., 404**

**161.** ——————— *Revival of lien.—Priority of lien among mortgagees.*—Where an estate had been mortgaged in 1863, and a second mortgage to the same person in 1867 had resulted in a re-adjustment of the old debt, under which the old mortgage had determined, but the original relations between mortgagor and mortgagee had been renewed; and where a fresh lien had been created on the same property by a new mortgage in 1864 to a third person, who also entered upon possession of the said property on a zur-i-peshgi lease, and who, on the sale of the property, sought to set aside the lien of the first mortgagee,—*Held* that the first and second mortgagees were entitled to priority in the following order: *first*, the first mortgagee for the amount outstanding from the first mortgage of 1863, and revived in the second mortgage of 1867; *second*, the second mortgagee for the amount stipulated in the mortgage of 1864; *third*, the first mortgagee for the residue (if any) after satisfying the above-mentioned claim of first mortgagee: *fourth* and *lastly*, the second mortgagee for any residue. *Held* also that, having failed to call for stricter proof of the fairness of the first mortgagee's claims in the Court below, the

**MORTGAGE**—*continued.*

5. SALE OF MORTGAGED PROPERTY—*continued.*

(c) PURCHASERS—*continued.*

**Rights of parties on sale**—*continued.*

second mortgagee could not urge in appeal that fair consideration had not been received. *Held* also that the second mortgagee, having enjoyed possession of the estate under the zur-i-peshgi lease, was not entitled to interest on the amount decreed. WOSEKUN *v.* BYJNATH SINGH . . . **25 W. R., 171**

**162.** ——— **Possession under mortgage.**—*Priority of mortgagee with possession.*—As a general rule, by Hindu law, a mortgagee in possession is entitled to have his claim satisfied in preference to the claim of the holder of a mortgage of prior date unaccompanied by possession. HARI RAMCHANDRA *v.* MAHADAJI VISHNU . . **8 Bom., A. C., 50**

KRISHNAPPA VALAD MAHADAPPA *v.* BAHIRU YADHAVRAV . . **8 Bom., A. C., 55**

There are cases, however, which the Courts treat as exceptions to that general rule. Thus, where a prior mortgagee sued to recover possession, of certain mortgaged premises from the mortgagor, and before judgment was given in that suit, a subsequent mortgagee filed another suit against the mortgagor and obtained judgment, under which possession was made over to him (the subsequent mortgagee); it was held that possession so obtained pending the earlier suit would not avail to give the subsequent mortgagee priority over the prior mortgagee. KRISHNAPPA VALAD MAHADAPPA *v.* BAHIRU YADAVRAV **[8 Bom., A. C., 55**

**163.** ——— *Registration of mortgage-deed.*—A mortgage-deed is when registered valid without possession. BALAJI NARAYAN KOLATKAR *v.* RAMCHANDRA GANESH KELKAR **[11 Bom., 37**

**164.** ——— *Law in Guzerat.—Rights of prior and puisne mortgagees.—Purchaser of equity of redemption with notice of incumbrances.*—The rule of Hindu law that a mortgage with possession takes precedence of a mortgage of a prior date, but unaccompanied by possession, does not apply to Guzerat. Where in Guzerat the defendant, a puisne mortgagee in possession, had notice of plaintiff's prior mortgage, the defendant was held not entitled to claim the benefit of the above rule of Hindu law. Registration could not of itself alter this rule of Hindu law except so far as effect may be given to it by statute, and registration secures the same object which the Hindu law intended to secure by requiring possession, *viz.*, notice to subsequent incumbrancers of the existence of a prior incumbrancer. The purchaser of an equity of redemption, with notice of subsequent incumbrances, stands in the same situation, as regards such subsequent incumbrances, as if he had been himself the mortgagor: he cannot set up against such subsequent incumbrances either a prior mortgage of his own, or a mortgage which he or the mortgagor may have got in. ITCHARAM DAYARAM *v.* RAIJI JAGA . **11 Bom., 41**

**MORTGAGE**—*continued.*

5. SALE OF MORTGAGED PROPERTY—*continued.*

(c) PURCHASERS—*continued.*

**Possession under mortgage**—*continued.*

**165.** ——— *Subsequent purchase.*—The mortgagee without possession of certain lands in the Dekhan (under a mortgage-deed of the 1st of August 1864) on the 16th of April 1867, obtained a decree awarding to him possession of the mortgaged premises. On the 11th of July following the mortgagor sold the mortgaged premises to the plaintiff, who had distinct notice of the mortgage. The deed of sale was duly registered. The plaintiff thereupon claimed to hold the premises free from the mortgage. *Held* that though a mortgage in the Dekhan must be accompanied by possession to give it validity against third parties, it is not absolutely void for want of such possession, and that the plaintiff, having notice of it, should not be allowed to hold the premises free from the mortgage. GOPAL YADAVRAV KESKAR *v.* KRISHNAPPA BIN MAHADAPPA **[7 Bom., A. C., 60**

*See* CHINTAMAN BHASKAR *v.* SHIVRAM HARI **[9 Bom., 304**

**166.** ——— *Purchase by mortgagee.—Priority.—Held* that a mortgagee in possession, who also became purchaser of the property for the amount secured by the mortgage under a deed of sale which was neither stamped nor registered, could fall back upon his mortgage and recover the amount thereof, in preference to a subsequent purchaser of the same property whose deed of sale was both stamped and registered. HIRACHAND BABAJI *v.* BHASKAR ABABHAT SHENDE **2 Bom., 198**

**167.** ——— *Possession of title-deeds.—Priority.—Rights of second mortgagees.*—The mere possession of the title-deeds by a second mortgagee, though a purchaser for value without notice, will not give him priority. There must be some act or default of the first mortgagee to have this effect. SOMASUNDARA TAMBIRAN *v.* SAKKARAI PATTAN . . . . **4 Mad., 369**

**168.** ——— *Decree for possession.—Sale in execution of money-decree.—Priority.—Estoppel.*—Plaintiff claimed under a mortgage, dated the 27th November 1871, for R50, which was neither registered nor accompanied with possession. Defendant claimed under a mortgage, dated the 17th March 1873, for R150, which was both registered and accompanied with possession. Defendant had no notice, express or constructive, of the plaintiff's previous mortgage. In 1873 plaintiff sued the mortgagor for a money-claim unconnected with the mortgage, and on the 20th February 1874 obtained a decree for R100. In execution of this money-decree the mortgaged property was attached and sold by the Court, at the plaintiff's instance, the defendant becoming the purchaser for R86 on the 17th September 1874. An unregistered certificate of the Court's sale, bearing date the 29th October 1874, was issued to defendant. In 1874 plaintiff brought a suit on his mortgage (to which suit defendant was not a

MORTGAGE—*continued.*

5. SALE OF MORTGAGED PROPERTY—*continued.*

(*c*) PURCHASERS—*continued.*

**Possession under mortgage—*continued.***

party), and obtained a decree (the date of which did not appear in evidence) for possession of the mortgaged property against the mortgagor. In endeavouring to enforce that decree, plaintiff was obstructed by defendant on the 15th January 1875. *Held* that, if it was passed subsequent to the Court's sale of the mortgaged property to defendant on the 17th September 1874, the decree for possession was valueless, as neither the title to, nor the possession of, the mortgaged property was then vested in the mortgagor. *Held*, further, that as defendant had no notice of the plaintiff's mortgage when plaintiff caused the Court's sale to be made under his money-decree, or that the sale was made subject to the plaintiff's mortgage, it was incumbent on plaintiff, as such money judgment-creditor, to inform defendant, when bidding for the right, title, and interest of the judgment-debtor in the mortgaged property, that the judgment-creditor (plaintiff) held a mortgage on the same property, and intended to enforce it, especially as the mortgage was neither registered nor accompanied with possession; and that the plaintiff, having omitted so to inform the defendant, was estopped from enforcing his own mortgage against the defendant. *Itcharam Dayaram* v. *Raiji Jaga, 11 Bom., 41,* distinguished. TUKARAM BIN ATMARAM *v.* RAMACHANDRA BUDHARAM

[I. L. R., 1 Bom., 314

169. ——————— *Mortgage without title.—Priority of mortgagee's right.—P.* and his partners mortgaged certain immoveable property to plaintiff on the 11th October 1869. They had then no title to the property, but they subsequently acquired one by purchase on the 29th June 1871. On plaintiff demanding that *P.* and his partners should make good the contract of mortgage out of the interest they had acquired, the matter was referred to arbitrators, who, on the 26th December 1873, made an award empowering plaintiff to sell the mortgaged property in satisfaction of his debt. The award was presented in Court by plaintiff on the 23rd January 1874, and was filed by the Court on the 23rd February 1874. Meanwhile, on the 14th February 1874, the property was attached in execution of a money-decree obtained by a creditor of *P.* and his partners against them. On the 15th April 1874 it was sold by auction and purchased by defendant. In a suit brought by plaintiff to recover possession of the property, both the lower Courts rejected his claim, on the ground that *P.* and his partners had no right to the property when they mortgaged it to plaintiff. *Held* by the High Court on second appeal, reversing the decrees of the lower Court, that the defendant, as purchaser under a money-decree, could not defeat the plaintiff's right as mortgagee to sell the property in satisfaction of his debt. PRANJIVAN GOVARDHONDAS *v.* BAJU . I. L. R., 4 Bom., 34

170. ——————— *Mortgage of property already sold in execution.—Subsequent*

MORTGAGE—*continued.*

5. SALE OF MORTGAGED PROPERTY—*continued.*

(*c*) PURCHASERS—*continued.*

**Possession under mortgage—*continued.***

*mortgagee with notice of previous sale.—Assignment.—Rejection of application under s. 269 of Act VIII of 1859.—Suit within one year.*—On the 17th October 1866, *K.* (defendant No. 1), one of the three sons of *B.*, mortgaged certain immoveable property to one *N.* with possession. On the 19th December 1866, *A.* (plaintiff No. 1) obtained a money-decree against *K.* and the estate of his deceased father. In execution of that decree the property was sold by the Court and purchased by *A.* himself, who obtained a certificate of sale dated the 30th January 1868. He subsequently sold and conveyed the property to *D.* and *C.* (plaintiffs Nos. 2 and 3). On applying to the Court for possession, the plaintiffs were resisted by *N.* The Court rejected the plaintiffs' application on the 11th July 1868. On the 31st May 1871, *K.* and his two brothers mortgaged the property to *M.* (defendant No. 2), who took the mortgage with full notice of the Court sale to the plaintiff *A.* *K.* and his brothers paid off the mortgage of *N.* out of the money borrowed by them from *M.* (defendant No. 2) on the mortgage of the property. *N.* returned his mortgage-deed to *K.* and his brothers, who made it over to *M.* In 1878 the plaintiffs brought a suit against *K.* and *M.* for possession of the property. The Subordinate Judge held the plaintiffs entitled to recover it, on payment of the amount due to *M.* on his mortgage, being of opinion that *M.* was in the same position as *N.* On appeal the District Judge dismissed the plaintiffs' suit on the ground that it was not brought within one year from the date when the application for possession was rejected. On appeal to the High Court,—*Held* that the mortgage by *K.* and his brothers to *M.*, dated the 31st May 1871, was a mortgage of property which did not then belong to them,—their estate and interest in it having passed to the plaintiff *A.* at the Court sale. *Held* also, that the order of the 11th July 1868, rejecting the plaintiff's application for possession under section 269 of the Civil Procedure Code (Act VIII of 1859) did not affect the right to bring a redemption suit against *N.* *Held*, further, that there was nothing to show any assignment, by *N.*, of his mortgage, or any intention on his part to assign it to *M.*, or to keep it on foot for *M.'s* benefit. The High Court accordingly reversed the decrees of the Courts below, and made a decree in favour of the plaintiffs. APAJI BHIVRAV *v.* KAVJI

[I. L. R., 6 Bom., 64

171. ——————— *Right to redeem.—Parties.—Registration Act, XX of 1866, s. 50.—Priority.—Notice of prior unregistered mortgage.*—On the 24th September 1869, *G.* mortgaged certain land to *H.* Subsequently, on the 14th June 1870, he mortgaged the same land to *P.* Both the mortgages were for sums less than R100. The mortgage to *H.* was unregistered, but the subsequent mortgage to *P.* was registered. On the 21st June 1873, in a suit to

MORTGAGE—*continued.*

5. SALE OF MORTGAGED PROPERTY—*continued.*

(c) PURCHASERS—*continued.*

**Possession under mortgage**—*continued.*

which *P.* was not a party, *H.* obtained a decree on his mortgage, and at the execution sale he himself became the purchaser, and was put into possession of the land under his certificate of sale. On the 21st September 1874, *P.* assigned his mortgage to the plaintiff. The deed of assignment was not registered; neither *P.* nor his assignee, the plaintiff, ever had possession under the mortgage of 1870. The plaintiff brought this suit to obtain possession of the land. Both the lower Courts dismissed the plaintiff's claim. On special appeal to the High Court,—*Held* that, in order to bind *P.* by the decree passed in 1873, and thus make a good title to the purchaser under that decree, *H.* should have made *P.* a party to his suit, thereby giving *P.* an opportunity of redeeming *H.'s* mortgage. *H.* having neglected to do this, the plaintiff in the present suit, as the assignee of the rights and equities of *P.*, was entitled to redeem the mortgage of *H.* in case it was proved that *P.* had notice of that mortgage. SHIVRAM *v.* GENU **[I. L. R., 6 Bom., 515**

*See* NARAN PURSHOTAM *v.* DALATRAM VIRCHAND **[I. L. R., 6 Bom., 538**

**172. ——— Purchaser of property mortgaged from grantee of mortgagor.**—*Decree and sale by mortgagee.—Auction-purchaser.—Priority of latter over purchaser from grantee of mortgagor.*—In the year 1869, *A.* mortgaged her share in a zemindari to *B.* In 1870 she granted a putni lease of the property to *C.*, who transferred it to *D.* Subsequently, *A.* made a gift of the property to *E.*, and in 1872 *E.* sold the land so given to *F.*, who thus became the owner of the putni and zemindari rights of the property formerly belonging to *A.* In 1873 *B.* brought a suit against *E.* (to which *F.* was not a party) on his mortgage-bond, and obtained a decree for the sale of the mortgaged property. At the sale the property was purchased by *G.* (the son of *D.*). *F.* then brought a suit for rent against *G.* and obtained a decree. *G.* then brought this suit against *F*, to have it declared that he was no longer liable to pay rent, and to establish his zemindari rights, claiming a refund of the money paid under the rent-decree. *Held* that *G.* had bought the entire interest which *A.* and *B.* could jointly sell, and not merely the right and interests of *A.* as they stood at the time of the sale, and that he was, therefore, entitled to a decree declaring that he was no longer liable to pay rent to *F.* MUTHORA NATH PAL *v.* CHUNDERMONEY DABIA . **I. L. R., 4 Calc., 817**

**173. ——— Purchaser, Assignee of.**—*Ejectment by assignee of purchaser at sale in execution of decree against puisne mortgagee.—Rights of parties.*—Where immoveable property mortgaged has been sold by a Court in execution of a decree obtained by the mortgagee to enforce his lien against the mortgagor, a puisne mortgagee who has not been made a party to the suit is not bound by the decree

MORTGAGE—*continued.*

5. SALE OF MORTGAGED PROPERTY—*continued.*

(c) PURCHASERS—*continued.*

**Purchaser, Assignee of**—*continued.*

or sale, and is entitled to redeem the first mortgage. The assignee of the purchaser of land sold in execution of a mortgage-decree obtained by a mortgagee in a suit against the mortgagor alone is not entitled to eject a puisne mortgagee; but where such a suit is brought and the puisne mortgagee does not object to a decree ordering him to pay the amount realised at the Court sale within a certain time, or else to deliver up possession to the plaintiff and be for ever foreclosed, he is entitled, on payment of the sum decreed, to retain possession as mortgagee both in respect of his original debt and of the sum required to be paid by him for its protection. The ruling in *Muthora Nath Pal* v. *Chundermoney Dabia, I. L. R., 4 Calc., 817*; and *dictum* of WEST, *J.*, in *Shringarpure* v. *Pethe, I. L. R., 2 Bom., 663*, dissented from. VENKATA *v.* KANNAM . **I. L. R., 5 Mad., 184**

**174. ——— Suit by purchaser for possession.**—*Priority.—Equity of redemption.—Registration.—Notice.—Parties to suit brought by a first mortgagee.—Practice.—Amendment of plaint.*—*A.*, the owner of certain land, mortgaged it to *S.* for ten years for R1,500 by a deed dated the 27th November 1867. The deed was registered, but *S.* was not put into possession of the mortgaged land. On the 17th January 1868, *A.* mortgaged the same land to the defendant *R.* for R250. The mortgage-deed was registered in May 1868, and recited that the mortgagee (defendant) was put in possession. The lower Courts found, as a fact, that the defendant had obtained possession of the mortgaged property. *S.* sued *A.* on her mortgage, and obtained a decree against him, dated the 8th December 1869, directing satisfaction of the mortgage-debt by the sale of the mortgaged property. The defendant was not a party to that suit. On the 10th March 1870, the land was sold in execution of that decree, and purchased by the plaintiff for R99-12, with notice of the defendant's mortgage. On the 28th April 1870, the defendant *R.* instituted a suit in ejectment against *N.* (the mother of *A.*), who was in occupation of the land as tenant and had failed to pay the rent. On the 7th July 1870, the plaintiff, as purchaser at the above-mentioned sale, was put into possession, but on the 24th August 1870, the defendant obtained a decree in ejectment against *N.* (the mother of *A.*) as her tenant. In execution of that decree the defendant recovered possession of the land, dispossessing the plaintiff, though he had not been a party to the ejectment suit. The plaintiff thereupon brought the present suit to recover the land under section 230 of Act VIII of 1859. His claim was rejected by the Subordinate Judge, but allowed by the Joint Judge in appeal. On special appeal to the High Court,—*Held* that the claim of *S.* against the land was prior to that of the defendant, inasmuch as her mortgage was prior in date to the defendant's mortgage, and was registered. *S.* had a right to maintain a suit for the sale of the land to satisfy her

MORTGAGE—*continued.*

5. SALE OF MORTGAGED PROPERTY—*continued.*

(c) PURCHASERS—*continued.*

**Suit by purchaser for possession**—*continued.*

mortgage, but he ought to have made the defendant (as subsequent mortgagee) a party to it, inasmuch as the equity of redemption was vested in the defendant to the extent of her (defendant's) mortgage, and she (defendant) would have been entitled to redeem the land by payment of the amount which might have been found due to *S.* in her suit. The defendant being in possession of the land at the time of the institution of the suit of *S.*, and her (defendant's) mortgage being registered, *S.* must be regarded as having had notice of the defendant's claim, and was bound to make defendant a party to that suit in order to give a good title to a purchaser under such decree as might be made in that suit. *S.* by her omission to do so did not afford to the defendant the opportunity of redeeming to which the defendant was entitled. The plaintiff, notwithstanding notice of the defendant's claim, became the purchaser, although the defendant was not a party to the suit of *S.*, and, therefore, not bound by the decree in it. The plaintiff, accordingly, was fully aware of the infirmity of the title which he was acquiring. No doubt, the decree in the suit of *S.* bound the mortgagor *A.*, who was a party to it, so far as his right to redeem was concerned. The plaintiff, therefore, had a good title to the interest of *A.*, and was entitled to redeem the land from the defendant's mortgage. The utmost relief which the Court could afford to the plaintiff under the above circumstances was to permit him to amend his plaint by praying a redemption of the land from the defendant's mortgage, and to treat his suit, which was in the nature of an ejectment suit, as one for redemption. The High Court, accordingly, reversed the decree of the Joint Judge, and made a decree for an account on the defendant's mortgage, allowing the plaintiff to redeem within a certain time on payment of the balance that might be found due to the defendant, or, in default, ordering the plaintiff to be for ever foreclosed from recovering the land. *Itcharam Dayaram* v. *Raiji Jaga, 11 Bom., 41,* and *Shringarpure* v. *Pethe, I. L. R., 2 Bom., 633,* referred to and followed. RADHABAI *v.* SHAMRAV VINAYAK . **I. L. R., 8 Bom., 168**

**175.** ——————— *Execution.—Sale of equity of redemption.—Purchaser at execution-sale.—Sale in execution of decree on mortgage prior in date.—Priority.—Possession.—Notice.—Certificate of sale.*—On the 18th January 1877, the father of the plaintiffs purchased the interest of *M.* in two houses at a sale in execution of a money-decree against *M.* The purchaser, however, never obtained possession and he did not obtain the certificate of sale until the 31st July 1878. Subsequently to the sale of the 18th January 1877, two suits were filed against *M.* on mortgages executed prior to that date and decrees in both were obtained against *M.* In execution of these decrees both the houses were sold and the respective purchasers were represented by two of the defendants. The purchasers got possession and both obtained sale-certificates, one prior to the sale to the father of the plaintiffs, *viz.*, on 5th February 1878, and the other subsequently, *viz.*, 1st November 1878. The plaintiffs now sued to recover the houses. *Held* that the plaintiffs were not entitled to recover as against the defendants. The plaintiffs not having either got possession or obtained a certificate of sale at the date of the sale in execution of the decrees on the mortgages, had only an inchoate title. The purchasers in execution had no notice of the plaintiffs' incipient right, and having been left to buy what, so far as they knew, was a complete title, they ought not to be disturbed at the instance of the plaintiffs who failed to assert their dormant right. Had the plaintiffs got into possession or obtained a certificate and registered, there would have been notice sufficient to put all persons interested on inquiry as to their rights; but while they chose to keep their rights wholly in the dark they invited others to act as if those rights were not in existence, and they could not look to the Courts to extend and complete such rights in a way which would render the defendants victims not of their own negligence but of the negligence of those who would gain by it. NANJUNDEPA *v.* HEMAPA . . **I. L. R., 9 Bom., 16**

**176.** ——————— *San mortgage.—Mortgage with possession.—Sale in execution of decree obtained by first mortgagee.—Purchase by first mortgagee at such sale.—Suit by purchaser against second mortgagee for possession.—Rights of second mortgagee.—Redemption.*—In 1866 *R.* executed a san mortgage of certain land to the plaintiff, and four years afterwards mortgaged the same land with possession to the defendant. In 1875 the plaintiff brought a suit against *R.* alone upon the mortgage, obtained a decree, and he himself purchased the property at the Court sale held in execution of that decree. In attempting to take possession he was obstructed by the defendant, who was in possession of the property as mortgagee. The plaintiff now sued the defendant for possession. Both the lower Courts held that the plaintiff should satisfy the defendant's subsequent mortgage before he could recover possession. On appeal by the plaintiff to the High Court,—*Held*, reversing the lower Court's decree, that the plaintiff's claim should be allowed. The plaintiff having brought to sale, in execution of his decree, the estate as it stood at the date of his mortgage free from all subsequent incumbrances, the fact that he himself was the purchaser could not affect the estate which passed by that sale. As the defendant had not been a party to the plaintiff's suit against *R.*, he was entitled to redeem the property if he wished. MOHAN MANOR *v.* TOGU UKA **[I. L. R., 10 Bom., 224**

**177.** ——————— *Suit by mortgagee for possession of mortgaged property.—Pre-*

**MORTGAGE**—*continued.*

5. SALE OF MORTGAGED PROPERTY—*continued.*

(c) PURCHASERS—*continued.*

**Suit by purchaser for possession**—*continued.*

*emption.—Purchaser for value without notice.*—Under a registered deed of mortgage, dated in May 1869, the mortgagee had a right to immediate possession; but by arrangement between the parties the mortgagors remained in possession, the right of the mortgagee to obtain possession as against them being, however, kept alive. In October 1869 the mortgagors sold the property, and, thereupon, one *R.* brought a suit to enforce the right of pre-emption in respect of the sale and obtained a decree, and got the property and sold it in 1871 to *D.* In 1883, the mortgagee brought a suit against *D.* to obtain possession under his mortgage. *Held*, also, that although it would be material to show that the defendant had in any way by fraud been kept out of knowledge of the mortgage, his not having notice of it would not otherwise affect his liability, inasmuch as the principle on which Courts of Equity in England refuse to interfere against *bonâ fide* purchasers for a valuable consideration, without notice, when clothed with the legal title, had no applicability in the Courts of British India. *Held*, under these circumstances, that there was no equitable ground why the plaintiff's right under the mortgage, which had priority, should be defeated by the defendant's purchase. DURGA PRASAD *v.* SHAMBHU NATH . **I. L. R., 8 All., 86**

6. MARSHALLING.

**178. ——— Mode of satisfaction of mortgage lien.**—*Sale by third party in execution.*—The plaintiff had a lien on three estates belonging to his debtor, and a third party having obtained a decree for money due from the same debtor, recovered his money by the sale of one of the three estates mortgaged to the plaintiff. *Held* that the sale did not release that estate from the mortgage, but that it forced the plaintiff to take measures in the first place to recover the amount due to him from the remaining estates included in his mortgage-deed; and that if a balance remained after he had realised all he could from these two remaining estates, he could then return to the third estate to recover the balance. NOWA KOOWAR *v.* ABDOOL RUHEEM **[W. R., 1864, 374**

**179. ——— *Charge on several properties.***—In a suit to establish a claim against three properties mortgaged to the plaintiff but situate in different districts, where one of the defendants (the appellant) was interested in one only of the properties, the appellant having asked that plaintiff might be compelled to resort first to the two other properties for the satisfaction of his demand before touching the third, but having given no evidence to show that he was a *bonâ fide* subsequent mortgagee without notice of the prior mortgage, the Court declined to accede to the prayer lest they should be prejudicing the plaintiff's rights or improperly controlling his remedies. *Quære*,—Should the doctrine of marshalling of securities be introduced into this country? KHETOOSEE CHEROORIA *v.* BANEE MADHUB DOSS . . . . . **12 W. R., 114**

**180. ——— *Charge on several properties.***—*Per* SETON-KARR, *J.*—Case remanded for the lower Court to find whether, when property hypothecated for a bond has passed to a *bonâ fide* purchaser, the same can be declared liable to satisfy such part of a money-decree on the bond as cannot be satisfied from any other source. *Per* NORMAN, *J.*—If *A.* has a mortgage on two different estates for the same debt, and *B.* has a mortgage on one only of the estates for another debt due from the same party, *B.* has a right in equity to throw *A.* in the first instance for satisfaction upon the security which he, *B.*, cannot touch, where it will not prejudice *A.'s* right or improperly control his remedies. A purchaser of one of the estates has the same equity as a mortgagee. BISHONATH MOOKERJEE *v.* KISTO MOHUN MOOKERJEE . . . **7 W. R., 483**

**181. ——— *Priority.—Marshalling of securities.—Purchaser for value.***—Where the owner of certain property mortgages it to *A.*, and afterwards sells a portion of the mortgaged property to *B*, it is not incumbent on *A.* in suing to enforce his mortgage to proceed first against that portion of the property which has not been sold by the mortgagor. LALA DILAWAR SAHAI *v.* DEWAN BOLAKIRAM . . **I. L. R., 11 Calc., 258**

**182. ——— *Money-decrees.—Doctrine of marshalling.—Mortgage-decree.—Surplus sale-proceeds.***—The doctrine of marshalling does not apply as between a mortgagee and attaching creditors of the mortgagor who hold mere money-decrees. A mortgagee brought a suit against the mortgagor to have a declaration of his lien over the mortgaged properties, and obtained a decree. He afterwards brought another suit against certain attaching creditors of his mortgagor to have a declaration of his lien over certain surplus moneys in the hands of the Collector, who, previously to the institution of the first suit, had sold certain of the mortgaged properties free of all incumbrances for arrears of Government revenue. *Held* that the mortgage-decree declaring the lien over all the mortgaged properties covered the surplus sale-proceeds then in the hands of the Collector, because these moneys must, as between the mortgagee and attaching creditors of the mortgagor, be taken to represent the mortgaged properties. *Heera Lall Mookerjee* v. *Janokeenath Mookerjee, 16 W. R., 222*, followed. KISTODAS KUNDOO *v.* RAMKANTO ROY CHOWDHRY **[I. L. R., 6 Calc., 142: 7 C. L. R., 396**

**183. ——— Apportionment of debt.**—*Right of mortgagee to sell any portion of his security.*—A mortgagee's right to realise his debt by sale of any portion of the land mortgaged to him cannot be curtailed by the fact that the portion of the land

**MORTGAGE**—*continued.*

6. MARSHALLING—*continued.*

**Apportionment of debt**—*continued.*

he elects to sell has been sold by the mortgagor subsequent to the date of the mortgage and the purchase-money has been applied to liquidate a prior mortgage on the land sold. RAMA RAJU *v.* SUBBARAYUDU . . . **I. L. R., 5 Mad., 387**

**184.** ——————— *Purchaser of part of mortgaged property without notice.—Suit for sale of whole property in satisfaction of mortgage.—Marshalling.—Apportionment.*—The equities which apply to a puisne incumbrancer in the marshalling of securities apply also to a *bonâ fide* purchaser for value, without notice, of a portion of property the whole of which was subject to a prior incumbrance. *Tulsi Ram* v. *Munnoo Lal, 1 W. R., 353; Nowa Koowar* v. *Abdool Ruheem, W. R., 1864, 374; Bishonath Mookerjee* v. *Kisto Mohun Mookerjee, 7 W. R., 483*; and *Khetoosee Cherooria* v. *Banee Madhub Doss, 12 W. R., 114*, referred to. The mortgagees of two properties, one of which had, subsequently to the mortgage, been purchased for value *bonâ fide* by one who had no notice of the incumbrance, brought a suit to enforce their lien against both the properties originally owned by the mortgagor, impleading as defendants both the mortgagor and the purchaser. *Held* that, while there was no doubt that, if the purchaser was compelled to pay more than the share of the mortgage-debt apportioned on the property purchased by him, he would be entitled to contribution, yet, in a suit so framed, and having regard to the array of parties, such an apportionment could not be made at the stage of second appeal. RODH MAL *v.* RAM HARAKH **[I. L. R., 7 All., 711**

**185.** ——————— *Right of creditor to realise entire debt from one parcel of land mortgaged.*—*T.*, in execution of a money-decree, brought to sale and purchased certain land of *S.* in 1875 and remained in possession till 1879. In 1874 *V.* obtained a decree against *S.* whereby the lands purchased by *T.* and other lands of *S.* were declared liable for a mortgage-debt of R1,802-8-0. In 1879 *V.*, in execution of this decree, attached and brought to sale and purchased the lands in *T.'s* possession. *Held*, in a suit by *V.* to eject *T.*, that *V.* was entitled to recover the lands unless *T.* paid the whole of *V.'s* decree-debt. TIMMAPPA *v.* LAKSHMAMMA **[I. L. R., 5 Mad., 385**

**186.** ——————— *Right to proceed against several properties.—Suit on mortgage-bond.—Purchase of one property by mortgagee at inadequate price where it was supposed to be subject to mortgage lien.*—In a suit to recover principal and interest on a bond which mortgaged the obligee's share in three villages, K., S., and P., the defence was that plaintiff had paid himself by becoming the purchaser at a sale in execution of another decree of the obligee's rights in K. at a price inadequate to the fair value. It was found that, at the sale in question, the bids were made on the understanding that the property was burdened with the plaintiff's bond-debt

**MORTGAGE**—*continued.*

6. MARSHALLING—*continued.*

**Apportionment of debt**—*continued.*

—*Held* that, as plaintiff chose to give out to the world of buyers that he intended to burden the village K. with the payment of the whole sum due to him, and took advantage of the lowness of the bids to buy the property himself, he could not now be allowed to proceed against the other properties. BYJONATH SAHOY *v.* DOOLHUN BISWANATH KOOER **[24 W. R., 83**

**187** ——————— *Charge on various properties.—Mortgagee as purchaser of equity of redemption in part of mortgaged property.*—Property which is the subject of a mortgage when sold in satisfaction, must be sold as a whole and not piecemeal at the pleasure of the mortgagee, especially when he has become owner of the equity of redemption in part. The proper course is to make an enquiry into the relative values of the properties included in the mortgage and to burden each with a proportionate share of the debt. It must not be assumed that the Government assessment represents the true value of estates. KISHEN PERTAB SAHEE BAHADOOR *v.* LALLA NUND COOMAR SINGH PARRAY **[25 W. R., 388**

**188.** ——————— *Charges on mortgages of different shares of same property.—Priority.—Form of decree.*—In certain lands *A.* held an 8-annas share, and *B.* and *C.* each a 4-annas share. *A.* having mortgaged his share to *G.*, the respondent took a mortgage of the whole estate, and afterwards the appellant took a mortgage of *B.'s* share and half of *A.'s* share. Subsequently, the respondent purchased the equity of redemption of the entire estate, the amount of the purchase-money being more than sufficient to pay off the first and second mortgages. *Held* that the appellant was entitled to have an apportionment of the amounts covered by the different mortgages made, and to have an 8-annas share in the land put up for sale, unless the respondent was willing to pay off his mortgage-debt. Rule of apportionment and form of decree set out. GUNGA NARAIN SEN *v.* HURRIS CHUNDER CHANGDARS . . . . . **6 C. L. R., 336**

**189.** ——————— *Charges on several properties.*—It appearing that the mortgagee deliberately abstained from executing his decree against eleven properties which still remained in the possession of the mortgagor, but proceeded against the one property which had passed out of the mortgagor's possession, the mortgage debt was directed to be apportioned between the twelve properties, and the mortgagee was not to be allowed to take out execution against the property which had passed out of the mortgagor's possession, except for the amount which should be apportioned to such property, without satisfying the Court that he had made every possible effort to execute the remainder of his decree against the other eleven properties. RAM DHUN DHUR *v.* MOHESH CHUNDER CHOWDHRY **[I. L. R., 9 Calc., 406: 11 C. L. R., 565**

MORTGAGE—*continued.*

6. MARSHALLING—*continued.*

Apportionment of debt—*continued.*

190. ——————— *Charges on separate mortgaged properties.*—One of two mouzahs upon a mortgage of which *A.* had obtained a decree with an order for sale of the mortgaged properties was attached in execution of another decree and sold subject to the first decree. *A.* became the purchaser, and now sought to execute his decree by the sale of the second mouzah, claiming to charge his entire debt upon that village. *Held* that he was bound to give credit for the proportionate share of the debt assignable to the first mouzah, and entitled only to execute his decree against the second village for the amount chargeable thereon. *Azimut Ali Khan* v. *Jowahir Singh, 13 Moore's I. A., 404,* cited. GOSSYEN LUCHMEE NARAIN POORI *v.* BICRAM SINGH [4 C. L. R., 294

YAKOOB ALI CHOWDHRY *v.* RAM DOOLAL [13 C. L. R., 272

7. TACKING.

191. ——————— Principle of tacking.—*Purchase of equity of redemption.—English law.*—In 1840 *A.* mortgaged certain lands to *B.*, which he had granted in putni at a rent of R145. Subsequently, in September 1844, *A.* granted a fresh putni at a reduced rent of R90; and on the 9th October 1844 *A.* mortgaged the same lands to *C.* In 1856 *C.* obtained a decree for the redemption of the mortgage to *B.*, and he paid off the debt to *B.*: but it did not appear that he took an assignment of the mortgage for the purpose of keeping it on foot as a security against incumbrances created by *A.* subsequently to the date of that mortgage, and prior to that of the mortgage to himself; and in 1862 he obtained a final decree for foreclosure against *A.* In a suit by *C.* to set aside the lease of September 1844,—*Held* that it was valid and binding upon him. *Semble,*—The English principle of tacking does not apply to mortgages of land in the mofussil. GAUR NARAYAN MAZUMDAR *v.* BRAJA NATH KUNDU CHOWDHRY [5 B. L. R., 463 : 14 W. R., 491

192. ——————— *English law.*—The English law of tacking is not recognised in the Courts of this country. UDAYA CHANDRA RANA *v.* BHAJAHARI JANA . 2 B. L. R., Ap., 45

ODOY CHURN RANA *v.* BROJOHURY JANA [11 W. R., 310

193. ——————— *Redemption.*—The owner of a house in 1861, in consideration of R190, mortgaged it to the defendant, and put him into possession. The mortgage-deed needed no registration, and was not registered. The mortgagor next mortgaged the house in 1873 to the plaintiff for R300 by a deed duly registered. He again in 1874 borrowed on the same security a further sum of R500 from the defendant, and executed in his favour a deed of mortgage which was duly registered. The plaintiff in 1876 sued the mortgagor for possession, and obtained a decree, the execution of which the defendant resisted. The plaintiff now sued the defendant

MORTGAGE—*continued.*

7. TACKING—*continued.*

Principle of tacking—*continued.*

to eject him, and to obtain possession of the mortgaged property until payment of the amount due on his mortgage. The defendant denied the plaintiff's mortgage and set up his own two mortgages, and claimed to be paid the amount due on both of them before he could be called upon to render up possession. *Held* that the English doctrine of tacking was of so special and technical a character, and so little founded on general principles of justice, that it ought not to be held applicable to the mofussil of Bombay, but that the obligations arising out of successive mortgages should be discharged in the order of their date. *Held,* consequently, that the defendant's right as against the plaintiff was either to redeem the plaintiff's intermediate mortgage, or else to hold the mortgaged property until his own first mortgage was redeemed by the plaintiff; but that the defendant could not claim to retain possession, as against the plaintiff, until his second mortgage, as well as his first, was paid off, since plaintiff's mortgage was prior in date to, and therefore was to be preferred before, the second mortgage of the defendants. NARAYAN VENKOBA *v.* PANDURANG KAMAT [I. L. R., 7 Bom., 526

194. ——————— *Redemption.*—The mortgagor of an estate gave the mortgagee four successive bonds for the payment of money, in each of which it was stipulated that, if the amount were not paid on the due date, it should take priority of the amount due under the mortgage, and redemption of the mortgage should not be claimed until it had been satisfied. The representative in title of the mortgagor subsequently sued the mortgagee for possession of such estate on payment merely of the mortgage-money. *Held* that, although such bonds did not in so many words create charges on such estate, yet inasmuch as it appeared from their terms that it was the intention of the parties that the equity of redemption of such estate should be postponed until the amount of such bonds had been paid, the representative in title of the mortgagor was not entitled to possession of such estate on payment merely of the mortgage-money. ALLU KHAN *v.* ROSHAN KHAN . . I. L. R., 4 All., 85

195. ——————— *Redemption.*—*Further charge.*—The mortgagor of an estate gave to the mortgagee, subsequently to the date of the mortgage, two successive money-bonds, in each of which it was stipulated that, if the amount were not paid on the due date, it should take priority of the amount due under the mortgage, and that redemption of the mortgage should not be claimed until the bond had been satisfied. The assignee of the equity of redemption sued for possession of the estate on payment merely of the mortgage-money. *Held* that the two subsequent bonds did not create a further charge on the mortgaged premises, although they would prevent the original mortgagor from redeeming without paying their amounts. HARI MAHADAJI SAVARKAR *v.* BALAMBHAT RAGHUNATH KHARE [I. L. R., 9 Bom., 233

MORTGAGE—*continued.*

8. REDEMPTION.

(*a*) RIGHT OF REDEMPTION.

196. ——— **Essential characteristic of mortgage.**—*Agreement waiving right to redeem.*—Where a document is, on its face, a mortgage, the right to redeem is so much an essential as not to be variable by agreement. The question of intention extra the document does not, therefore, arise. SAMATHAL *v.* MATHOOSHI KAMATCHI AMMA BOYI SAIB AVERGUL . . . . . 7 Mad., 395

197. ——— *Usufructuary mortgage.*—*Alteration of original transaction.*—When the original transaction is an usufructuary mortgage, the mortgagee is entitled to nothing beyond the repayment of his principal and interest from the usufruct of the property. The Court will not allow additional advantages to be obtained through the necessity of the debtor, by the conversion of a mortgage into a transaction of a different nature. Once a mortgage always a mortgage, is a principle not to be departed from. Consequently an estate mortgaged is always redeemable. KASEENAUTH *v.* BHEEKAREE LOLL. TEWAREE LOLL *v.* KASSEENAUTH [W. R., F. B., 79

ASAPAL SINGH *v.* NUNKOO SINGH . 3 Agra, 216

198. ——— **Right to get back land on deposit in usufructuary mortgage.**—*Beng. Reg. I of 1798.*—*Demand of land in excess.*—The mortgagor under a zur-i-peshgi is entitled, under section 2, Regulation I of 1798, to demand back his land immediately after making his deposit. If by mistake or otherwise he demands more land than is comprised in the mortgage, that is not a matter which can justify the mortgagee in keeping possession of land which is in fact comprised in it. MOHUN LAL *v.* ALI AFZUL . . W. R., 1864, 219

199. ——— **Objection to redemption.**—*Purchaser who has not paid purchase-money.*—In a suit brought to redeem the purchased property, the mortgagee cannot avail himself of the objection, that the full amount of purchase-money has not been paid. The mortgagee has only the right to be satisfied that the person claiming redemption is not a stranger, but one to whom the equity of redemption has been transferred by a *bonâ fide* sale. HEERA SINGH *v.* RAGHO NATH SUHAI. BHURTH SINGH *v.* RAGHO NATH SUHAI . . . . . 3 Agra, 30

200. ——— **Deposit giving no right to redeem.**—*Beng. Reg. I of 1798.*—*Beng. Reg. XVII of 1806, s. 7.*—Where money was paid into Court by a person alleged to be a mortgagor of certain property after notice of foreclosure, without any actual restriction being placed on its being paid over to the alleged mortgagee, but the payment was made with a notice in these words: "I have shown the mortgage to be false and fraudulent, and to set aside the kobala and to get back the money I shall hereafter institute a regular suit;" it was held that Regulations I of 1798 and XVII of 1806, section 7, did not apply to such a case. Such payment gave no right to redeem. ABDOOL RAHMAN *v.* KISTOLAL GHOSE [B. L. R., Sup. Vol., 598: 6 W. R., 225

MORTGAGE—*continued.*

8. REDEMPTION—*continued.*

(*a*) RIGHT OF REDEMPTION—*continued.*

201. ——— **Mortgage becoming sale if not redeemed in certain time.**—*Madras law of mortgage.*—*Beng. Reg. XVII of 1806.*—In a suit instituted in 1853 to redeem a mortgage containing a clause making it an absolute sale in default of redemption by a certain date,—*Held* that, in the Madras Presidency, effect must be given to that clause, the Regulation XVII of 1806 not being applicable. PATTABHIRAMIER *v.* VENKATAROW NAICKEN [7 B. L. R., 136: 15 W. R., P. C., 35 13 Moore's I. A., 560

202. ——— **Right to redeem by deposit of principal.**—*Possession of mortgagee.*—On a question of a right of a mortgagor to redeem by deposit of the principal sum due only, the length of possession by the mortgagee is immaterial. ABDULLA KHAN *v.* UPENDRA CHANDRA . [6 B. L. R., Ap., 53

S. C. ABDOOL KHAN *v.* UPENDRO CHUNDER BHUTTACHARJEE . . . 14 W. R., 278

203. ——— **Time for redemption.**—*Stipulation for payment by instalments.*—A mortgage-deed stipulated for the liquidation of a moiety of the debt by the usufruct of certain land for seven years, and as to the other moiety, stipulated for its repayment by instalments in five years, and, in default, for its liquidation by the possession and the usufruct of the same land being continued and enjoyed after the expiry of the seven years' term, but no further term was created,—*Held* that the mortgagor was entitled to redeem at any time after the expiry of the seven years' term. MARANA AMMANNA *v.* PENDYALA PERUBOTULU . I. L. R., 3 Mad., 230

204. ——— *Decree for redemption.*—*Execution barred by limitation.*—*Second suit to redeem.*—In a suit for redemption of a mortgage a decree was passed by consent to the effect that the land was redeemable upon payment of a certain sum on a certain date, but there was no direction in the decree that in default of payment the mortgage be foreclosed. This decree was not executed. After three years the right, title, and interest of the mortgagors in the land was purchased in execution of a decree by the plaintiff, who thereupon sued the mortgagees to redeem the land,—*Held* that the plaintiff was entitled to redeem. PERIANDI *v.* ANGAPPA . . . I. L. R., 7 Mad., 423

205. ——— **Redemption of mortgaged land subsequently assessed with revenue.**—A mortgagor of lakhiraj land subsequently assessed with Government revenue is not entitled to redeem, except on payment of the amount paid by the mortgagee to Government for revenue, with interest in addition to the money due under the mortgage. But in a suit for redemption, in which the mortgagor deposited before suit the amount of the principal sum borrowed by him, he is entitled to a decree on payment into Court of the further sum paid for Government revenue. JOYPROKASH ROY *v.* OORJHAN JHA . . . . . 3 W. R., 174

MORTGAGE—*continued.*

8. REDEMPTION—*continued.*

(*a*) RIGHT OF REDEMPTION—*continued.*

**206. ——— Attaching creditors, Right of, to redeem.**—*Civil Procedure Code (Act X of 1877), ss. 276, 282, 295.*—An attaching creditor has not, as such, any right to redeem a mortgage subsisting prior to his attachment. SOOBHUL CHUNDER PAUL *v.* NITYE CHURN BYSACK

**[I. L. R., 6 Calc., 663 : 7 C. L. R., 201**

**207. ——— Putnidar, Right of, to redeem.**—Terms upon which a putnidar was let in to redeem stated. KASIMUNNISSA BIBEE *v.* NILRATNA BOSE . . . . . **I. L. R., 8 Calc., 79**

**[9 C. L. R., 173 : 10 C. L. R., 113**

**208. ——— Heir of mortgagor, Right of, to redeem.**—*Right of purchaser.—Limitation.*—Suit to redeem against transferee, or (in alternative) to enforce terms of purchase. The form of mortgage was the usual indigo planter's mortgage, with power of sale. After heavy losses the agents (mortgagees) stopped the factories, and sold them, informing the planter (mortgagor) of the sale, and suggesting his concurrence. He, in a written acknowledgment, gave reluctant assent; he was not called on for any formal confirmation or act; the mortgagees wrote off the greater part of the debt to profit and loss, credited the purchase-money, and closed the account. The purchaser took and retained possession. After two years the mortgagor died, leaving a will, in which he described his property, but did not mention the mortgaged factories. The conveyance to the purchaser was produced, in which the mortgagor was made a party, but which was dated and executed after the mortgagor's death. It purported to be, not an exercise of the power of sale, but a transfer of the legal estate by the mortgagees at the request of the mortgagor: it was executed by the mortgagees and purchaser. *Held*, firstly, that the mortgagor's heir was not entitled to redeem (see also *Sreemulmoney Bebee* v. *Goberdhone Bermono, 2 Ind. Jur., N. S., 319*); also that, on dismissal of the redemption suit, no terms or conditions could be imposed on the defendant, who in this case held under the original contract of sale to which the mortgagor assented. *Held*, secondly, that even had the contract included (as argued for appellant) an undertaking to indemnify from liabilities, the payments sought to be reimbursed were beyond six years, and no fraud was proved; therefore as to these the suit was barred. DOUCETT *v.* WISE

**[2 Ind. Jur., N. S., 280**

**209. ——— *Conditional sale.—Surety, Assignment to, from mortgagee.—Right of redemption.***—On a mortgage of land with a proviso that in default of repayment of the money advanced the mortgage should be turned into a sale, a third party joined as surety, undertaking to repay the amount advanced if the mortgagor made default in payment at the stipulated time. Default was made and the surety paid the money, and took an assignment of the land from the mortgagee. *Held* that the heir of the mortgagor was entitled to redeem, and that as against him the surety could not

MORTGAGE—*continued.*

8. REDEMPTION—*continued.*

(*a*) RIGHT OF REDEMPTION—*continued.*

**Heir of mortgagor, Right of, to redeem** —*continued.*

claim to hold the lands as purchaser. GORAKI KANAJI *v.* NATHU BIN APPAJI . **1 Bom., 135**

**210. ——— Assignee of mortgagor, Right of, to redeem.**—*Razinamah.—Gatkuli tenure.—Extinguishment of equity of redemption.*—A mortgage-deed of gatkuli land contained a clause by which the mortgagor agreed, at the expiration of the period for which the mortgage was made, to give a razinamah of the mortgage land. In accordance with this stipulation the mortgagor gave a razinamah to Government by which he gave up all claim to the land, which was then granted to the mortgagee. *Held* that the equity of redemption of the mortgagor was thereby extinguished. RANEE VALAD AVAJI MALI *v.* RAMA BAI KOM MAHADU MALI

**[6 Bom., A. C., 265**

**211. ——— Puisne mortgagee, Right of, to redeem.**—*Prior mortgagee.*—A puisne mortgagee is entitled to redeem from the prior mortgagee who obtains a foreclosure decree in a suit to which the puisne mortgagee is not made a party or from the purchaser in the foreclosure suit; and it is immaterial whether the puisne mortgage is or is not registered, or whether the prior mortgagee at the date of the suit had or had not notice of the puisne mortgage. The plaintiff charging the defendants with collusion sued to eject them, but the Court found he was only a puisne mortgagee, and one of the defendants a prior mortgagee. The Court, however, allowed the plaintiff to change his case, and in the same suit permitted him to redeem the defendant. SANKANA KALANA *v.* VIRUPAKSHAPA GANESHAPA

**[I. L. R., 7 Bom., 146**

**212. ——— *Redemption of first mortgage by further mortgage.—Held*** that a mortgage contract received as a security for a repayment of loan, does not incapacitate the mortgagor from any other dealing with the property, except in defeasance of the right of the mortgagee. Where therefore a zur-i-peshgi lease had been granted to the defendant for nine years, containing a stipulation that the mortgagor should not alienate or mortgage the land,—*Held* that a second zur-i-peshgi to the plaintiff made after the expiration of the nine years' term, for the *bonâ fide* purpose of paying off the debt due on the first mortgage was not voidable as contravening the terms of the first mortgage lease, and the plaintiff was entitled to sue to redeem the first mortgage. DOOKHCHORE RAI *v.* HIDAYUTOOLLAH . . **Agra, F. B., 7 : Ed. 1874, 5**

*See* MAHOMED ZAKAOOLLA *v.* BANEE PERSHAD

**[1 N. W., Ed. 1873, 135**

SHEOPAL *v.* DEEN DYAL . **5 N. W., 145**

**213. ——— Purchaser of equity of redemption, Right of, to redeem.**—*Usufructuary mortgage followed by sale.—Revival of mort-*

**MORTGAGE**—*continued.*

8. REDEMPTION—*continued.*

(*a*) RIGHT OF REDEMPTION—*continued.*

**Purchaser of equity of redemption, Right of, to redeem**—*continued.*

*gage by concelment of sale.—Attachment in execution of decree.*—*Z.* mortgaged in 1859 certain immoveable property, being joint ancestral property, for a term of five years, giving the mortgagee possession of the mortgaged property. In 1861 *Z.* sold this property to the mortgagee, whereupon the sons of *Z.* sued their father and the mortgagee, purchaser, to have the sale set aside as invalid under Hindu law, and in August 1864 obtained a decree in the Sudder Court setting aside the sale. The mortgagee, purchaser, remained, however, in possession of the property as mortgagee. In May 1867, *Z.* having sued the mortgagee for possession of the property on the ground that the sale had been set aside as invalid, the High Court held that *Z.* could not be allowed to retain the purchase-money and to eject the mortgagee, purchaser, but must be held estopped from pleading that the sale was invalid. In November 1867, one *K.* having caused the property to be attached and advertised for sale in the execution of a decree which he held against *Z.* and his sons, the mortgagee objected to the sale of the property on the ground that *Z.* and his sons had no saleable interest in the property. This objection was disallowed by the Court executing the decree, and the rights and interests of *Z.* and his sons were sold in the execution of the decree, *K.* purchasing them. In 1878 *K.* sued as the purchaser of the equity of redemption, for the redemption of the mortgage of 1859. *Held* that *K.* was entitled to redeem the property. *Held* also, that the mortgagee not having contested in a suit the order dismissing his objection to the sale of the property in execution of *K.'s* decree, he could not deny that *K.* had purchased the rights and interests remaining in the property to *Z.* and his sons. *Held* also, that the mortgagee had no lien on the property in respect of his purchase-money. *Held*, also, that, it being stipulated in the deed of mortgage that the mortgagee should pay the mortgagor a certain sum annually as "malikana," and the mortgagee not having paid such allowance since the date of the sale, the plaintiff was entitled to a deduction from the mortgage-money of the sum to which such allowance amounted. BASANT RAI *v.* KANAUJI LAL . . . . . **I. L. R., 2 All., 455**

**214. ——— Purchaser of property, Right of, to redeem.**—*Suit for ejectment where there is an equitable lien on the property.*—In 1848, *B. L.* obtained a decree against *R. C.* and *R. L.*, and in 1863 at a sale in execution of that decree the plaintiffs' ancestor purchased the property now in dispute and took possession. In 1861 one *K. R.* sued the representatives of *R. C.* on a mortgage-bond under which a sum of money was alleged to have been secured upon the said property, and obtained a decree against the defendants personally which did not direct sale of the mortgaged property. The plaintiff's ancestor bought the property with the knowledge of the mortgage. *K. R.* in 1868, in execution, sold the right, title, and interest of her judgment-debtors in the property to the defendants who paid R5,000 as consideration money and obtained possession. In a suit to eject the defendants on the ground that the latter obtained no title to the property by their purchase,—*Held* that so far as the defendants' money had gone to pay off the charge which *K. R.* had on the land to that extent they were entitled to stand in her shoes as an incumbrancer; and that the suit as far as regards the land covered by the mortgage-bond must be taken to be a redemption suit and the plaintiff ought not to be allowed to recover the property without paying the defendants so much as on a proper taking of accounts might appear to be due to them. RAMESSUR PERSHAD NARAIN SINGH *v.* DOOLEE CHAND **[19 W. R., 422**

**MORTGAGE**—*continued.*

8. REDEMPTION—*continued.*

(*a*) RIGHT OF REDEMPTION—*continued.*

**Purchaser of property, Right of, to redeem**—*continued.*

**215. ——— Right to redeem sub-tenures purchased by mortgagee.**—*Acquisitions by mortgagor and mortgagee.—Semble,*—Under the English law, which, in so far as it rests on principles of equity and good conscience, may properly be applied in India, it is recognised as a general rule that most acquisitions by a mortgagor enure for the benefit of the mortgagee; and, conversely, that many acquisitions by a mortgagee are, in like manner, to be treated as accretions to the mortgaged property, or substitutions for it, and, therefore, subject to redemption. But *semble,*—It cannot be affirmed that every purchase, by a mortgagee, of a sub-tenure existing at the date of the mortgage, must be taken to have been made for the benefit of the mortgagor so as to enhance the value of the mortgaged property, and make the whole, including the sub-tenure, subject to the right of redemption on equitable terms:—*e. g.*, where there is a mortgage of a zemindari in Lower Bengal, out of which a putni-tenure has been granted, the mortgagee in possession might buy the putni with his own funds and keep it alive for his own benefit. An Oudh talookdar granted an usufructuary mortgage of a portion of his talook, in respect of which there existed certain subordinate birt tenures. The mortgagee having subsequently acquired these birt tenures by purchase, did not, as he might have done, keep them alive as distinct sub-tenures, but treated them as merged in the talook. The mortgagor, many years after, brought a suit for redemption, when the question arose, whether upon repaying the sum expended by the mortgagee in the purchase of the birts, in addition to the amount due on the face of the mortgage-deed, the plaintiff was entitled to the possession of the estate as then enjoyed by the mortgagee; or whether the latter was entitled to retain the birt rights and interests purchased by him as an absolute under-proprietary tenure in subordination to the talookdar, and to have a sub-settlement on that basis,—*Held* that the plaintiff on repayment of the original mortgage-debt, and on reimbursing the defendant the sum expended in purchasing the birts, was entitled to

MORTGAGE—*continued.*

8. REDEMPTION—*continued.*

(*a*) RIGHT OF REDEMPTION—*continued.*

**Right to redeem sub-tenures purchased by mortgagee**—*continued.*

re-enter on the estate with all the rights and privileges enjoyed by the latter. KISHENDATT RAM *v.* MUMTAZ ALI KHAN

[I. L. R., 5 Calc., 198 : 5 C. L. R., 213
L. R., 6 I. A., 145

**216. ——— Right where mortgagee has purchased equity of redemption.**—*Act VI of 1855, Construction of.—Sale of legal and equitable rights of judgment-debtors.*—Clause 1, section 1, Act VI of 1855, shows that the statute was designed for the benefit of creditors, and that it authorised sale of both the legal and equitable rights of judgment-debtors. Under this clause, therefore, an equity of redemption was a kind of property that might be seized and sold. *A.*, a mortgagee who takes from *B.* as security an existing mortgage from *C.* to *B.*, stands in the same position towards, and is subject to the same equities in respect of, the mortgagor *B.*, who has assigned that mortgage to him by way of sub-mortgage, as *B.*, himself, a mortgagee, does to the original mortgagor *C.* A mortgagee, at a Sheriff's sale held under a writ of *fi. fa.* sued out by him upon his mortgagor's bond and warrant to confess the mortgage-debt, purchased his mortgagor's equity of redemption and obtained a conveyance thereof from the Sheriff under clause 3, section 1, Act VI of 1855. *Held*, in a suit by the mortgagor against the mortgagee for redemption of the mortgage, that the latter was entitled under that Act to hold the mortgaged estate against the mortgagor freed from the equities existing in him previous to sale and conveyance of his rights and interests under the mortgage. TOYLUCKOMOHUN TAGORE *v.* GOBIND CHUNDER SEN

[1 Ind. Jur., O. S., 128 : 1 Hyde, 289

**217. ——— Redemption where mortgagee has partitioned property.**—*Interference with right to redeem.*—A mortgagor's right to redeem what he has mortgaged is indefeasible, and cannot be interfered with by unauthorised acts of the mortgagees, *e.g.*, a butwarra entered into by the latter. MUZHUR HOSSEIN *v.* HUR PERSHAD ROY

[15 W. R., 353

**218. ——— Omission to execute decree for redemption in time.**—*Effect of fresh suit for redemption.*—Where a decree for redemption is obtained, but is not executed within the prescribed period for execution, the mortgagee does not, by omission of the mortgagor to execute the decree, cease to be the mortgagee, but the mortgagor or his representative may still maintain a fresh suit for redemption. CHAITA *v.* PURUM SOOKH

[2 Agra, 256

**219. ——— Alienation by mortgagee pending foreclosure suit.**—*Effect of, on right of redemption.*—Where a mortgagee alienates the mortgaged property while the foreclosure suit

MORTGAGE—*continued.*

8. REDEMPTION—*continued.*

(*a*) RIGHT OF REDEMPTION—*continued.*

**Alienation by mortgagee pending foreclosure suit**—*continued.*

brought by him is pending, such alienation cannot be allowed to stand between the mortgagor and those rights to redeem which that suit in its ultimate issue may have left open and affirmed to him. MUNSOOR ALI KHAN *v.* OJOODHYA RAM KHAN

[8 W. R., 399

**220. ——— Right of purchaser to redeem.**—*Effect of sale by mortgagor.*—Where a mortgagor before the expiry of the year of grace and after sale to a purchaser agreed with the mortgagee that of the two villages conditionally mortgaged, one should be given to him and a decree of foreclosure for the other should be obtained by the mortgagee,—*Held* that such an agreement could not bind the purchaser or take away his right to redeem. JYRAM GIR *v.* KRISHAN KISHORE CHUND . 3 Agra, 307

**221. ——— Clause for conditional sale.**—*Effect of, on right of redemption.*—A clause of conditional sale contained in a mortgage-deed does not prevent the redemption of the mortgage. KANAYALAL *v.* PYARABAI . I. L. R., 7 Bom., 139

**222. ——— Settlement with mortgagee.**—*Effect of, on right of redemption.*—The mere settlement of a resumed maafee estate with the mortgagee does not destroy the mortgagor's right to redeem, nor does it necessarily make the holding by the mortgagee a holding adverse to the mortgagor's right. OOMRAO BEGUM *v.* NIZAMOONNISSA

[1 Agra, 224

**223. ——— Bar of right of redemption.**—*Foreclosure.—Accounts.*—In a suit for redemption of a mortgage the Zillah Court declared the mortgagors (appellants) entitled to redemption, the mortgagees in possession (respondents) having fully paid themselves by receipt of rents and profits. In a special appeal, the Sudder Court reversed the Zillah Court's decision, on the ground that certain proceedings, taken by the mortgagees with a view to foreclosure, had effectually barred the equity of redemption. *Held* by the Privy Council that the Sudder Court ought not to have decided the case on the question of foreclosure, because that question, though raised upon the pleadings, had not been made one of the issues settled in the Court of first instance, where alone evidence could be taken; that the Court was wrong in treating the proceedings as an effectual bar to the appellant's right of redemption; and that the question of foreclosure ought therefore to be further fully tried upon an issue to be regularly settled. MOHUN LALL SOOKUL *v.* GOLUCK CHUNDER DUTT

[1 W. R., P. C., 19 : 10 Moore's I. A., 1

**224. ——— Condition preventing effect of right of redemption.**—*Onerous condition in mortgage-deed.—Condition that after redemption the mortgagee should continue in possession as perpetual tenant not enforceable.*—A condition in a mortgage, that if the mortgagor redeems

MORTGAGE—*continued.*

8. REDEMPTION—*continued.*

(*a*) RIGHT OF REDEMPTION—*continued.*

**Condition preventing effect of right of redemption**—*continued.*

the property, the mortgage right should be extinguished, but that the property should for ever remain in the possession of the mortgagee on his paying a fixed rent, is a condition which cannot be enforced in a Court of Equity. MAHOMED MUSE *v.* JIJIBHAI BHAGVAN . . . I. L. R., 9 Bom., 524

(*b*) REDEMPTION OF PORTION OF PROPERTY.

225. ——— **Division of liability under mortgage.**—Where money is advanced on a mortgage-debt the liability cannot be divided. MUJEEDOONISSA *v.* DILDAR HOSSEIN . 14 W. R., 216

226. ——— **Right to redeem share of property where part has been sold for arrears of revenue.**—A mortgagor cannot redeem a share of the mortgaged property. This rule is not affected by the sale of part of the mortgaged lands for arrears of revenue. HASHIM *v.* AUJEET SINGH [W. R., 1864, 217

RAM BALUK SINGH *v.* RAM LOLL DOSS [21 W. R., 428

227. ——— **Payment of proportionate amount of debt.**—*Right to retain property till whole is paid.*—A zur-i-peshgidar is entitled to retain the whole property pledged to him until the whole debt has been paid to him. It is optional with him to relinquish any portion either on receiving a proportionate amount of what is due to him or otherwise. HURBHUR SINGH *v.* DABEE SAHOY [W. R., 1864, 260

228. ——— **Redemption of separate share.**—*Right to retain possession till whole debt paid.*—A mortgagee is entitled to hold possession till the mortgage-debt is fully paid, and no person representing the original mortgagor, and claiming any portion of the mortgaged property, can sue to redeem his separate share, without proof of the satisfaction of the entire debt. RAZEEOODDEEN *v.* JHUBBOO SINGH [W. R., 1864, 75

229. ——— *Redemption of whole estate by one of several mortgagors.*—Mortgage-debts are indivisible except where there is a distinct notice on the face of the mortgage-deed of the separate shares of the mortgagors. One co-mortgagor or his representative may redeem the entire estate, if joint and undivided, by payment of the whole of the mortgage-money. RAM KRISTO MANJHEE *v.* AMEEROONISSA BIBEE . . . 7 W. R., 314

ALI REZA *v.* TARASOONDEEBE . 2 W. R., 150

230. ——— *Payment of proportionate part of debt.*—Where moneys were advanced to several mortgagors, who owned the mortgaged land in certain defined shares, and the mortgagee by purchasing the interest of some of the mortgagors in such land broke up the joint security, the

MORTGAGE—*continued.*

8. REDEMPTION—*continued.*

(*b*) REDEMPTION OF PORTION OF PROPERTY—*continued.*

**Redemption of separate share**—*continued.*

remaining mortgagors were held to be entitled to redeem on payment of a just proportion of the moneys advanced. KESREE *v.* SETH ROSHUN LAL [2 N. W., 4

231. ——— *Payment of proportionate part of debt.*—The mortgagors in a joint mortgage transaction are jointly liable to the mortgagees for the whole of the mortgage-debt, and some out of the number cannot bring a suit to redeem their own shares of the mortgaged property by payment of a proportional amount of the mortgage-debt. SALIG RAM SINGH *v.* BARUN RAI . 4 N. W., 92

232. ——— *Suit to redeem land in possession of co-owner of equity of redemption.*—Where a mortgagee in possession acquires a right to a share in the property mortgaged, he cannot be compelled to surrender the mortgaged property on payment of the debt, or any part of it on payment of a proportionate amount of the debt, until the mortgagor has, by a proper suit for partition, ascertained definitely the shares of the co-owners. MARAKAR AKATH KONDABAKAYIL MAMU *v.* PUNJAPATATH KUTTU [I. L. R., 6 Mad., 61

233. ——— *Purchase of equity of redemption of part of property by one of several mortgagees.—Right of redemption of purchaser of another part.*—Where one of several mortgagees has purchased the equity of redemption as to a part of the mortgaged property, the purchaser of another part is not thereby entitled to redeem, unless he discharges the whole mortgage-debt. SOBHA SAH *v.* INDERJEET . . . . 5 N. W., 148

234. ——— *Purchaser of estate jointly and separately mortgaged by co-sharers.*—The purchaser of a share in an estate which had been jointly mortgaged by the several shareholders, and subsequently further charged by all by deeds to which one or more were parties, sued for the redemption of the whole estate by payment of the original mortgage-debt. *Held* that representing the whole of the co-sharers, he must, if he desired to redeem, discharge all the debts with which they had jointly or severally charged the property. BHUGWAN DASS *v.* MAHOMED JAFER . . . 4 N. W., 161

235. ——— *Purchase by mortgagee of a share in mortgaged property.—Redemption of mortgage.*—Where all the proprietors of an estate joined in mortgaging it, and the mortgagee subsequently purchased the share in such estate of one of the mortgagors, thereby breaking the joint character of the mortgage, and one of the mortgagors sued to redeem his own share and also the share of *B.*, another of the mortgagors,—*Held* that he was entitled to redeem his own share, but he could not redeem *B.'s* share against the will of the mortgagee. KURAY MAL *v.* PURAN MAL [I. L. R., 2 All., 565

**MORTGAGE**—*continued.*

8. REDEMPTION—*continued.*

(*b*) REDEMPTION OF PORTION OF PROPERTY —*continued.*

**Redemption of separate share**—*continued.*

**236.** ——————— *Purchase by one of several mortgagees of a portion of the mortgaged property.—Redemption by one of the mortgagors of his own share.*—The fact that one of several mortgagees has acquired the equity of redemption of the share of one of the mortgagors in the mortgaged property does not give another of the mortgagors the right to redeem his share in the mortgaged property. *Sobha Shah* v. *Inderjeet, 5 N. W., 148,* distinguished. *Kuray Mal* v. *Puran Mal, I. L. R., 2 All., 565,* and *Azimut Ali Khan* v. *Jawahir Singh, 13 Moore's I. A., 404,* referred to. MAHTAB RAI *v.* SANT LAL . **I. L. R., 5 All., 276**

**237.** ——————— *Usufructuary mortgage.—Satisfaction of mortgage-debt from usufruct.—Suit for whole mortgaged property by some of several mortgagors.*—In a suit by some of several co-mortgagors to redeem the entire property mortgaged, on the ground that the mortgage-debt had been satisfied out of the usufruct,—*Held* that the plaintiffs could only claim their own shares, and the Court of first instance should determine the extent of the shares after making the other co-mortgagors parties. FAKIR BAKHSH *v.* SADAT ALI **[I. L. R., 7 All., 376**

**238.** ——————— *Destruction of indivisible character of property.*—Where the equity of redemption of different plots of land in the possession of a usufructuary mortgagee under one entire contract has been sold to two different persons and the mortgagee has abandoned his possession of one plot, and taken a lease from the purchaser of that plot, and thereby destroyed the indivisibility of the original contract, the purchaser of the other plot is entitled to redeem his land on payment of a proportionate amount of the mortgage-debt. MARANA AMMANNA *v.* PENDYALA PERUBOTULU **[I. L. R., 3 Mad., 230**

**239.** ——— **Redemption of whole property by owner of portion.**—*Proportional contribution.*—The owner of a part of the equity of redemption can redeem the whole property mortgaged from the mortgagee after paying the whole of the money due on the mortgage, and has a lien on the share of the co-owner for the proportional contribution of that share to the sum expended in redemption, and this right or interest is as capable of transfer as the aggregate group of interests called the ownership. *B.* in one transaction mortgaged two fields (Nos. 20 and 22) to *J.* On the 16th January 1869, in execution of a decree against *B.*, his interest in one of them (No. 22) was sold, and *R.* became the purchaser. *R.*, however, did not take possession. On the 25th April 1877, *B.* paid off *J.'s* mortgage with money borrowed from the defendant *V.*, to whom *B.* again mortgaged the two fields as security. *R.* died, leaving a son *A.*, whose interest in field No. 22 was conveyed by his grandfather (*R.'s* father) to the plaintiff. *A.* was not a party to the conveyance, but attested it with an expression of assent. The plaintiff now sued the defendant *V.* to eject him from No. 22. *Held* that the defendant *V.* had a lien on No. 22, and that the plaintiff could not eject him without paying him the amount of such lien. When *R.* purchased No. 22 he and *B.* stood in equal positions towards the mortgagee *J.* *J.* might enforce his rights under the mortgage against both together, or against either of the two, leaving that one, if forced to pay the whole sum, to recover the proper rateable contribution from the other. On the other hand, *R.* might redeem the whole and seek contribution from *B.*, or *B.* might redeem the whole and seek contribution from *R.* Whichever of the two redeemed, he would have a lien on the share of the other for the proportional contribution of that share to the sum expended in redemption. *B.* did, in fact, redeem the mortgage to *J.*, and thereupon became entitled to a lien on *R.'s* share of the property, *viz.*, field No. 22. He then mortgaged his whole interest to the defendant *V.*, including his lien on No. 22. *R.*, who had not yet obtained possession of No. 22, was entitled to get it only on paying off the amount of the lien which had passed to the defendant *V.* VITHAL NILKANTH PINJALE *v.* VISHVASRAV BIN BAPUJIRAV **[I. L. R., 8 Bom., 497**

**240.** ——————— *Purchaser of equity of redemption of part of an estate.*—The purchaser of the equity of redemption of part of an estate under mortgage is entitled to redeem the whole of the mortgaged estate if the mortgagee insists on his right to have it so redeemed. When the former elects to pay the entire mortgage-debt, he puts himself in the place of the mortgagee redeemed, and acquires a right to treat the original mortgagor as his mortgagor, and to hold that portion of the estate in which he would have no interest but for the payment as a security for any surplus payment he may have made. ASANSAB RAVUTHAN *v.* VAMANA RAU . . . . **I. L. R., 2 Mad., 223**

**241.** ——————— *Mortgage of property owned by co-sharers.—Subsequent severance of interests.—Suit by one co-sharer to redeem more than his share.—Time of taking objection.*—In 1805 a two annas share in certain property held by co-sharers was mortgaged to the defendant. The mortgage was effected by the mortgagor as manager of all the co-sharers in union. In 1848 one of the co-sharers redeemed his share of two pies in the mortgaged property, and a further share of two pies therein was redeemed by a second co-sharer in 1867. The plaintiff was admittedly the owner of another two pies share; but he now sued the defendant to redeem the whole of the property still unredeemed,—*viz.*, a one anna eight pies share of the original mortgage. The defendant objected that the plaintiff could only

MORTGAGE—*continued.*

8. REDEMPTION—*continued.*

(*b*) REDEMPTION OF PORTION OF PROPERTY —*continued.*

**Redemption of whole property by owner of portion**—*continued.*

redeem his own two pies share, which had become separated from the rest. The plaintiff denied that the estate had been divided. *Held* that the plaintiff's claim being to redeem all that remained of the estate in the mortgagee's possession, the suit could not be maintained, unless all the other persons interested in the equity of redemption were before the Court either as co-plaintiffs or as defendants. Without their presence the suit could not be properly disposed of, and the excuse, that the defendant did not take objection at the right time, had, under such circumstances, no validity. As owner of a two pies share, which by consent of all interested had become an estate wholly separated from the other parts of the original aggregate, the plaintiff would have been bound to set forth the transactions on which his right rested. RAGHO SALVI *v.* BALKRISHNA SAKHARAM . . . . . **I. L. R., 9 Bom., 128**

**242.** ——— **Partial redemption.**—*Beng. Reg. I of 1798, s. 5.*—Where the contract between a mortgagor and a mortgagee provides for the payment of the principal sum on a specified date, and for the payment in the meantime of interest thereon, the mortgagor cannot have a partial redemption of the property under Regulation I of 1798 which was not intended (section 5) to alter the terms of a contract settled between the parties except as regards illegal interest. Should the mortgagee consent to allow the principal sum, or part of it, to be paid off before the time fixed, he would be entitled, when agreeing to this, to make the payment of interest a condition of such redemption. BURNO MOYEE DOSSEE *v.* BENODE MOHINEE CHOWDHRAIN . **20 W. R., 387**

**243.** ——— *Property redeemable on payment of two separate amounts.*—Where a certain quantity of land was the subject of one zur-i-peshgi mortgage redeemable on payment of R225 to *K.* and R275 to *M.*, the mortgagees taking possession in moieties, it was held that the mortgagor could not recover any portion of the land until he had paid up all the money due upon the mortgage,—*e.g.*, as long as he had not paid up the amount due to *M.*, he could not claim even the land allotted to *K.*, whose portion had been liquidated. IMAM ALI *v.* OOGRAH SINGH . . . . **22 W. R., 262**

**244.** ——— *Purchase of portion of equity of redemption by mortgagees.—Apportionment of mortgage-debt.*—The plaintiffs in this suit were purchasers of the equity of redemption in a portion of certain mortgaged premises which were sold in lots, and they brought this suit against the mortgagees, who were also purchasers of the equity of redemption of several of the lots. They made the purchasers of the other lots parties to the suit, and sought to redeem their own portion of the estate and to recover possession of their own portion and the portion purchased by the purchasers other

MORTGAGE—*continued.*

8. REDEMPTION—*continued.*

(*b*) REDEMPTION OF PORTION OF PROPERTY —*continued.*

**Partial redemption**—*continued.*

than the mortgagees, on payment into Court of a sum sufficient to cover the proportion of the mortgage-debt attributable to the said parcels. The mode of applying the whole of the mortgage-debt between the different mouzahs of the mortgaged estate in such a case pointed out. AZIMUT (AJIMUT) ALI KHAN *v.* JOWAHIR SINGH

**[14 W. R., P. C., 17 : 13 Moore's I. A., 404**

BEKON SINGH *v.* DEEN DYAL LALL

**[24 W. R., 47**

**245.** ——— *Mortgage of one estate consisting of several villages.—Purchase by mortgagee of part of equity of redemption.*—Where sixteen villages were included in one mortgage and the equity of redemption in one village was sold to the plaintiffs,—*Held* that they were entitled to sue the mortgagee, who had purchased the equity of redemption in twelve of the villages, for redemption of their own and three other villages; a previous suit for redemption of their one village having been dismissed on the objection of the mortgagee that they were not entitled to sue to redeem their one village alone. AHMED ALI KHAN *v.* JAWAHIR SINGH

**[1 Agra, 3**

**246.** ——— *Purchase of equity of redemption of part of village.*—The entire village was mortgaged to the defendants, who subsequently obtained by purchase the equity of redemption as to a portion of it. The equity of redemption in another portion was sold to two other persons jointly, one of whom (the plaintiff) claimed to represent by purchase, the other by descent. The plaintiff having sued to redeem the whole share, the defendants questioned the validity of the sale to the persons through whom the plaintiff claimed, and impugned the plaintiff's right as heir. *Held* that the mortgagees, who, on the occasion of the sale impugned, had sued to establish their claim to pre-emption, were not now entitled to question the sale; and, secondly, inasmuch as the estate, or the portion of it held by the persons whom the plaintiff claimed to represent, was a joint estate, the plaintiff having established his right to one moiety by purchase, was entitled to redeem the whole, whether his title to the other moiety by heirship was proved or not. BITHAL NATH *v.* TOOLSEE RAM . . **1 Agra, 125**

**247.** ——— *Purchase of portion of equity of redemption.*—The equity of redemption in two mouzahs (the mortgage being joint) was sold in satisfaction of a decree by a third party, and purchased partly by plaintiff and partly by the mortgagee himself. *Held*, on plaintiff's claim for redemption of the part of the mortgaged property purchased by him, that under such circumstances the whole burden of the mortgage-debt could not be thrown on a portion of the equity of redemption, and the plaintiff would be entitled to redeem the portion

**MORTGAGE**—*continued.*

8. REDEMPTION—*continued.*

(*b*) REDEMPTION OF PORTION OF PROPERTY —*continued.*

**Partial redemption**—*continued.*

of the property purchased by him on payment, not of the whole, but of such portion of the debt as was proportionate to the relative value of the mortgaged properties. MAHTAB SINGH *v.* MISREE LALL

[2 Agra, 88

**248.** ——————— *Purchase of portion of equity of redemption.*—An entire mouzah had been mortgaged by way of usufructuary mortgage. The plaintiff subsequently purchased a four annas share from the heirs of some of the mortgagors, and sued for possession of his purchased share on the averment that the whole of the mortgage-debt and interest had been satisfied. *Held* that he was not precluded from suing on the ground that he claimed only a portion of the mortgaged property. LALLA DABEE PERSHAD *v.* BEHAREE LALL . 3 Agra, 33

**249.** ——————— *Suits heard together brought by co-sharers of whole estate.*—*A.* granted a zur-i-peshgi lease of certain lands to the defendants for a fixed term of years, which was to continue after the expiry of the term so long as the money advanced remained unpaid. Shortly afterwards *A.* evicted the defendants, and sold the land to *C.* and *D.* in the proportion of twelve annas and four annas. The defendants sued all the three, and obtained a decree for possession and mesne profits. They never got back possession, but recovered the mesne profits from *A.* On the expiry of the term of the lease, *C.* and *D.* each brought a suit to redeem his own share of the estate after payment into Court of the money advanced, in amounts proportionate to the share of the land purchased by each. The two suits were heard together. *Held*, they were entitled to redeem. WUZUROONNESSA *v.* SAEEDUN. JOYMUNGUL SINGH *v.* SAEEDUN

[B. L. R., Sup. Vol., 613 : 6 W. R., 240

**250.** ——————— ——— *Deposit of proportionate share of debt.—Purchase of portion of equity of redemption by mortgagee.*—*R.* mortgaged to *N.* certain property, of which *N.* caused a moiety to be sold in execution of a money-decree against *R.*, and himself became the purchaser. The moiety was sold subject to *N.'s* mortgage in satisfaction of another decree, and purchased by *L.* *N.*, in exercise of his rights as mortgagee, attached and proceeded to sell the share of *L.* in the portion purchased by him; and *L.* thereupon, with a view to stay the sale, deposited an amount proportionate to the share held by him. The sale, however, was allowed to proceed. *Held*, in a suit brought by *L.* against *N.* to set aside the sale, he was entitled to a decree. NATHOO SAHOO *v.* LALAH AMEER CHAND

[15 B. L. R., 303 : 24 W. R., 24

**251.** ——————— *Equity of redemption, Attachment of.—Payment of proportionate share of mortgage-debt.*—*A.*, the holder of a decree upon a mortgage-bond, attached in execution



**MORTGAGE**—*continued.*

8. REDEMPTION—*continued.*

(*b*) REDEMPTION OF PORTION OF PROPERTY —*continued.*

**Partial redemption**—*continued.*

a one-third share of a certain mouzah, one of seventeen mouzahs included in the mortgage, and the equity of redemption in which one-third share had been purchased by *B.* *Held* that although, as laid down in *Azimut Ali Khan* v. *Jowahir Sing, 13 Moore's I. A., 404, B.* would have been at liberty to insist that his one-third share should be burthened with no more than a proportionate amount of the original mortgage-debt, and might claim to redeem such share upon payment of that quota, yet, as he had not shown what that proportion was, nor paid it into Court, that *A.* under the circumstances was entitled to enforce his attachment. HIRDY NARAIN *v.* ALLAOOLLAH

[I. L. R., 4 Calc., 72 : 2 C. L. R., 580

**252.** ——————— ——— *Contribution.—Suit for redemption of share of property sold in execution of decree for mortgage-debt.*—*M.*, *B.*, and *N.* held mouzah D. in equal one-third shares, and *M.* also held a share in mouzah A. On the 3rd January 1863, *M.* and *B.* mortgaged their shares in mouzah D. to *L.* to secure a loan of certain moneys. On the 16th March 1870, *M.*, *B.*, and *N.* mortgaged mouzah D. to *R.* to secure a loan of R600, and on the same day, by a separate deed, they mortgaged mouzah D., and *M.* mortgaged his share in mouzah A. to *R.*, to secure a loan of R1,600. On the 8th December 1875, *L.* obtained a decree for the sale of the shares of *M.* and *B.* in mouzah D. for the satisfaction of the mortgage-debt due to her. On the 18th April 1876, *R.* obtained a decree for the realisation of the mortgage-debts due to him by the sale of mouzah D. and *M.'s* share in mouzah A. On the 23rd October 1876, the shares of *M.* and *B.* in mouzah D. were sold in execution of *L.'s* decree, and were purchased by *R.* A portion of the purchase-money was applied to satisfy *L.'s* decree, and the balance of it was deposited in Court. Instead of applying to the Court to pay him this balance in execution of his decree dated the 18th April 1876, *R.* attached and obtained payment of such balance in execution of a decree for money which he held against *M.* and *B.* On the 20th June 1877, *R.*, in execution of his decree dated the 18th April 1876, brought to sale *N.'s* one-third share in mouzah D. and became its purchaser. On the 20th July 1877, *R.*, in execution of a decree for money against *M.*, brought to sale his share in mouzah A. and became its purchaser. *Held*, in a suit by *N.* against *R.* in which he claimed that the sum due by him under the two mortgages dated the 15th March 1870, and the decree dated the 16th April 1876, might be ascertained, and that, on payment of the amount so ascertained, the sale of his one-third share in mouzah D. might be set aside, and such share declared redeemed. *Held* that the sale of *N.'s* share in mouzah D. could not be set aside. *Held*, also, that if it were shown that the sum realised by the sale of his one-third share in mouzah D. exceeded the proportionate share of his liability on the two mortgages,

**MORTGAGE**—*continued.*

8. REDEMPTION—*continued.*

(*b*) REDEMPTION OF PORTION OF PROPERTY —*continued.*

**Partial redemption**—*continued.*

he was entitled to recover one moiety of such excess as a contribution from mouzah A. As it appeared that there was such an excess, the Court gave *N.* a decree for a moiety of such excess, together with interest on the same from the date of the sale of *N.'s* share at the rate of 12 per cent. per mensem; and further directed that, if such moiety, together with interest, were not paid within a certain fixed period, *N.* would be at liberty to recover it by the sale of the share in mouzah A., or so much thereof as might be necessary to satisfy the debt. BHAGIRATH *v.* NAUBAT SINGH . . **I. L. R., 2 All., 115**

**253.** ——————— *Sale of equity of redemption of two parcels.—Second mortgage of six parcels and redemption of one by mortgagor.—Transfer of Property Act, s. 60.—Redemption by purchaser of two parcels on payment of proportionate amount of debt decreed.*—In 1873 *R.* mortgaged to *S.* seven parcels of land (items 1—7) for R300. In 1880 *M.* purchased *R.'s* rights in items 1 and 2. In 1881 *R.* redeemed item 5 on payment of R30, and executed a second mortgage of the rest to *S.* for R200. *Held* that *M.* was entitled to redeem items 1 and 2 on payment of a proportionate amount of the first mortgage debt. SUBRAMANYAN *v.* MANDAYAN . . . . **I. L. R., 9 Mad., 453**

**254.** ——————— *Purchase by third parties of mortgagee's interest in portions of mortgaged property.—Redemptiom and apportionment of liability of purchasers for the mortgage charge.—Joinder of parties.—Mortgage account.—Form of decree.*—Purchasers of the right, title, and interest of a mortgagor in certain portions of the mortgaged property, sold in execution of a prior decree against the mortgagor, were added as co-defendants in a mortgagee's suit against the mortgagor for foreclosure on failure to redeem. As against these purchasers the suit was dismissed with costs, on the ground that their claims to portions of the mortgaged property, under titles prior to, and independent of, the mortgagee's title, could not be decided therein. A decree was then made against the mortgagor, and on his subsequent failure to redeem or to pay the debt, his equity of redemption was sold, and was bought by the mortgagee. In a suit brought by the mortgagee against the representatives of one of the said purchasers, who refused to deliver possession of the portion,—*Held* that (*a*), as this purchaser had disclaimed the right to redeem the portion, and had alleged a paramount title, causing the dismissal of the suit as against him, he, and those claiming under him, were precluded from afterwards claiming to redeem; and (*b*), the proportion of mortgage charge for which he was liable could not be apportioned by the taking an account as between him and the mortgagee alone, in the absence of the purchasers of the other portions. *Azimut Ali Khan* v. *Jowahir Singh, 13 Moore's I. A., 404,* referred to. A decree which

**MORTGAGE**—*continued.*

8. REDEMPTION—*continued.*

(*b*) REDEMPTION OF PORTION OF PROPERTY —*continued.*

**Partial redemption**—*continued.*

ordered that the defendants, without any account being taken at all, should retain possession of the portion purchased as above stated, clear of the proportion of mortgage-debt chargeable thereon, on payment to the mortgagee of the sum for which he had bought the equity of redemption, was held to be incorrect, and was accordingly reversed. NILAKANT BANERJI *v.* SURESH CHANDRA MULLICK **[I. L. R., 12 Calc., 414: L. R., 12 I. A., 171**

**255.** ——————— *Right of one of several joint mortgagors to redeem the whole estate.—Parties to a redemption suit.*—In the case of joint-family property, which, though held in certain shares by the several coparceners, is mortgaged as a whole and redeemable upon payment of the entire sum, each and every one of the mortgagors has a right to redeem the whole estate, seeking his contribution from the rest. The rule is the same as regards any persons, other than the original mortgagors, who have acquired any interest in the lands mortgaged by the operation of law, or otherwise in privity of title. The plaintiffs sued to redeem a sixteen pies takshim of the khoti village of Shirbe, which had been jointly mortgaged by *S.*, the owner of one-half share of the takshim, and *H.*, the eldest of the four sons of *P.*, the owner of the remaining half share. The plaintiffs were the owners, by purchase at two Court sales, of the equity of redemption of two out of the eight pies share belonging to *S.*, and of one quarter of the eight pies share belonging to *P.* One of these sales was in execution of a decree against *R.*, the eldest of the five sons of *S.*, and the other in execution of a decree against *H.* After the institution of the suit, the defendants purchased privately the shares in the equity of redemption belonging to Bala, the fifth son of *S.*, and to Saya and Devji, two of the sons of Baba, the fourth son of *S.* Under these sales, they claimed to be owners of a four pies share in the takshim. Pending the appeal in the District Court, the defendants allowed *L.*, the grandson of *P.*, to redeem a two pies share, and *L.'s* brother, *R.*, to redeem a pie share. *Held* that, as the sixteen pies takshim of the khoti village, though held in certain shares by the original mortgagors, was undivided family property, which was mortgaged as a whole and for an entire sum, the plaintiffs, as owners by purchase of a part of the equity of redemption, had a right to redeem the whole of the sixteen pies takshim; and this right could not be affected by the conduct of the defendants *post litem motam,* either by their purchase of a share in the equity of redemption pending the suit, or by the partial redemption allowed by them pending the appeal. *Held,* also, that the defendants had no power to permit partial redemption, as before partition none of the co-sharers could redeem any particular share. NARO HARI BHAVE *v.* VITHALBHAT **[I. L. R., 10 Bom., 648**

**MORTGAGE**—*continued.*

8. REDEMPTION—*continued.*

(*b*) REDEMPTION OF PORTION OF PROPERTY —*continued.*

**Partial redemption**—*continued.*

SAKHARAM NARAYAN *v.* GOPAL LAKSHUMAN [I. L. R., 10 Bom., 656, note

ALIKHAN DAUDKHAN *v.* MAHOMADKHAN SHAMSHERKHAN DESMUKH [I. L. R., 10 Bom., 658, note

**256.** ——————— *Sale by mortgagor of part of mortgaged property pending redemption suit.—Sale by mortgagor of rest of mortgaged property after decree for redemption.—Application by purchasers for execution of decree.—Subsequent suit for redemption by one purchaser.—Sale pendente lite.*—One *M.* sued the defendant *R.* for partition. The defendant pleaded a prior partition, and alleged that the property which *M.* now sued to recover had been mortgaged by *M.* to him (the defendant). Pending the suit, *M.* sold to the plaintiff a portion of the property claimed from the defendant. Subsequently to this sale a decree was passed in the suit, by which it was declared that the mortgage alleged by the defendant had been proved, and that *M.* should redeem within six months from the date of the decree. Subsequently to this decree, —*viz*, on 25th November 1879,—*M.* sold the remainder of the mortgaged property to one *H. S.* The two purchasers (*viz*, the plaintiff and *H. S.*) then made a joint application for execution of the decree for redemption. The Subordinate Judge held, as to the plaintiff, that the plaintiff having purchased *pendente lite*, and having become *M.'s* assignee prior to the decree, was not entitled to come in under section 232 of the Civil Procedure Code (Act X of 1877) to get the decree enforced; and on 6th March 1880 an order was made that *H. S.* should redeem the whole property on payment of R100 and costs. *H. S.* subsequently sold his interest to the mortgagee, *R.* In 1880 the plaintiff brought the present suit for redemption against *M.* (the mortgagor) and the defendant *R.* (the mortgagee), alleging (*inter alia*) that *M.*, having sold the property, had not sought to execute the former decree for redemption. The defendant *R.* in his written statement alleged that the sale by *M.* to the plaintiff was fraudulent; that the plaintiff as purchaser from *M.* had not applied to be made a party to the former suit; that *M.* having failed to redeem as ordered by the said decree within the period specified, neither he nor the plaintiff was now entitled to sue. *Held* that the plaintiff's suit was unsustainable. By the sale to the plaintiff the rights of *M.* came to the plaintiff subject to the result of the suit then pending in which he did not choose to get himself made a co-plaintiff. When the decree was passed it was only through a right derived from *M.* that the plaintiff could have a *locus standi* in the further proceedings, and he applied for execution as assignee, and, therefore, as representative of *M.* under section 244 of the Code of Civil Procedure (X of 1877). As such representative he might have appealed, but did not, against the order of the 6th March 1880, passed on the application made by him jointly with *H. S.*

**MORTGAGE**—*continued.*

8. REDEMPTION—*continued.*

(*b*) REDEMPTION OF PORTION OF PROPERTY —*continued.*

**Partial redemption**—*continued.*

He had this right of appeal as representative of *M.* but he could not bring a fresh suit. If he was not a representative of *M.*, then he was a stranger to the proceedings under the decree; and as *M.* took no steps to fulfil the decree, the right to redeem was foreclosed in six months from the date of the decree,—*i.e.*, in May 1881. The plaintiff could not, by any step, prevent the right of the defendant as mortgagee against *M.* from growing and perfecting itself during the six months allowed for redemption. RAMCHANDRA KOLATKAR *v.* MAHADAJI KOLATKAR [I. L. R., 9 Bom., 141

**257.** ——————— *Right to redeem share coming to person by inheritance.*—The plaintiff recognised the validity of a mortgage for a term of twenty years of her deceased father's estate made in 1854 by her two brothers, nor did she dispute the sale in 1863, after the death of the brothers, of the estate to the mortgagees by *M.*, her mother, describing herself as sole owner, as a transfer of *M.'s* rights. She claimed to have a right to redeem from the mortgage in 1854, in due course of time, the share in the estate which devolved upon her by right of inheritance from her father and brothers, the sale-deed of 1863 notwithstanding. The purchase-money under the sale-deed represented personal debts of *M.* and *N.*, one of the brothers. The plaintiff did not claim as an heir of *M.*, whose death was not known for certain. *M.* did not profess in the sale-deed to be acting for her daughter either as guardian or as one of *N.'s* heirs managing for them all. The plaintiff was apparently not a minor at the time, and *M.* was not an heir of *N.*, being his step-mother. Under Mahomedan law she could not have disposed of her daughter's property as her guardian, and not being one of *N.'s* heirs she could not deal with his estate on behalf of his real heirs. At the time of sale half the mortgage term had not expired, the mortgage-debt was not claimable at the time, and the sale with a view to its liquidation was unnecessary. Under these circumstances the plaintiff's claim was decreed. IMAMAN *v.* LALTA BUKSH . . . . 7 N. W., 343

(*c*) REDEMPTION OTHERWISE THAN ON EXPIRY OF TERM.

**258.** ——— **Redemption after expiry of time.**—*Mortgage becoming absolute on default of redemption.—Security for repayment of loan.*—Where an instrument of mortgage, though in terms it transfers an estate on failure to repay the mortgage-money on a fixed day, yet appears clearly to have been entered into by the parties for securing repayment of a loan, the mortgagor, making the security subservient for the purpose for which it was created, may in equity and good conscience redeem the property by paying off the principal debt and interest, though the stipulated time for payment has been allowed to pass by. RAMJI BIN TUKARAM *v.* CHINTO SAKHARAM [1 Bom., 190

MORTGAGE—*continued.*

8. REDEMPTION—*continued.*

(*c*) REDEMPTION OTHERWISE THAN ON EXPIRY OF TERM—*continued.*

**Redemption after expiry of time**—*continued.*

MUHAMMAD VALAD ABDUL MULNA *v.* IBRAHIM VALAD HASAN . . 3 Bom., A. C., 160

259. ——————— *Conditional sale.*—*Dhrislabandhaka.*—A dhrislabandhaka, or Hindu instrument by which visible property is mortgaged, which names a time for payment of the money borrowed, and stipulates that on default the mortgagee shall be put into exclusive possession and enjoyment of the property, will not be treated strictly as a conditional sale, even though the instrument expressly provides that on default the transaction shall be deemed an outright sale; and in a suit by the mortgagee for possession, the Court, in decreeing the right thereto, will give the mortgagor a day for redeeming. VENKATA REDDI *v.* PARVATI AMMAL [1 Mad., 460

260. ——————— *Mortgage for fixed term.*—*R.* mortgaged certain land to *A.* in 1844, stipulating that if he (*R.*) failed to pay a moiety of the mortgage-money within three years or wholly redeem within five years from the date of the mortgage, the property mortgaged should be considered as sold to *A.* The property remained in the possession of *R.* till 1847, at the end of which he gave it into the possession of *A.*, *R.* then believing that he had thereby lost all right to the property. Subsequently to 1847 the property changed hands. The absolute right was first sold in 1855, and then on two occasions in 1862. At this time *R.* did not raise any objection to the property being sold, although he was fully aware of the fact. *R.* had also admitted, in a suit brought against him in 1850 by *A.*, that he had sold the land to *A.* In a suit brought by *R.* against *A.* in 1867 to redeem the mortgaged property,—*Held* (following the decision in *Ramji bin Tukaram* v. *Chinto Sakharam, 1 Bom., 199*) that *R.* was entitled to redeem the property. RAMSHET BACHASHET *v.* PANDHARINATH . . . 8 Bom., A. C., 236

*See* KRISHNAJI *alias* BABAJI KESHAV *v.* RAVJI SADASHIV . . . . 9 Bom., 79

261. ——————— *Gahan lahan clause.*—Since the decision of the case of *Ramji bin Tukaram* v. *Chinto Sakharam, 1 Bom., 199,* it has been the practice of the High Court on its appellate side and of the inferior Courts in the Bombay Presidency to treat "gahan lahan" mortgages (mortgages containing a proviso that if not redeemed within a certain fixed time they will be considered as converted into absolute sales) as redeemable, notwithstanding that such fixed time has expired. Such practice has proved beneficial and should be adhered to. *Ramji bin Tukaram* v. *Chinto Sakharam, 1 Bom., 199,* and the cases decided in accordance with it, referred to and followed. SHANKARBHAI GULABBHAI *v.* KASSIBHAI VITHALBHAI . . 9 Bom., 69

MORTGAGE—*continued.*

8. REDEMPTION—*continued.*

(*c*) REDEMPTION OTHERWISE THAN ON EXPIRY OF TERM—*continued.*

**Redemption after expiry of time**—*continued.*

262. ——————— *Conditional sale.*—A mortgagor stipulated by an instrument in writing that if he failed to repay the sum lent on mortgage within three years, the property mortgaged was to be held an absolute sale. *Held* that the mortgagor was entitled to redeem although the amount lent had not been repaid within three years. NALLANA GAUNDAN *v.* PALANI GAUNDAN . 2 Mad., 420

263. ——————— *Usufructuary mortgage.*—The plaintiff executed an usufructuary mortgage of certain land for a term of twenty-two years to the first defendant, for the considerations stated in a written instrument of mortgage, dated the 21st of January 1863. The mortgage instrument contained a stipulation that possession should be given to the plaintiff upon his paying the principal and interest due to the first defendant within two months from the date of the execution. *Held* that the plaintiff was entitled to redeem although the amount of principal and interest had not been paid or tendered within two months. DORAPPA *v.* KUNDIKURI MALLIKARJUNUDU . . . . 3 Mad., 363

264. ——————— *English law.*—*Construction.*—The decisions of the Sudder Court at Madras carried the doctrine of relief after the time named in the conveyance so far as to say that wherever the security for money is an object of the transaction, no sale can become absolute. The High Court have followed the English rule and have held the question one of construction—admitting, however, for the purpose of the construction, other documents and oral evidence. LAKSHMI CHELLIAH GARU *v.* SRIKRISHNA BHUPATI DEVU MAHARAJ GARU, ZEMINDAR OF MADUGULU . . 7 Mad., 6

265. ——————— *Power of sale by mortgagor.*—*Reasonable time.*—*Suit to remove attachment.*—Claim by a mortgagee to remove an attachment, placed by a judgment-creditor of the mortgagor, on the ground that the entire ownership of the property had passed to him at the date of attachment. The mortgagee had never had possession of the mortgaged property; and by the stipulations of the deed the mortgagor had a power of sale after the expiration of the time fixed for the payment of the debt, and it was only on the failure to exercise this power that the proprietory title would pass to the mortgagee. *Held* that, under a condition of this character, a reasonable time must be allowed for the exercise of the power of sale, and that the fact that no sale had taken place within an interval of twenty-three days from the date fixed for payment could not equitably be held to divest the mortgagor of the equity of redemption; that consequently at the time of attachment the defendant was only a mortgagee, and the suit to remove the attachment could not be maintained. KONER MANOHAR MAHAJAN AMBEKAR *v.* NARO HARI DASPUTRE . 1 Bom., 167

MORTGAGE—*continued.*

8. REDEMPTION—*continued.*

(*c*) REDEMPTION OTHERWISE THAN ON EXPIRY OF TERM—*continued.*

**266. ——— Redemption before expiry of time.**—*Suit for redemption of zuri-i-peshgi mortgage.*—A mortgagor who has granted a zur-i-peshgi lease can sue to recover possession of his lands before the expiry of the term fixed by the lease, on the ground that the mortgage-debt has been satisfied by the mortgagee's receipts while in possession. PUNJUM SINGH *v.* AMEENA KHATOOM **[6 W. R., 6**

**267.** ——— *Mortgage for fixed period.—Act XXVIII of 1855.—Held* that a mortgage effected for a fixed period subsequent to Act XXVIII of 1855 coming into operation, is not redeemable until the period for which it was effected has expired, and that under the circumstances the mortgagor's remedy was to sue for the balance of the mortgage-loan which had not been paid to them. MUN PEARY *v.* SHIVA DEEN **[1 Agra, 91**

**268.** ——— *Hindu and English law.*—The same principle exists both in the English and the Hindu law, that the right of the mortgagor to redeem does not, in the absence of any circumstances or language indicating a contrary intention, arise any sooner than the right of the mortgagee to foreclose, and therefore a suit for redemption of a Hindu mortgage cannot be brought before the time fixed by the mortgage for the payment of the mortgage-money. SAKHARAM NARASIMHA SARDESAI *v.* VITHU LAKHA GOUDA **[1 Ind. Jur., N. S., 250: 2 Bom., 237: 2nd Ed., 225**

**269.** ——— *Cause of action.—Mortgage for fixed term.*—The general principle as to redemption and foreclosure is that, in the absence of any stipulation, express or implied, to the contrary, the right to redeem and the right to foreclose are co-extensive. A mortgage-deed, dated the 30th April 1870, stipulated that the mortgagor would pay the debt, with interest, within ten years and redeem the mortgaged property. In a suit instituted on the 30th July 1877 for the redemption of the property, the mortgagee contended that the time had not expired. *Held* that the suit was unsustainable, because prematurely instituted, the mere use of the word "within" not being a sufficient indication of the intention of the parties that the mortgagor might redeem in a less period than ten years. VADJU *v.* VADJU . . . . **I. L. R., 5 Bom., 22**

**270.** ——— *Usufructuary mortgage.*—Plaintiff borrowed a sum of money for defendant, and executed what he called a "usufructuary mortgage," taking from defendant a lease of nine years, under which the lessee, after paying the Government revenue and a certain rent (claiming no abatement), was to retain the rest of the jumma as interest and principal of the loan until the term of the lease expired, when the balance was to be repaid in a lump sum, the lessor not being at liberty

MORTGAGE—*continued.*

8. REDEMPTION—*continued.*

(*c*) REDEMPTION OTHERWISE THAN ON EXPIRY OF TERM—*continued.*

**Redemption before expiry of time**—*continued.*

to alienate the property until the debt was paid. The present suit was brought to redeem the property by payment of the principal and interest due, although the term of the lease had not expired. *Held* that the document leasing the property was partly "ticca" and partly "zur-i-peshgi," and the plaintiff was not entitled to enter into possession before the expiry of the term of the lease, nor could he then enter even if the transaction were viewed as a zur-i-peshgi. LOTF ALY *v.* GUJRAJ THAKOOR . . **11 W. R., 408**

**271.** ——— *Usufructuary mortgage.—Suit for redemption on deposit of balance due.—A.* executed an ikrar by way of mortgage, whereby it was stipulated that *B.*, the mortgagee, was to remain in possession of the mortgaged premises for a period of eight years; that the amount due was to be paid off from the usufruct; and that if at the expiry of that period any sum should remain due under the ikrar, *A.* was to pay the same. In a suit for redemption brought before the expiry of the period mentioned in the ikrar on deposit of the amount due thereunder,—*Held* that the suit would not lie. CHANDRA KUMAR BANERJEE *v.* ISWAR CHUNDRA NEWGI **[6 B. L. R., 562: 14 W. R., 455**

But *see* DINDOYAL SHAH *v.* GANESH MAHATUN **[6 B. L. R., 56, note: 12 W. R., 528, note**

which, however, was decided on the supposition that the mortgage was executed previously to Act XXVIII of 1855. SURJAN CHOWDHRY *v.* IMAMBANDI BEGUM . . **6 B. L. R., 566, note [12 W. R., 527**

**272.** ——— *Mortgage for fixed term.*—A mortgage-deed, which was executed in March 1858, provided for the redemption of the mortgaged property after the expiration of fifteen years from date. In a suit brought in 1867 to recover part of this property, the Appellate Court held the plaintiff entitled to recover, because on the 29th November 1873, when that Court passed its decision, the time fixed for redemption in the mortgage-deed had already expired. *Held* on special appeal, in reversal of the decree of the lower Court, that in 1867, when the suit was brought, the right even to redeem the mortgaged property as a whole had not accrued, and that, therefore, the action was premature. LILA MORJI *v.* VASUDEV MORESHVAR GANPULE . . . . . **11 Bom., 283**

**273.** ——— *Mortgage for fixed term.*—Where money was lent on mortgage without a stipulated rate of interest, and it was mutually agreed that the mortgagee was to retain possession for a given period precisely calculated, the stipulation was held to involve a condition that the property was not to be taken out of the hands of the

MORTGAGE—*continued.*

8. REDEMPTION—*continued.*

(c) REDEMPTION OTHERWISE THAN ON EXPIRY OF TERM—*continued.*

**Redemption before expiry of time**—*continued.*

mortgagee before the expiration of that time. SREEMUNT DUTT *v.* KRISHNANATH ROY . 25 W. R., 10

274. ——— A mortgage-deed, dated the 15th March 1883, stipulated that the mortgagor would "pay the interest every year, and the principal in ten years;" that "the principal shall be paid at the promised time, and the interest every year," and that upon failure by the mortgagor to pay the principal and interest "at the stipulated period," the mortgagee should be at liberty to realise the debt from the mortgaged property, and from the other property and against the person of the mortgagor. The mortgagor instituted a suit for redemption on the 15th July 1884. *Held*, upon a construction of the mortgage-deed, that the advance by the mortgagee to the mortgagor was for a period of ten years certain; that the case was essentially one in which, looking to the merits of the matter between the parties, their obligations were mutual and reciprocal, and there was nothing in the terms of the deed to take it out of the ordinary rules applicable to documents of the kind; and that while on the one hand the mortgagee could not enforce his rights during the period of ten years, on the other hand the mortgagor was not entitled, before that period had expired, to redeem the property. *Vadju* v. *Vadju, I. L. R., 5 Bom., 22*, referred to. RAGHUBAR DAYAL *v.* BUDHU LAL . . . I. L. R., 8 All., 95

275. ——— *Mortgage for a term.—Intention of parties.*—When the continuance of the enjoyment of property mortgaged for a prescribed period forms a material part of the contract, the mortgagee cannot be deprived of his right to enjoyment on the mere ground that the contract is one of mortgage. The creation of a term is not conclusive evidence that redemption should not take place before the end of the term. But where there was no agreement for payment of interest at an annual rate, but a lump sum equal to the principal was to be accepted as interest for the term, and a small balance of rent was to be paid at the end of the term when the land was returned, and, taking the net annual usufruct at a fixed sum, a term of years was created, during which the debt and interest were to be liquidated by that usufruct, the risk of seasons and payment of quit-rent falling on the mortgagee,—*Held* that the basis of the contract was the enjoyment of the property by the mortgagee for the term fixed. SETRUCHERLA RAMABHADRA RAJU BAHADUR *v.* VAIRICHERLA SURIANARAYANA RAJU BAHADUR . . . I. L. R., 2 Mad., 314

276. ——— *Dekkan Agriculturists' Relief Act, XVII of 1879.*—The rule of law that the right to redeem is co-extensive with the right to foreclosure, and is consequently postponed until the time fixed for the payment of the mortgage-debt, does not apply to cases falling under the Dekkan Agriculturists' Relief Act. BABAJI *v.* VITHU . . . . I. L. R., 6 Bom., 734

277. ——— **Suit for redemption.**—*Question of title.*—In a suit for redemption the mortgagee cannot dispute the mortgagor's title to the land comprised in the mortgage, on the ground that a claim to it is asserted by other proprietors. MAHOMED ABDOOL RUZZAK *v.* SADIK ALI [3 Agra, 142

(d) MODE OF REDEMPTION AND LIABILITY TO FORECLOSURE.

278. ——— **Payment of mortgage-debt.**—*Tender or deposit of debt.—Beng Reg. XVII of 1806, s. 7.*—Under section 7, Regulation XVII of 1806, if a mortgagee has obtained possession at any time before a final foreclosure of the mortgage, the mortgagor's payment or tender of the principal sum due under the mortgage-debt saves his equity of redemption. *Held* that the section applies where the mortgagee has obtained a decree for possession and wasilat, whether he executes it or not. SAKRIMAN DICHUT *v.* DHARAM NATH TEWARI [3 B. L. R., A. C., 141

279. ——— *Tender of portion of mortgage-debt.*—A mortgagor cannot ask for a decree for possession without tendering the whole of the mortgage-debt. JOY GOBIND ROY *alias* BHOJRAJ ROY *v.* BUNDHOO SINGH [17 W. R., 342

280. ——— *Tender by one of several mortgagors.*—A tender by one or more of several mortgagors is not such as a mortgagee is bound to accept, unless it is made conjointly by the whole of the mortgagors, or on their behalf and with their consent. RAM BAKSH SINGH *v.* RAM LALL DOSS . . . . . 21 W. R., 428

281. ——— *Deposit in Court by mortgagor.—Legal tender.—Right to mesne profits.*—Where a mortgagor deposits the amount of the mortgage for the express purpose of preventing a foreclosure, he is entitled to wasilat, of which the mere fact of his having put in a petition, which refers to some other suit between him and the mortgagee, but does not prevent the latter from taking out the deposit, cannot deprive him. Where a mortgagor is liable for only a portion of the mortgaged property, but pays in the whole amount to secure himself against his co-sharers, he is entitled to wasilat for the whole. DABI DUTT SINGH *v.* GOBIND PERSHAD [25 W. R., 259

282. ——— *Time for payment.—Year of grace.*—The year of grace counts from the date of issue of notice of application for

**MORTGAGE**—*continued.*

8. REDEMPTION—*continued.*

(*d*) MODE OF REDEMPTION AND LIABILITY TO FORECLOSURE—*continued.*

**Payment of mortgage-debt**—*continued.*

foreclosure, and not from the date of service of the notice. GHAZEROOD-DEEN *v.* BHOOKUN DOOBEY [2 Agra, 301

**283.** ——————— *Time for payment.— Year of grace.— Holiday.— Beng. Reg. XVII of 1806.*—The year of grace allowed to a mortgagor by Regulation XVII of 1806, to tender or deposit the amount due to the mortgagee, includes authorised holidays; the mortgagor not being entitled to the deduction of any holidays which may occur when that year expires. KUMOLA KANT MYTEE *v.* NARAINEE DOSSEE . . . 9 W. R., 583

**284.** ——————— *Time for payment.—Beng. Reg. XVII of 1806, s. 8.—Extension of time.*—A Judge has no discretion to extend the time allowed to a mortgagor under section 8, Regulation XVII of 1806. MAHOMED GAZEE CHOWDHRY *v.* ABDOOL MAHOMED AMEEROODEEN [5 W. R., Mis., 31

**285.** ——————— *Time for payment. — Deposit. — Tender of mortgage-money.*— Where a mortgagee extended the time for payment to the 25th November, and the mortgagor was prevented by the closing of the Court from depositing the mortgage-money in the Judge's Court on that day,—*Held* that the mortgagor saved his estate from foreclosure by depositing the money in Court on the first day after the 25th November on which the Court was open. The mortgagor having the option either of depositing the money in the Judge's Court, or of tendering it if there is sufficient excuse for not depositing in the Judge's Court, he is not bound to tender the money and prove that tender. DABEE RAWOOT *v.* HERAMUN MUHATOON . 8 W. R., 223

**286.** ——————— *Time for payment.—Tender of mortgage-money.—Notice of deposit to mortgagee.*—Where a decree declared plaintiffs' right to redeem a mortgage whenever within the month of Jeth they paid the mortgage-money, but did not direct that the money should be paid into Court, and plaintiffs brought the money into Court on the first day of the following month, the last day of Jeth falling on a Sunday; but did not, however, take out execution for some months, nor apprise the defendant that they had paid the money into Court,—*Held* that such payment was not a proper tender, and that to make it a proper tender the plaintiffs should not only have paid the money into Court in the month of Jeth, but were bound to see that the mortgagee in possession had due notice of such payment. NITIA NUND *v.* MYA RUN . . . 3 N. W., 80

**287.** ——————— *Right of purchaser to redeem usufructuary mortgage.—Limitation.*—A zur-i-peshgi lease, being nothing but a simple mortgage, may be cancelled on proof of discharge of the advance, with interest from the usufruct, or on payment of the money in cash. The purchaser of the proprietary rights in a zur-i-peshgi is not barred from suing to redeem, because he, or those through whom he claims, did not sue for an account within twelve years from the expiry of the term, or from discharge of the debt by the usufruct. PULTUN SINGH *v.* RESHAL SINGH . . . . 1 W. R., 7

NUND LALL *v.* BALUK . . 2 Agra, 122

**288.** ——————— *Deposit of mortgage-money.—Tender.—Notice of deposit.*—A deposit of the mortgage-money by a mortgagor, accompanied by a protest against the validity of the mortgage itself, and a threat to sue for its cancelment, imposes no condition upon the acceptance of the money so as to render the tender invalid. A deposit being once duly made, the mortgagor's equity of redemption is saved, quite irrespective of whether the mortgagee has received notice of the deposit or not. HETHAN SINGH *v.* NURKOO SINGH. HETHAN SINGH *v.* LOKRAJ SINGH . . 3 W. R., 184

**289.** ——————— *Suit by purchaser from mortgagor for redemption.—Tender of mortgage-money.*—A purchaser of the right of redemption of a mortgagor may sue without tender out of Court of the mortgage-debt to the mortgagee. The tender of the money out of Court only affects the purchaser's right to recover his costs. DINONATH BUTOBYAL *v.* WOMACHURN ROY . 3 W. R., 128

**290.** ——————— *Tender of payment. — Bye-bil-wafas. — Foreclosure.—Beng. Reg. III of 1795, s. 14; Beng. Reg. II of 1805, s. 3; and Beng. Reg. XVII of 1806, s. 8.*—Bye-bil-wafas or kut-kobalas are redeemable like ordinary mortgages, and subject to foreclosure. It cannot be laid down as a rule universally true, that under section 14, Regulation III, 1793, a mortgagee's proceeding for a foreclosure under a mortgage of the class of bye-bil-wafa simply, cannot be preferred after twelve years from the expiration of the time which the instrument fixes as the period of redemption of payment, and on the expiration of which the conditional sale will become absolute; for this indiscriminating ground of decision would include alike adverse occupations and those which had not the semblance even of such a character, and would establish a bar arising from simple occupation, and not from the *laches* of the demandant or of others before him. When a mortgagee not only seeks the assistance of a Court to give him possession of his pledge, but also to foreclose the mortgage, he must effect that object in the mode prescribed by section 14, Regulation III of 1795; section 3, Regulation II, 1805; and section 8, Regulation XVII, 1806. Mere words in the form of a protest which may accompany a tender will not defeat it when they can reasonably be regarded as idle words. But the payment into Court of the mortgage-money, accompanied by a petition disputing the mort-

MORTGAGE—*continued.*

8. REDEMPTION—*continued.*

(*d*) MODE OF REDEMPTION AND LIABILITY TO FORECLOSURE—*continued.*

**Payment of mortgage-debt—*continued.***

gagee's title to foreclose, and expressing an intention amounting to a notice to sue the mortgagee to recover back the very money tendered, is not a valid tender. PRANNATH CHOWDHRY *v.* RAMRUTTON ROY [4 W. R., P. C., 37

S. C. PRANNATH ROY CHOWDRY *v.* ROOKEA BEGUM . . . 7 Moore's I. A., 323

291. ——————— *Payment into Court of redemption-money.—Costs.*—It is sufficient to bar a foreclosure suit that the principal money and interest due on the mortgage have been paid into Court within the year of grace, or an extended time agreed upon by the parties without costs incurred by the mortgagor in the matter of the mortgage. ZALEM ROY *v.* DEB SHAHEE [Marsh., 167 : 1 Hay, 373

292. ——————— *Beng. Reg. XVII of 1806, s. 8.—Mode of payment.*—The mortgagors of certain landed property not having paid the money due on the mortgage within the stipulated period, the mortgagees considering it unnecessary to proceed under section 8, Regulation XVII of 1806, —*i.e.*, without waiting to foreclose the mortgage, brought a suit, obtained a decree, and took possession. *Held* that, as the mortgagees took possession before final foreclosure, the mortgagors were in a position to redeem, and might do so by payment of the advance made on the mortgage, whether such payment was made in cash or realised by the mortgagees from the usufruct of the estate. ISHAN CHUNDER BANERJEE *v.* JUGGUT CHUNDER DOSS . . 13 W. R., 44

293. ——————— *Payment by order of Judge into Collector's treasury.*—The payment by order of the Judge into the Collector's treasury, before the expiration of the year of grace, of a debt due to a mortgagee, was held to be a deposit in Court entitling the borrower to redeem. ABDOOL HUQ *v.* MYAH BEWAH . . W. R., 1864, 184

294. ——————— *Acceptance of payment—Subsequent objection.*—A mortgagee who once takes the mortgage-money as deposited by the mortgagor within time, cannot afterwards sue for possession, on the ground that the deposit was made after the expiry of the year of grace, and that he had applied for the money under wrong information from his agent. KHONDHAR NOWAZUSH HOSSEIN *v.* WOOSULOONISSA BIBEE . . 6 W. R., 249

295. ——————— *Payment into Court of redemption-money.—Legal tender.*—The defendant in a foreclosure suit paid into Court the amount due in respect of principal and interest of the mortgage. This payment was made after the day on which, according to the mortgage, the sale was to become absolute, but within a few days of the expiration of the year of grace. The payment into Court was accompanied by a petition praying that the fund might be retained in Court, until the decision of certain objections made by the defendant, disputing the amount due under the mortgage-money. *Held* that such payment into Court was not a tender of the mortgage-money, and that the mortgagee was entitled to foreclosure. NUBUNGO MOONJURREE DABEA *v.* GOLUCKMONEE DABEA [Marsh., 45 : 1 Hay, 76

S. C. GOLUCKMONEE DABEA *v.* NABUNGO MOONJUREE DABEA . . W. R., F. B., 14

296. ——————— *Beng. Reg. XVII of 1806.—Stipulated period.—Notice.*—In a suit by a mortgagee for possession after foreclosure proceedings under Regulation XVII of 1806, on the ground that the mortgagor had failed to pay the money within one year from the notice, the defence was that the notice had been issued before the lapse of the time stipulated for repayment. The period stipulated for the payment of the principal sum was 3rd July 1866; but the deed contained a proviso that if the mortgagor paid the interest every half year during the continuance of the security, the mortgagee would not enforce his security until the 3rd January 1871. *Held* that the time for redemption expired with the period stipulated for the payment of the principal sum,—*i.e.*, the 3rd July 1866. WOOMA CHURN CHOWDHRY *v.* BEHAREE LALL MOOKERJEE [21 W. R., 274

297. ——————— *Beng. Reg. XVII of 1806, ss. 7, 8.—Tender of mortgage-money.—Unconditional tender.*—Where, in a suit for foreclosure of a mortgage by conditional sale, a notice of foreclosure had been issued under Regulation XVII of 1806, and the mortgagors deposited in Court the money due on the mortgage before the expiry of the year of grace, but at the same time denied the mortgagees' right to receive the money, and threatened them with legal proceedings if they took it from the Court,—*Held* that the deposit was not an unconditional tender of the money due on the mortgage; that it was vitiated by the conditions under which it was made; that the mortgagees were not bound to accept a deposit so vitiated; and that therefore it was not valid to prevent foreclosure. *Prannath Roy Chowdhry* v. *Ram Rutton Rae, 7 Moore's I A., 323;* and *Abdoor Ruhman* v. *Kisto Lall Ghose, B. L. R., Sup. Vol., 598,* followed. MAKHAN KUAR *v.* JASODA KUAR . . . . I. L. R., 6 All., 399

298. ——————— *Mortgage prior to Beng. Reg. XVII of 1806.—Beng. Reg. I of 1798.*—When the time fixed for payment of a mortgage, in the nature of a bye-bil-wafa, was the end of 1802, and there was no allegation of tender or deposit of the money prior to that date,—*Held* that the mortgagor had, under Regulation I of 1798, lost his right of redemption, and that the benefit of Regulation XVII of 1806 could not be applied to mortgages

**MORTGAGE**—*continued.*

8. REDEMPTION—*continued.*

(*d*) MODE OF REDEMPTION AND LIABILITY TO FORECLOSURE—*continued.*

**Payment of mortgage-debt**—*continued.*

made prior to the passing of that enactment. RUHMUN *v.* SHUMSOODDEEN HYDER [W. R., 1864, 183

**299.** ——————— *Deed without provision for interest.—Payment only of principal money.*—When a deed of mortgage is silent as to interest, payment of the bare principal within the year of grace is sufficient to bar foreclosure. RADHANATH SEIN *v.* BUNGO CHUNDER SEIN [W. R., 1864, 157

**300.** ——————— *Payment of interest.—Interest exceeding principal.—Held* that the deposit of the principal due, and a sum equal to the principal by way of interest, was sufficient under the law applicable to the case, and that no sum could legally accrue due as interest during the year of grace, as the law prohibited the recovery of interest beyond the principal. SHEOBURTS *v.* DHAREE THAKOOR . . . . 2 Agra, Pt. II, 194

**301.** ——————— *Mortgage not providing for interest.—Usufruct.—Payment only of principal money.*—In an usufructuary mortgage, where there is no stipulation for interest the mortgagee is not entitled to it, the usufruct going in lieu of interest, and the payment of only the principal sum is a bar to foreclosure. GUNGA PERSHAD ROY *v.* ENAYET ZAHERA . . . 16 W. R., 251

**302.** ——————— *Payment within a year.—Reg XVII of 1806, s. 7.—Interest.*—Where interest is not reserved by the mortgage-deed, but it provides for repayment of the principal only, a payment into Court within a year after the institution of a foreclosure suit of the principal only without interest satisfies the 7th section of Regulation XVII of 1806, and entitles the mortgagor to the redemption of the property. ROOPNARAIN SINGH *v.* MADHO SINGH . . . . Marsh., 617

**303.** ——————— *Mortgage with condition that mortgagor should remain in possession until default in payment of interest.—Relief from forfeiture.*—The defendant mortgaged certain premises to the plaintiff by a deed of mortgage, which contained a condition that the mortgagor should remain in possession so long as the interest was regularly paid. Default in payment of the interest was made, and the mortgagee sued for possession of the mortgaged premises. *Held* that the mortgagor was entitled to equitable relief against the entry of the mortgagee on payment of all arrears of rent, together with interest upon each instalment and costs; and three months' time was allowed to the mortgagor to make such payment. SITARAM DANDEKAR *v.* GANESK GOKHLE . . . 6 Bom., A. C., 121

**304.** ——————— *Interest, Non-payment of.—Right of assignee of mortgagee to foreclose in default of payment.*—Where the mortgagor covenanted to pay to the mortgagee the principal sum at a given date and interest in the meantime, and in default of payment of the principal on the date mentioned, interest on so much as should remain due at the same rate, the mortgagee covenanting to reconvey on payment on the given date, and in default of payment of principal or interest at their respective due dates the whole sum to become due,—*Held* that the assignee of the mortgagee had a right to foreclose on default of payment of an instalment of interest before the date on which the principal was made payable. PROSADDOSS DUTT *v.* RAMDHONE MULLICK . . 1 Ind. Jur., N. S., 255

**305.** ——————— *Default in payment of interest.—Action on covenant before principal sum is due.*—Where, by a proviso in a mortgage, it is agreed that, "in case of default in payment by the mortgagor of the principal sum, or any one instalment of interest thereon," &c., "then and in any such case the whole of the money so secured by these presents shall immediately thereupon become due and payable with a power of sale on such default;" and where the principal sum and interest thereon was also secured by a bond and warrant of attorney to confess judgment thereon, the condition of which was in the same words as the covenant for repayment in the mortgage,—*Held* that, in an action on the covenant contained in the proviso, and on the bond, brought on default of payment of an instalment of interest, but before the date on which the principal was payable, the plaintiff could only recover on either the covenant or the bond in respect of the interest unpaid. FOOL CHUND JOHURRY *v.* RAMKRISTO BOSE . . 1 Ind. Jur., N. S., 425

**306.** ——————— *Breach of condition in mortgage.—Relief against forfeiture.*—In November 1873 *M.* sued for the cancelment of a deed of usufructuary mortgage executed by her in November 1856, and for the ejectment of the mortgagees, on the ground of the breach of a condition in the deed that the mortgagees should pay her a life annuity of R15 during the term of the mortgage (twenty years) and also after foreclosure, otherwise, on any failure, they would be liable to ejectment and to the forfeiture of the mortgage. No payments of annuity had been made, and each failure to pay was held to be a separate breach of the condition. *Held* that if there had not been so many successive breaches, and if the defendants had at any time brought into Court the arrears with interest, or had offered to do so, the Courts below, although they could not have passed a decree for the money, might have withheld a decree for enforcing the forfeiture. SADHA *v.* BHAGWANI [7 N. W., 53

**307.** ——————— *Conditional sale.—Non-payment of entire interest.—Beng. Reg. XVII of 1806, ss. 7 and 8.*—In those parts of India where Bengal Regulation XVII of 1806 is

MORTGAGE—*continued.*

8. REDEMPTION—*continued.*

(*d*) MODE OF REDEMPTION AND LIABILITY TO FORECLOSURE—*continued.*

**Payment of mortgage-debt—*continued.***

in force the right to redeem a mortgage by conditional sale is governed entirely by the Regulation and not by the terms of the condition. Where, within a year after service of the notification of a foreclosure petition, the mortgagor deposited the principal debt and interest for the last year, alleging that interest for the previous years was, according to the condition, to be recovered by separate suit,—*Held* that his suit for redemption must be dismissed. There had been default in payment of the interest due, and by section 8 the mortgage, notwithstanding the conditions relied upon, had been finally foreclosed. MANSUR ALI KHAN *v.* SARJU PERSHAD

**[L. R., 13 I. A., 113: I. L. R., 9 All., 20**

**308.** ——————— *Conditional sale.—Interest.—Mesne profits.—Foreclosure.—Beng. Reg. XVII of 1806, s. 7.*—A deed of conditional sale, after reciting that the vendor had received the sale-consideration (R199) and had put the vendee in such possession of the property as the vendor himself had, proceeded as follows: "I (vendor) shall not claim mesne profits, nor shall the vendee claim interest: in case the vendee does not obtain possession, he shall recover mesne profits for the period he is out of possession: and when, after the expiry of the term fixed, I repay the entire sale-consideration in a lump sum, I shall get my share redeemed: in case of default in payment of the sale-consideration, the sale shall be deemed to become absolute." The vendee did not get possession of the property for some years, and, on the expiry of the term, took proceedings under Regulation XVII of 1806 to foreclose. The legal representative of the vendor deposited the sale-consideration mentioned in the deed of conditional sale (R199) within the year of grace. In a suit by the vendee for possession of the property, the sale having been declared absolute, the question arose whether or not the legal representative of the vendor should have deposited, by way of interest, in order to prevent the sale from becoming absolute, in addition to the sale-consideration, the amount of mesne profits for the period the vendee was out of possession of the property. *Held* (SPANKIE, *J.*, dissenting), on the construction of the deed of conditional sale, that the deposit of the sale-consideration (R199) was sufficient for the redemption of the property. RAMESHAR SINGH *v.* KANHIA SAHU . . . **I. L. R., 3 All., 653**

**309.** ——————— *Lease of mortgaged property by mortgagee to mortgagor.—Intention of parties as to mode of payment and default.—Remedies of mortgagee under mortgage.*—On the 16th March 1874 *L.* gave *M.* a mortgage on certain land for R24,000 for a term of ten years, by which it was provided, *inter alia*, that the mortgagee should take the profits of the land in lieu of interest; that the mortgagee should grant a lease of the land to the mortgagor, the latter paying the former the profits of the land every harvest in lieu

MORTGAGE—*continued.*

8. REDEMPTION—*continued.*

(*d*) MODE OF REDEMPTION AND LIABILITY TO FORECLOSURE—*continued.*

**Payment of mortgage-debt—*continued.***

of interest; that if the mortgagor failed to pay the mortgagee the profits of the land by the end of any year, he should pay interest on the principal amount of the mortgage at the rate of one per cent. calculated from the date of the mortgage, and in such case the mortgagee should have no claim to the profits; and that, if the mortgagor failed to pay the mortgagee the profits by the end of any year, the mortgagee should be at liberty to cancel the lease and to enter on the land, and collect the rents thereof and apply the same to payment of interest. On the 21st March 1874 *M.* gave *L.* a lease of the land, under which R1,980 was the sum agreed to be payable annually as profits in lieu of interest. In 1879 *M.*, who had not been paid any profits, sought to enforce in the Revenue Courts the condition as to entry on the land, but was successfully resisted by *L.'s* widow. On the 16th January 1880 *M.* sued *L.'s* widow for interest on the principal amount of the mortgage at the rate of one per cent. calculated from the date of the mortgage to the date of suit, claiming the same by virtue of the provisions of the mortgage, on the ground that he had not been paid any profits. *Held* that the mortgage and lease transactions must be regarded as one and indivisible, and the questions at issue between the parties be dealt with *qud* mortgagor and mortgagee; that so regarding such transactions and dealing with such questions, *M.* and *L.* did not stand in the position of "landlord" and "tenant" and the proceedings of 1879 in the Revenue Courts were had without jurisdiction; also that, although looking at the terms of the contract of mortgage, it was the intention of the parties that, on the mortgagor failing to pay the mortgagee the profits by the end of any year, the latter should in the first place seek possession of the land, yet as *M.* had never obtained possession, but on the contrary had been resisted when he sought to obtain it, his present claim for interest was maintainable. The Court directed that so much of the interest as was due at *L.'s* death should be recoverable from such property of his as had come into his widow's hands; and as to the rest, which related to the period during which the widow had been in possession and in receipt of the profits, that it should be recoverable from her personally. BHAGHELIN *v.* MATHURA PRASAD . . . **I. L. R., 4 All., 430**

**310.** ——————— *Usufructuary mortgage.—Interest, Payment of.—Beng. Reg. XXXIV of 1803, ss. 9, 10.—Act XXVIII of 1855.—Act XIV of 1870.—Transfer of Property Act IV of 1882, s. 2.*—A deed of usufructuary mortgage executed in 1846, under which the mortgagee had obtained possession, contained the following conditions:—"Until the mortgage-money is paid, the mortgagee shall remain in possession of the mortgaged land, and what profits may remain after paying the Government revenue are allowed to the mortgagee, and shall not be deducted at the time of

**MORTGAGE**—*continued.*

8. REDEMPTION—*continued.*

(*d*) MODE OF REDEMPTION AND LIABILITY TO FORECLOSURE—*continued.*

**Payment of mortgage-debt**—*continued.*

redemption. At the end of any year, the mortgagors may pay the mortgage-money and redeem the property. Until they pay the mortgage-money neither they nor their heirs shall have any right in the property." In 1884, a representative in title of one of the original mortgagors sued to redeem his share of the mortgaged property, upon the allegation that the principal amount and interest due upon the mortgage had been satisfied from the profits, and that he was entitled to a balance of R45. It was found that from the profits, after deducting Government revenue, the principal money with interest at the rate of 12 per cent. per annum had been realised, and that the surplus claimed by the plaintiff was due to him. The lower Appellate Court dismissed the suit, on the ground that under section 62 (*b*) of the Transfer of Property Act (IV of 1882) and with reference to the terms of the deed of mortgage, the plantiff was not entitled to recover the property until he paid the mortgage-money. *Held* that, although the word "interest" was not specifically used, the natural and reasonable construction of the deed was that it was arranged that the mortgagee should have possession of the property and enjoy the profits thereof, until the principal sum was paid, in lieu of interest. *Held* that the provisions of sections 9 and 10 of Regulation XXXIV of 1803, which was in force when the deed of mortgage was executed, were not affected or abrogated by Act XXVIII of 1855 or Act XIV of 1870 or Act IV of 1882; that these provisions were incidents attached to the mortgagor's rights of which he was entitled to have the benefit; and that the contract of mortgage being subject to these provisions, the charge would have been redeemed as soon as the principal mortgage-money with 12 per cent. interest had been realised by the mortgagee from the profits of the property. SAMAR ALI *v.* KARIMUL-LAH . . . **I. L. R., 8 All., 402**

**311.** ——————— *Usufructuary mortgage.—Interest.—Waiver.*—By a deed of usufructuary mortgage, dated in 1875, a sum of R30,000 with interest at R1 per cent. per mensem, was advanced on the security of certain property, for a period of ten years. The deed contained various provisions for securing the payment of interest to the mortgagee, and among these a provision that he should have possession of the property and take the profits on account of interest, the profits being fixed at a certain amount yearly, leaving an agreed balance of interest to be paid yearly in cash. There was also a provision that, in the event of possession not being given, the mortgagee might treat the principal money as immediately due, and recover it at once with interest at the rate of R1-6 per cent. per mensem. The mortgagee did not take possession of the mortgaged property, and took no steps to obtain such possession, or to recover the money for nine years, during which no interest was paid. In November 1884 the mortgagee brought a suit against the mortgagors to recover the mortgage-money, claiming interest from the date of the mortgage-deed to the date of the suit at R1-6 per cent. per mensem. *Held* that the fair inference of fact from the circumstances above described was that the mortgagee waived the provisions for securing and recovering the interest, and that the transaction must be looked at as simply one of a loan for the specified period at the agreed rate, *i.e.*, R1 per cent. per mensem. GANGA SAHAI *v.* LACHMAN SINGH **[I. L. R., 8 All., 194**

**312.** ——————— *Interest.—Suit for redemption.—Transfer of Property Act, s. 84.*—In February 1883 a decree for pre-emption was obtained in respect of a mortgage by conditional sale executed in August 1882. On the 23rd August 1883 the decree-holder executed his decree by depositing the principal amount of the mortgage-money, and obtained possession of the property in substitution for the original mortgagee. In June 1884 the mortgagor, proceeding under section 83 of the Transfer of Property Act, deposited in Court the sum of R699, claiming the same to be adequate for redemption. The case was, however, struck off in consequence of the pre-emptor's objection to receiving the deposit on the ground that it did not include the interest due on the mortgage. The deposit remained in Court, and on the 21st August 1884 the mortgagor deposited a further sum on account of interest, but this also the pre-emptor refused to receive, for the same reason as before. In a suit by the mortgagor for redemption of the mortgage, it was found that the amount deposited was all that was due on the mortgage on the 21st August 1884. *Held* that until the 23rd August 1883 when the defendant enforced his pre-emptive decree by depositing the consideration for the conditional sale of August 1882 he had no interest in the subject of pre-emption as would entitle him to any benefits arising therefrom, and that the defendant was not entitled to claim any interest on the mortgage-money for the period antecedent to the 23rd August 1883. *Semble,*—That the proper person entitled to receive the interest for that period was the original conditional vendee, and the Court which passed the decree for pre-emption should have allowed him the amount of such interest in addition to the principal mortgage-money. *Ashik Ali* v. *Mathura Kandu, I. L. R., 5 All., 187,* referred to. *Held,* with reference to section 84 of the Transfer of Property Act (IV of 1882), that the Courts below were right in not allowing interest to the defendant after the 21st August 1884 when the plaintiff, to his knowledge, deposited the whole money due on the mortgage. DEO DAT *v.* RAM AUTAR . **I. L. R., 8 All., 502**

**313.** ——————— *Mortgage by conditional sale.—Interest.—Foreclosure.*—A deed of mortgage by conditional sale executed in 1872, giving the mortgagee possession, contained a

MORTGAGE—*continued.*

8. REDEMPTION—*continued.*

(*d*) MODE OF REDEMPTION AND LIABILITY TO FORECLOSURE—*continued.*

**Payment of mortgage-debt**—*continued.*

stipulation that the principal money should be paid within ten years from the date of execution of the deed, and that, in default of such payment, the conditional sale should become absolute. It contained the following condition as to interest:—"As to interest, it has been agreed that the mortgagee has no claim to interest and the mortgagor has none to profits." The mortgagee, however, did not obtain possession. In 1878 the mortgaged property was purchased by the appellant at a sale in execution of decree. In 1884 the mortgagee brought a suit for foreclosure against the purchaser and the heirs of the mortgagor, claiming the principal money with interest at 8 annas per cent. per mensem. The defendants pleaded that the plaintiff was not entitled to claim interest. *Held* that whatever claim the mortgagee might have against his mortgagors for compensation or damages by way of interest in consequence of the failure to get possession under the contract, he had none enforceable in this respect against the land, which had passed free from charge for interest to the purchaser. *Rameshur Singh* v. *Kanahia Sahu, I. L. R., 3 All., 653,* referred to. ALLAH BAKHSH *v.* SADA SUKH **[I. L. R., 8 All., 182**

9. FORECLOSURE.

(*a*) RIGHT OF FORECLOSURE.

**314. ——— Right in mortgage by conditional sale.**—A mortgagee under an instrument creating a conditional sale has the right of foreclosure. The decisions of the Sudder Court that no mortgagee could ever foreclose the mortgagor's equity of redemption overruled. VENKATCHELLAM PILLAY *v.* TIRUMALA CHARY . . . **2 Mad., 289**

**315.** ——— *Forfeiture of priority.*—The power of foreclosure is incidental to a mortgage in the form of a conditional sale, and the mortgagees by availing themselves of that power do not forfeit the priority they possess. BHIROOGEE MISSER *v.* OOLFUT ALI . . . **2 N. W., 311**

**316.** ——— *Beng. Reg. XVII of 1806.—Agreement of parties.—Held* that a conditional sale may, by agreement and acts of the parties, become absolute without formal foreclosure proceedings taken under Regulation XVII of 1806. GOORDYAL *v.* HUNSKOONWER . **2 Agra, 176**

RUGHONATH DASS *v.* RAM GOPAL . **5 N. W., 29**

**317.** ——— *Title of purchaser by conditional sale.*—The right of a purchaser by conditional sale, who has duly taken proceedings under Regulation XVII of 1806, becomes absolute on the expiry of the year of grace, and he is entitled to claim mesne profits from that date without bringing a suit for possession. JEORAKHUN SINGH *v.* HOOKUM SINGH . . . . **3 Agra, 358**

MORTGAGE—*continued.*

9. FORECLOSURE—*continued.*

(*a*) RIGHT OF FORECLOSURE—*continued.*

**Right in mortgage by conditional sale**—*continued.*

**318.** ——— *Beng. Reg. XVII of 1806.—Expiration of year of grace.*—On the expiration of the year of grace allowed by Regulation XVII of 1806, the ownership of the mortgaged property vests absolutely in the mortgagee, even though he may not have obtained a decree establishing or declaring his right. *Khoob Chund* v. *Leela Dhur, 3 Agra, 103; Jeorakhan Singh* v. *Hookum Singh, 3 Agra, 358; Suroop Chunder Roy* v. *Mohender Chunder Roy, 22 W. R., 539;* and *Lotf Hossein* v. *Abdool Ali, 8 W. R., 476,* followed. TAWAKKUL RAI *v.* LACHMAN RAI. TAWAKKUL RAI *v.* SHEO GHULAM RAI . **I. L. R., 6 All., 344**

**319.** ——— *Right at expiration of year of grace.—Suit to confirm title.*—The title of a mortgagee is not complete upon the expiry of the year of grace allowed by the Regulation, but it is necessary for him to bring a regular suit and obtain a decree in order to confirm his title. RAISUDDIN CHOWDHRY *v.* KHODA NEWAZ CHOWDHRY . . . . . **12 C. L. R., 479**

**320.** ——— *Agreement to pay amount to co-sharer or in default to forfeit share.*—Where certain arbitrators, summoned by the revenue authorities under the Regulations, investigated ancestral debts, and ascertained the amounts to be contributed by the other co-sharers to one who paid the revenue, and they, accepting the award, promised to pay principal and interest on a certain date; and also further agreed that, if they failed to pay on the specified day, their shares should thenceforward become his absolute property,—*Held* that such an agreement amounted to a conditional sale, and was liable to the incidents which under the Regulations attach to such sales, and the suit for possession, without summary process of foreclosure, was not maintainable. GHOSEE LALL *v.* GAIND LALL **[3 Agra, 184**

**321.** ——— *Beng. Reg. XXXIV of 1802.—Mahomedan mortgagor.*—In 1832 a Mahomedan mortgaged certain land with possession on condition that if the money lent was not repaid within eight years, the land should be enjoyed by the mortgagee after that period as if conveyed by sale. In 1883 a suit was brought to redeem. *Held* that the title of the mortgagee became absolute by virtue of the terms of the contract on default of payment within the time specified. The obligation cast by Regulation XXXIV of 1802 upon a mortgagee to account for profits does not prevent a mortgage by way of conditional sale from becoming, after the period for redemption has elapsed, an absolute sale where no account has been rendered by the mortgagee. The rule laid down in *Pattabhiramier's case, 13 Moore's I. A., 560,* applies to a mortgage executed by a Mahomedan. MALLIKARJUNUDU *v.* MALLIKARJUNUDU **[I. L. R., 8 Mad., 185**

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**MORTGAGE**—*continued.*

9. FORECLOSURE—*continued.*

(*a*) RIGHT OF FORECLOSURE—*continued.*

**Right in mortgage by conditional sale**—*continued.*

**322.** ——————— *Parol conditional mortgage.—Beng. Reg. XVII of 1806.—K.* made over to *G.*, from whom he had borrowed certain moneys, certain land, on the oral condition that, if such moneys were not repaid within two or three months, such land should become *G.'s* absolutely. *Held* that, as there was no deed of conditional mortgage, the provisions of Regulation XVII of 1806 were not applicable to *G.*, and he became the owner of such land after the expiry of three months from the date on which it was made over to him, in consequence of the amount of the loan not having been repaid to him. GOBAR DHAN DAS *v.* GOKAL DAS

**[I. L. R., 2 All., 633**

**323.** ——————— *Mortgage in English form.*—A mortgage in the English form between Hindus of lands in the mofussil, outside Calcutta, has always been treated by the Courts as a mortgage by conditional sale. SHURNOMOYEE DASI *v.* SRINATH DAS . . . . **I. L. R., 12 Calc., 614**

**324.** ——————— *Beng. Reg. XVII of 1806, s. 7.—Foreclosure of equity of redemption.—"Stipulated period."*—By a mortgage in the English form, the defendants conveyed certain property to the plaintiff, subject to the proviso that, in the event of the defendants paying to the plaintiff the principal sum on the 4th September 1868, and in the meantime paying interest on that sum half-yearly, with annual rests, in case of default of such payment, then the plaintiff should re-convey the property. The defendants failed to pay interest; and on the 4th December 1866 the plaintiff applied to the Judge of Chittagong for foreclosure: thereupon notice, under section 8 of Regulation XVII of 1806, was issued, and served on the defendants. On the 15th April 1868 this suit was instituted by the plaintiff for the establishment and confirmation of absolute purchase, and to obtain possession of the mortgaged premises. *Held* that the suit was not maintainable. Regulation XVII of 1806 applied to this mortgage; and, under that Regulation, the mortgagee could not apply for foreclosure until the time agreed upon for repayment by the mortgagor,—that is, the "stipulated period" referred to in section 7;—and the mortgagor was entitled to one year's grace from notification of the application for foreclosure made after that date. SARASIBALA DEBI *v.* NAND LAL SEN

**[5 B. L. R., 389**

S. C. SHOROSHEE BALA DABEE *v.* NUND LALL SEIN

**[13 W. R., 364**

**325.** ——————— *Beng. Reg. XVII of 1806, s. 8.—Conditional sale.*—An instrument of conditional sale provided that the conditional vendor should retain possession of the property to which it related, paying interest on the principal sum lent annually at twelve per cent., and should repay the principal sum lent within seven years; that

**MORTGAGE**—*continued.*

9. FORECLOSURE—*continued.*

(*a*) RIGHT OF FORECLOSURE—*continued.*

**Right in mortgage by conditional sale**—*continued.*

(by the fourth clause thereof), in the event of default of payment of interest in any year, the term of seven years should be cancelled, and the conditional sale should at once become absolute; and that (by the fifth clause thereof) in the event of the principal sum lent not being repaid at the end of seven years, the conditional sale should become absolute. Default having been made in the payment of interest annually as stipulated, the conditional vendee, the term of seven years not having expired, took proceedings to foreclose, in pursuance of the condition contained in the fourth clause of the deed, and the conditional sale was declared absolute. The conditional vendee then sued for possession of the property. *Held* that the fifth clause of the deed did not dispense with the necessity of complying with the provisions of section 8 of Regulation XVII of 1806 and was compatible with them, and on or after the expiry of the stipulated period application for the foreclosure of the mortgage and rendering the conditional sale absolute in the manner prescribed by that Regulation might and must be made; that the condition contained in the fourth clause of the deed in effect defeated and violated the provisions of that Regulation, and summarily converted a conditional into an absolute sale in disregard and defiance thereof, and the foreclosure proceedings taken by the conditional vendee before the expiry of the period stipulated for the repayment of the principal sum lent were irregular, and the sale could only be rendered conclusive in the manner prescribed by that Regulation in pursuance of the fifth clause of the deed; and that, accordingly, such suit was not maintainable. IMDAD HUSAIN *v.* MANNU LAL

**[I. L. R., 3 All., 509**

**326.** ——— **Rights of mortgagee.**—*Clause for recovery of mortgage-money before expiry of term.—M.*, a Hindu widow, executed a deed of usufructuary mortgage in *J.'s* favour, the property hypothecated being the separate property of her husband in which she had only a life interest. On *J.* applying for mutation of names, *B.* objected that he was in proprietary possession under a deed of gift executed by *M.*, and the objection was allowed. In virtue of a clause in the deed of mortgage, that in case any demand was made in respect of the rest of the property within the mortgage term, the mortgagee was entitled to sue for the mortgage-money notwithstanding the term had not expired, *J.* sued to recover the money by the sale of the hypothecated property. *B.*, in addition to an objection to the validity of the mortgage based on the deed of gift, pleaded that it was invalid as against him, the next reversioner, there being no legal necessity for the alienation. The lower Appellate Court held that the mortgage was valid as against the deed of gift, but invalid as against the reversioner. *Quære,*—Whether, in reference to that ruling, there was any such danger or weakness in *J.'s* title so as to entitle him to enforce the mortgage-debt before the

**MORTGAGE**—*continued.*

9. FORECLOSURE—*continued.*

(*a*) RIGHT OF FORECLOSURE—*continued.*

**Rights of mortgagee**—*continued.*

expiry of the term. BULAKI SINGH *v.* JAI KISHEN DAS . . . . . **7 N. W., 203**

**327.** ——————— *Extension of term of grace after notice of foreclosure.*—A mortgagee, under a conditional sale, caused notice of foreclosure to be issued, and subsequently by an agreement securing certain advantages to him he extended the term of grace. The terms of that agreement not having been complied with, the mortgagee was held to be entitled to revert to the foreclosure proceedings before instituted. LALL DHUR RAE *v.* GUNPUT RAE **[1 N. W., Pt. II, p. 22: Ed. 1873, 81**

**328.** ——————— *Agreement between mortgagor and mortgagee.—Breach by mortgagor.—Right of mortgagee to fall back on mortgage rights.*—The mortgagee of certain shares of certain villages applied for foreclosure under Regulation XVII of 1806. While the year of grace was running and shortly before its expiration the mortgagor and the mortgagee came to a compromise in the matter of the mortgage. It was agreed by the mortgagor to transfer by sale to the mortgagee the shares of three of the villages, in lieu of the mortgage-money, and that he should not assert his rights under section 7 of Act XVIII of 1873, as ex-proprietor, to retain the sír lands appertaining to such shares. The mortgagee agreed to relinquish his claim on the remaining shares arising out of the mortgage and the foreclosure proceedings. It was further agreed that, if the mortgagor asserted the right mentioned above, the mortgagee should be entitled to assert his right in respect of all the shares as a mortgagee who had foreclosed. The mortgagor subsequently, in breach of his agreement, asserted his right under section 7 of Act XVIII of 1873 to the sír lands appertaining to the shares transferred to the mortgagee. Thereupon the mortgagee sued the mortgagor for possession of all the shares by virtue of the foreclosure proceedings. *Held*, following *Lall Dhur Rae* v. *Gunput Rae, 1 N. W., Ed. 1873, 81*, that, on the failure of the mortgagor to give effect to the compromise transaction, the mortgagee was entitled to fall back on his equities under his mortgage and the foreclosure proceedings taken thereunder. DHONDHA RAI *v.* MEGHO RAI **[I. L. R., 4 All., 332**

**329.** ——————— *Compromise during proceedings.—Intention of parties.*—A mortgage-debt not having been paid off at due date, notice of foreclosure was issued and served. During the currency of the year of grace the parties came to an arrangement and filed petitions in Court in the foreclosure proceedings, setting forth that part payment had been accepted and that the rest of the debt would be paid with interest on the date of the expiry of the year of grace, failing which the sale should become absolute,—*Held* that it was not the intention of the parties to substitute a new contract for the one under which the notice of foreclosure

**MORTGAGE**—*continued.*

9. FORECLOSURE—*continued.*

(*a*) RIGHT OF FORECLOSURE—*continued.*

**Rights of mortgagee**—*continued.*

issued or that the proceedings should be allowed to drop. GOONOMONEE DOSSIA *v.* PARBUTTY DOSSIA **[10 W. R., 326**

**330.** ——————— *Usufructuary mortgage.—Position of mortgagee in possession.*—Where, in proceedings held before the issue of Circular Order of 22nd July 1813, a mortgagor had the opportunity in a Court competent to decide the matter, to contest, as against the mortgagee, all questions of fact necessary to give a good and absolute title to the mortgagees, and, though called upon, did not show that the mortgage was a bad one, but admitted that the mortgagees were not paid off, and that an extension of the year of grace had elapsed without his performing any of the conditions which would have saved the property from being foreclosed, it was held that even if the proceedings did not possess the character of a regular suit, they were sufficient in themselves to effect a foreclosure, if such was their purpose. Where a party, originally a mortgagee out of possession, has been put into possession by the act and permission of the mortgagors, he has really (inasmuch as a parol contract is sufficient in this country to pass immoveable property) obtained a new title altogether different from that which he possessed before, and having its foundation in the act of the parties themselves when they put him into possession. RUNJEET NARAIN SINGH *v.* SHUREEFOONISSA **[10 W. R., 478**

**331.** ——————— *Agreement, for fresh consideration, between mortgagee and third person for release of property from mortgagee.—Release not required to be in writing and registered.*—The mortgagee of immoveable property under a hypothecation bond, entered into an agreement with one who was not a party to his mortgage, to release part of the property from liability under his mortgage. This agreement was not in writing and registered. The mortgagee subsequently sought to enforce the hypothecation against the whole of the mortgaged property. *Held* that the agreement, being a new contract for a fresh consideration between persons who were not parties to the mortgage, was not, as between the parties to the mortgage, a release which the law required to be in writing and registered. *Held*, also, that the party to the agreement with the mortgagee might have come into Court as a plaintiff to enforce the same, and that it was equally competent for him to plead it in avoidance of the mortgagee's claim to bring to sale the property referred to therein. *Nash* v. *Armstrong, 30 L. J., C. P., 286*, referred to. GURDIAL MAL *v.* JAUHRI MAL **[I. L. R., 7 All., 820**

**332.** ——————— *Effect of foreclosure.—Purchaser from mortgagor.*—Foreclosure proceedings in the Supreme Court as to mofussil property, to which a purchaser from the mortgagor is not made a party, cannot affect that purchaser.

**MORTGAGE**—*continued.*

9. FORECLOSURE—*continued.*

(*a*) RIGHT OF FORECLOSURE—*continued.*

**Rights of mortgagee**—*continued.*

BRAJANATH KUNDU CHOWDRY *v.* KHILAT CHUNDRA GHOSE . . . . 8 B. L. R., 104
[S. C. 14 Moore's I. A., 144 : 16 W. R., P. C., 33

S. C. in Court below. KHELUT CHUNDER GHOSE *v.* TARA CHAND KOONDOO CHOWDHRY.
[6 W. R., 269

333. ——————— *Foreclosure, Effect of.—Deed of conditional sale.*—Until foreclosure, the vendee, under a bond of conditional sale, holds the lands, the subject of the bond, only as security for the money lent. *Semble,*—The effect of foreclosure is to put an end to the original conditional sale and to make the property *ab initio* the immoveable property of the person who advanced the money. SHAM NARAIN SINGH *v.* ROGHOOBUR DYAL
[I. L. R., 3 Calc., 508 : 1 C. L. R., 343

334. ——————— *Effect of foreclosure.—Sale for arrears of revenue.—Fraud of mortgagee.—Act I of 1845.*—The effect of a foreclosure decree in the Supreme Court in a mortgage suit between Hindus, is equivalent to a decree establishing proprietary right in the mofussil Courts, in similar suits on the like instruments. The mortgagee in possession and another having sought to deprive the mortgagor of his title to redeem by means of a secret purchase of the mortgaged estate between them, including the fraudulent device of a sale by auction for arrears of revenue, such arrears being designedly incurred by the mortgagee in possession, it was held that a suit for redemption and for possession instituted many years after the sale for arrears was not barred by section 24 of Act I of 1845. If a mortgagee in possession fraudulently allows the Government revenue to fall into arrears, with a view to the land being put up for sale and his buying it in for himself, and he does in fact become the purchaser of it at the Government sale for arrears, such a purchase will not defeat the equity of redemption. NAZIR ALI KHAN *v.* OJOODHYARAM KHAN
[5 W. R., P. C., 83 : 10 Moore's I. A., 540

335. ——————— *Usufructuary mortgage.—Profits paying the interest.—Suit by mortgagee to recover mortgage-money after time for redemption.*—Certain property was mortgaged for a term of years, and possession given to the mortgagee. The mortgagor covenanted in the mortgage-deed that he would redeem the property after the term had expired, and that the mortgagee should take the profits in lieu of interest until redemption. After the expiry of the term the mortgagee sued to recover the mortgage-money. *Held* that the mortgage was security for the repayment of the mortgage-money after the term had expired, and that during the term the mortgagor could not redeem nor could the mortgagee recover his money, but that when the term had expired, either party could bring the transaction to a close. GANESH KOOER *v.* DEEDAR BUKSH
[5 N. W., 128

**MORTGAGE**—*continued.*

9. FORECLOSURE—*continued.*

(*a*) RIGHT OF FORECLOSURE—*continued.*

**Rights of mortgagee**—*continued.*

DYA RAM *v.* JWALA NATH . 5 N. W., Ap., 2

336. ——————— *Suit for possession.—Covenant to pay.—Conditional sale.—Damages, Measure of.—Costs.*—Two out of several co-sharers mortgaged as their own, by way of conditional sale, a portion of the joint family property. The mortgagee foreclosed, and then instituted a suit for possession, which he withdrew with liberty to bring a fresh suit. He afterwards brought a suit for possession against the mortgagors and their co-sharers, on the suggestion of the mortgagors that it would be undefended. It was, however, defended by the co-sharers, and the suit was dismissed. The mortgage-deed contained no covenant to repay the money lent. In an action for damages brought by the mortgagee against his mortgagors,—*Held* that the plaintiff was entitled to recover the money lent and interest, and the costs of the second suit. BHUGWAN ACHARJEE *v.* GOBIND SAHOO
[I. L. R., 9 Calc., 234 : 11 C. L. R., 355

337. ——— **Partial foreclosure.**—*Foreclosure in respect of share of property.*—Where several parties have an interest in a mortgage it is not competent for one of them to foreclose in respect of his fractional share. A party suing for possession of a share of mortgaged property (after its release has been effected by an arrangement made between the mortgagees and mortgagor) on the ground that he had an interest in the mortgage and in the funds advanced by the mortgagees, must show that the mortgagor had notice of such interest. BHOLA ROY *v.* ABILACK ROY . . . 10 W. R., 476

338. ——————— *Joint mortgagors.—Foreclosure of portion of property.—Suit for possession of portion of property after foreclosure.*—Where the whole of a mortgage-debt was due to the persons claiming under the mortgage jointly and not severally, and a person entitled only to one moiety of the debt, foreclosed the mortgage as to that moiety, and sued the different mortgagors for possession of a moiety of their interests in the mortgaged property, in virtue of the mortgage and foreclosure,—*Held* that the foreclosure was invalid and the suit was not maintainable. BISHAN DIAL *v.* MANNI RAM . . . I. L. R., 1 All., 297

339. ——————— *Joint mortgage by conditional sale of two villages.—Sale of the equity of redemption.—Foreclosure in respect of one village.*—*B.* mortgaged by conditional sale two villages to *L.* for a certain sum. He subsequently sold one village to *L.* and the other to *S. L.* having foreclosed the mortgage in respect of the village sold to *S.*, for a proportionate amount of the mortgage-money, sued *S.* for possession of that village. *Held* that the suit was maintainable. *Chandika Singh* v. *Pokhar Singh, I. L. R., 2 All., 906,* distinguished. BISHESHAR SINGH *v.* LAIK SINGH
[I. L. R., 5 All., 257

**MORTGAGE**—*continued.*

9. FORECLOSURE—*continued.*

(*a*) RIGHT OF FORECLOSURE—*continued.*

**Partial foreclosure**—*continued.*

**340.** ——— *Foreclosure of portion of joint property.*—Where a mortgage of an estate is a joint one and there is no specification in it that any individual share or portion of a share of such estate is charged with the repayment of any defined proportion of the mortgage-money, but the whole estate is made responsible for the mortgage-money, it is not competent for the mortgagee to treat a sum paid by one of the mortgagors as made on such mortgagor's own account in respect of what might be calculated as his reasonable share of the joint debt and to release his share from further liability. Where therefore in the case of such a mortgage the mortgagee, in taking foreclosure proceedings, exempted the person and share of the mortgagor so paying and proceeded only against the other mortgagors, and the mortgage having been foreclosed sued the other mortgagors for the possession of their shares of such estate,—*Held* that, the foreclosure proceedings being irregular, the suit was not maintainable. CHANDIKA SINGH *v.* PHOKAR SINGH **[I. L. R., 2 All., 906**

**341.** ——— *Purchaser of share of mortgaged property.*—A mortgagee sold part of the mortgaged property and then foreclosed, his purchaser being no party to the foreclosure proceedings. The mortgagee and purchaser afterwards sued for recovery of possession of the mortgaged property after foreclosure. *Held* that the purchaser could maintain his suit, although he had not been a party to the foreclosure proceedings for the recovery of the mortgaged property, which had been purchased by him. The foreclosure conferred an absolute title to the whole property mortgaged on the mortgagee and anybody claiming under him. RAJ CHANDRA PODDER *v.* MANORAMA **[3 B. L. R., Ap., 148 : 12 W. R., 353**

**342.** ——— *Merger.—Foreclosure proceedings on the first of two mortgages of the same property to the same mortgagee.*—On the 26th of March 1872 *A.* mortgaged to *B.* certain properties for R12,000. On the 9th of May 1872 *A.*, to secure a further advance of R24,000 made to him by *B.*, executed a second mortgage to *B.* of the same and certain other property. On the 29th of July 1873 *B.* served *A.* with notice to foreclose the properties mortgaged by the first deed. On the 23rd March 1874 and before the expiration of the year of grace, a portion of the properties subject to both mortgages was sold at an auction-sale subject to existing incumbrances, and *C.* became the purchaser. *C.*, thereupon, to protect the interests he had bought at the sale, purchased in the name of *D.*, a trustee, all the interest of *B.* in both mortgages, and, after the expiration of the year of grace, filed, in the name of himself and *D.*, a suit to declare his absolute right to the foreclosed properties, and afterwards filed another suit against *A.* for a money-decree on the bond in the second mortgage. *Held* that *C.*, being

**MORTGAGE**—*continued.*

9. FORECLOSURE—*continued.*

(*a*) RIGHT OF FORECLOSURE—*continued.*

**Partial foreclosure**—*continued.*

owner of portion of the property subject to both mortgages, and as such liable to contribute proportionately to the payment of both, could not foreclose the first mortgage, and then sue *A.* for the whole debt due upon the second. *Quære,*—Whether it would be equitable for *C.* to foreclose the first mortgage? *Held* further, that the bringing of the second suit had the effect of reopening the foreclosure proceedings, and that the Court could now make a decree in the whole case. KALIPROSONNO GHOSE *v.* KAMINI SOONDURI CHOWDHRAIN **[I. L. R., 4 Calc., 475 : 3 C. L. R., 184**

**343.** ——— **Foreclosure of property in two districts.**—*Beng. Reg. XVII of 1806, s. 8.*—According to section 8, Regulation XVII of 1806, where mortgage-property is situate in two districts, an order of foreclosure relating to the whole property may be obtained in the Court of either district. RASMONEE DEBEA *v.* PRANKISHEN DAS **[7 W. R., P. C., 66**

S. C. RAS MUNI DIBIAH *v.* PRAN KISHEN DAS **[4 Moore's I. A., 392**

PROSONNO COOMAR ROY *v.* HARAN CHUNDER CHATTERJEE . . . **5 C. L. R., 599**

**344.** ——— **Foreclosure of property partly in Calcutta and partly in mofussil.**—*Beng. Reg. XVII of 1806.*—The High Court, in a suit for foreclosure of property partly in Calcutta and partly in the mofussil, has no power to follow the procedure prescribed by Regulation XVII of 1806, which relates to the foreclosure of property in the mofussil; but it is bound to see that the defendant is not, by reason of the suit being brought in the High Court, deprived of any substantial advantage which he would have had if the suit had been instituted in the mofussil Court. BANK OF HINDUSTAN, CHINA, AND JAPAN *v.* NUNDOLOLL SEN . . **11 B. L. R., 301**

**345.** ——— **Foreclosure of property situated partly in Oudh and partly in the North-Western Provinces.**—*Beng. Reg. XVII of 1806, s. 8.*—Where a mortgage of land situated partly in the district of Shahjahanpur in the North-Western Provinces and partly in the district of Kheri in the province of Oudh was made by conditional sale, and the mortgagee applied to the District Court of Shahjahanpur to foreclose the mortgage and render the conditional sale conclusive in respect of the whole property, and that Court granted such application,—*Held*, with reference to the ruling of the Privy Council in *Ras Muni Dibiah* v. *Pran Kishen Das, 4 Moore's I. A., 392*, that, where mortgaged property is situated in two districts, an order of foreclosure relating to the whole property may be obtained in the Court of either district, that the circumstance that Oudh was in some respects a distinct province from the North-Western Provinces did not take the case out of the operation of that ruling, inasmuch as Regulation XVII of 1806 was in force

MORTGAGE—*continued.*

9. FORECLOSURE—*continued.*

(*a*) RIGHT OF FORECLOSURE—*continued.*

**Foreclosure of property situated partly in Oudh and partly in the North-Western Provinces—*continued.***

in Oudh as well as in the North-Western Provinces at the time of the foreclosure proceedings. SURJAN SINGH *v.* JAGAN NATH SINGH [I. L. R., 2 All., 313

(*b*) DEMAND AND NOTICE OF FORECLOSURE.

**346. ——— Demand from mortgagor.**—*Beng. Reg. XVII of 1806, s. 8.—Foreclosure, Right of.*—Under the terms of Regulation XVII of 1806, a demand from the mortgagor or his representative is a condition precedent to the right to take foreclosure proceedings. GONESH CHUNDER PAL *v.* SHODANUND SURMA . . I. L. R., 12 Calc., 138

**347. ——— Demand for payment of mortgage-debt.**—*Power of a minor to take a mortgage.—Beng. Reg. XVII of 1806, s. 8.*—A conditional mortgagee applied for foreclosure omitting previously to demand from the mortgagor payment of the mortgage-debt. On foreclosure of the mortgage he sued for possession of the mortgaged property. The lower Appellate Court dismissed the suit on the ground that the foreclosure proceedings were invalid and ineffective by reason of such omission, and in so doing directed that the demand which the mortgagee should make prior to a fresh application for foreclosure should be limited to a certain amount. *Held* that the foreclosure proceedings were invalid and ineffective by reason of such omission and the suit had been properly dismissed; and that it was not competent for the lower Appellate Court to put any limitation on the amount to be demanded by the mortgagee prior to a fresh application for foreclosure. BEHARI LAL *v.* BENI LAL [I. L. R., 3 All., 408

**348. ——— *Beng. Reg XVII of 1806, s 8.***—Section 8 of Regulation XVII of 1806 contemplates a previous demand of payment of the mortgage-money, and non-compliance therewith as a kind of cause of action for commencing foreclosure proceedings, and such demand must therefore necessarily be made before the mortgagee has the right of applying for foreclosure, and the omission to make such demand vitiates the foreclosure proceedings altogether. *Behari Lal* v. *Beni Lal, I. L. R., 3 All., 408,* followed. KARAN SINGH *v.* MOHAN LAL [I. L. R., 5 All., 9

**349. ——— Notice of foreclosure.**—*Issue of notification.—Beng. Reg. XVII of 1806, ss. 7 and 8.*—A mortgagee's "application" for foreclosure, as the term is used in section 7, Regulation XVII of 1806, means the whole transaction contemplated in section 8, ending with the notification to the mortgagor; thus the year of grace for payment, and the year necessary for completion of foreclosure, commence to run from the date of the notification. By the "date of the notification" is meant not the date on which it is served on the mortgagor, nor the date

MORTGAGE—*continued.*

9. FORECLOSURE—*continued.*

(*b*) DEMAND AND NOTICE OF FORECLOSURE—*continued.*

**Notice of foreclosure—*continued.***

on which the purwannah or document of notification is signed and sealed, but the date of its issue by the Court. The purwannah is first issued when it is handed to the peon for delivery. SUROOP CHUNDER NAG *v.* BONOMALEE PUNDIT . . 9 W. R., 116

**350. ——— *Beng. Reg. XVII of 1806.—Form of notification to mortgagor.***—In order to obtain a decree for foreclosure against a mortgagor, the purwannah to be issued by the Judge under section 8 of Regulation XVII of 1806 must distinctly notify to the mortgagor that if he shall not redeem the property mortgaged in the manner provided for by the preceding section within one year from the date of notification, the mortgage will be finally foreclosed and the conditional sale will become conclusive. BHEEKUN KHAN *v.* BECHUN KHAN . . . . . 3 N. W., 35

**351. ——— *Omission to give mortgagor copy of application to foreclose.***—A mortgagee failing to fulfil one of the two conditions prescribed by Regulation XVII of 1806, section 8, *i.e.*, furnishing the mortgagor or his legal representative with a copy of his application to foreclose, cannot be said to be in a position to foreclose. SANTEE RAM JANA *v.* MODOO MYTEE . . 20 W. R., 363

**352. ——— *Service of notice.***—*On whom to be served.*—The only person on whom effectual service of notice of foreclosure can be made is the person really interested in protecting the estate. KALEE KOOMAR DUTT *v* PRAN KISHOREE CHOWDHRAIN . . . . 22 W. R., 168

**353. ——— *Right to notice.***—*Beng. Reg. XVII of 1806, s. 8.—Purchaser of equity of redemption.*—The purchaser of the equity of redemption is not entitled to notice in a foreclosure suit, especially if the purchase has not been made until after the institution of the suit. GOOROOPERSAUD JANAH *v.* BIPPROPERSAUD BERRAH [Marsh., 292; 2 Hay, 152

KURMOFOOL *v.* BISSESSUR SINGH [Marsh., 337

S. C. BISSESSUR SINGH *v.* KURMOFOOL [2 Hay, 408

*See* KISHEN BULLUBH MAHTA *v.* BELASOO KOMNUR . . . . . 3 W. R., 230

where, however, the Judges (BAYLEY and PEARE, *JJ.*) differed, the former holding notice was not necessary. BISSONATH SINGH *v.* BROJONATH DOSS [6 W. R., 230

**354. ——— *Right to notice.***—*Purchaser from mortgagor.*—A purchaser from a mortgagor, as one of his legal representatives, is entitled to notice of foreclosure. MADHUB THAKOOR *v.* JHOONUCK LALL DOSS . . 12 W. R., 105

MORTGAGE—*continued.*

9. FORECLOSURE—*continued.*

(*b*) DEMAND AND NOTICE OF FORECLOSURE —*continued.*

Notice of foreclosure—*continued.*

MITTERJEET SINGH *v.* MOOKH LALL SINGH [25 W. R., 139

355. ——————— *Right to notice.—Purchaser from mortgagor.—Legal representative.—Beng. Reg. XVII of 1806, s. 8.*—The purchaser from a mortgagor is his legal representative; and when the mortgagee takes out foreclosure proceedings, the notice enjoined by section 8, Regulation XVII of 1806, must be served on such purchaser if it is used after the sale; fresh notice to the purchaser would not be necessary if the sale took place after notice to the mortgagor. ACHUMBIT MISSER *v.* LALLA NUND RAM . . . 11 W. R., 544

356. ——————— *Right to notice.—Transferees in possession.*—Transferees in possession are entitled to notice of foreclosure. TAZUN BIBEE *v.* SHIB CHUNDER DHUR . 19 W. R., 170

357. ——————— *Assignee of mortgagor.—Beng. Reg. XVII of 1806, s. 8.—Legal representative.*—A purchaser of the rights and interests of the mortgagor is a legal representative within section 8, Regulation XVII of 1806, and notice of application for foreclosure must be served on him. GOLAM DUSTAGIR KHAN *v.* JOGAI SINGH [1 B. L. R., S. N., 3 : 10 W. R., 86

358. ——————— *Right to notice.—Beng. Reg. XVII of 1806, s. 8.—Conditional sale.—Purchaser.—Second mortgagee.—Legal representative.*—Where land which has been conditionally sold is subsequently mortgaged, the second mortgagee, being the mortgagor's "legal representative," within the meaning of that term in section 8 of Regulation XVII of 1806, is entitled, on foreclosure proceedings being taken by the conditional vendee, to the notice required by that section, and cannot be deprived by the conditional vendee of the possession of the land, notwithstanding foreclosure, where no such notice has been given to him. DIRGAJ SINGH *v.* DEBI SINGH . . . I. L. R., 1 All., 499

359. ——————— *Right to notice.—"Legal representative" of mortgagor.—Beng. Reg. XVII of 1806, s. 8.*—The holder of a decree for money does not, merely because he has attached land belonging to his judgment-debtor while it is subject to a conditional mortgage, become the "legal representative" of the mortgagor within the meaning of section 8 of Regulation XVII of 1806, and entitled to notice of the foreclosure of such mortgage; neither is the holder of a prior lien on land which is conditionally mortgaged the "legal representative" of the mortgagor and entitled to notice of foreclosure proceedings. RADHEY TEWARI *v.* BUJHA MISR [I. L. R., 3 All., 413

360. ——————— *Right to notice.—Purchaser of mortgagor's interest.*—Where a person mortgages his property by deed of conditional sale, and afterwards the right, title, and interest of the mortgagor is sold in execution of a money-decree previously obtained against him, the purchaser at such sale is entitled to due notice of foreclosure proceedings instituted subsequently to the sale, but before the confirmation thereof. See *Bhyrub Chunder Bundopadhya* v. *Soudamini Dabee, I. L. R., 2 Calc., 141.* RAMESWAR NATH SINGH *v.* MEWAR JUGJEET SINGH . . . . I. L. R., 11 Calc., 341

361. ——————— *Right to notice.—Assignee of mortgagor.—Beng. Reg. XVII of 1806, s. 8.*—Under section 8, Regulation XVII of 1806, a mortgagee is bound to serve notice of foreclosure upon the assignee of the mortgagor, whether such assignee be of the whole or a portion of the mortgaged premises, and whether notice of the assignment has been given to the mortgagee or not. GANGA GOBIND MANDAL *v.* BANI MADHAB GHOSE [3 B. L. R., A. C., 172 : 11 W. R., 548

362. ——————— *Right to notice.—Assignee of mortgagor.—Beng. Reg. XVII of 1806, s. 8.*—The assignee of a mortgagor, though purchaser of only a portion of the mortgaged property, is his "legal representative," within the meaning of section 8, Regulation XVII of 1806, and as such entitled to notice of foreclosure. SHEO GOLAM SINGH *v.* RAMROOP SINGH [15 B. L. R., 34, note : 23 W. R., 25

363. ——————— *Right to redeem.—Mokurraridar.—Beng. Reg. XVII of 1806, s. 8.*—The holder of a maurasi mokurrari potta under the mortgagor is not a "representative" within the meaning of section 8 of Regulation XVII of 1806, and is therefore not entitled to notice of foreclosure under that section. *Lalla Doorga Pershad* v. *Lalla Luchmun Sahoy, 17 W. R., 272,* followed. SRIPOTI CHURN DEY *v.* MOHIP NARAIN SINGH [I. L. R., 9 Calc., 643 : 13 C. L. R., 119

364. ——————— *Beng. Reg. XVII of 1806.*—A second mortgagee under a mortgage-bond is entitled to notice of foreclosure under Regulation XVII of 1806. NUDYAR CHAND CHUCKERBUTTY *v.* ROOP DOSS BANERJEE [22 W. R., 475

365. ——————— *Right to notice.—Second mortgagee.—Prior foreclosure of a second mortgage.—Legal representative.—Beng. Reg. XVII of 1806, s. 8.*—In the case of the prior foreclosure of a subsequent mortgage,—*Quære,*—Whether the second mortgagee is the mortgagor's legal representative for the purpose of the notice of foreclosure under section 8, Regulation XVII of 1806. When the first mortgagee had no knowledge or cognisance of the second mortgage, or of the foreclosure proceedings taken under it, the second mortgagee had no just ground of complaint that the notice of fore-

**MORTGAGE**—*continued.*

9. FORECLOSURE—*continued.*

(*b*) DEMAND AND NOTICE OF FORECLOSURE —*continued.*

**Notice of foreclosure**—*continued.*

closure was served, not on him, but on the mortgagor. KALEE KISHORE CHATTERJEE *v.* TARA PERSHAD ROY . . . . . 4 W. R., 1

**366.** ——————— *Right to notice.* —*Purchaser from mortgagee.*—Property in the mofussil which had been mortgaged in 1862 to *C.* by a deed in the English form containing the usual power of sale on default of payment, and again in 1864 to *T.* by deed of conditional sale, was sold by *C.* under the power of sale and purchased by *N.* Previously to the sale, *T.* had foreclosed. In a suit for possession of the property brought by the widow of *T.* against *N.* and the mortgagor, it appeared that no notice of foreclosure had been served on *N.* *Held* that *N.* was entitled to such notice by the fact of his purchase, whether he had obtained possession or not, and that no notice having been served upon him, the suit was not maintainable against him. BHANOOMUTTY CHOWDRAIN *v.* PREMCHAND NEOGEE [15 B. L. R., 28 : 23 W. R., 96

MOHUN LALL SOOKUL *v.* GOLUCK CHUNDER DUTT [1 W. R., P. C., 19 : 10 Moore's I. A., 1

**367.** ——————— *Sufficiency of notice.*—*Foreclosure of share of mortgaged property.* —Two persons jointly held a mortgage, each having an equal share in it. The equity of redemption subsequently became vested solely in one of these persons. *Held* that, under the circumstances, a notice of foreclosure confined to a one-half share only of the mortgage (issued by the mortgagee, who had no interest in the equity of redemption) was sufficient, and that the foreclosure proceedings were not bad, although they related only to a part and not to the whole of the mortgaged property. HUNOOMANPERSAUD SAHOO *v.* KALEEPERSAUD SAHOO . W. R., 1864, 285

**368.** ——————— *Sufficiency of notice.*—*Effect of service of second notice of foreclosure.*—Where the notice of foreclosure was duly served on the mortgagor, no subsequent transfer of the property, whether voluntary or involuntary, could affect the validity of the notice, or impose on the mortgagee any new obligation in the way of causing a fresh notice to be served on the purchaser. The notice having been duly served on the mortgagor, his right and interest were subsequently sold in execution and the mortgagee caused a second notice to be served on the purchaser. The foreclosure took place after the expiry of a year from the first, but within a year from the date of second notice. *Held*, under the circumstances of the case, that, as the second notice was merely for greater caution to bring to the knowledge of purchaser that notice had already been issued, and did not supersede the first notice, the foreclosure proceedings were regular, and the suit for possession was maintainable. ZAMIN ALI *v.* HOSSEIN ALI . 2 Agra, Pt. II, 187

**MORTGAGE**—*continued.*

9. FORECLOSURE—*continued.*

(*b*) DEMAND AND NOTICE OF FORECLOSURE —*continued.*

**Notice of foreclosure**—*continued.*

**369.** ——————— *Fresh notice.*—*Allowance of time by mortgagee beyond year of grace.* —A mortgagee having issued notice of foreclosure on the mortgagor, allowed him six months' time in which to redeem, shortly before the expiry of the year of grace. The mortgagor died, and the mortgagee sued to recover the property. *Held* that fresh notice of foreclosure on the legal representative of the mortgagor was not necessary, the requirements of the law in the issue of the notice and the expiry of the year of grace having been complied with. BAZLOOR RAHIM *v.* ABDULLAH [2 B. L. R., S. N., 5 : 10 W. R., 359

**370.** ——————— *Extension of time for payment.*—*Fresh notice.*—Where a mortgage becomes foreclosed and the mortgagee abstains from enforcing his right and allows the mortgagor an extension of time, it is not necessary that a fresh notice should be served. BRIJO MOHUN SUTPUTTY *v.* RADHA MOHUN DEY . . 20 W. R., 179

**371.** ——————— *Service of notice.* —*Proof of service.*—*Beng. Reg. XVII of 1806.*—*Duty of Judge.*—Under Regulation XVII of 1806, the Zillah Judge is judicially required to see it proved before him that the notice of foreclosure has been duly served, and to record a proceeding certifying that the requirements of that Regulation have been duly carried out, and also any elucidating facts necessary to be recorded as occurring within the year of grace. ABBAS ALY *v.* NUND COOMAR GHOSE [7 W. R., 123

**372.** ——————— *Service of notice.* —*Proof of service.*—*Beng. Reg. XVII of 1806, s. 8.* —The provisions of section 8 of Regulation XVII of 1806, that a copy of the mortgagee's application to foreclose is to be served with the Judge's purwannah referred to in that section, are imperative and not merely directory. Where the evidence fell short of proof that a copy of such application was served with the purwannah of the Judge,—*Held* that such failure of proof was fatal to the plaintiff's suit to recover possession of the mortgaged premises after the expiration of the year of grace. When the plaintiff's second mortgagees, who had foreclosed their mortgagor's equity of redemption, sued for possession of the mortgaged property, and alleged that their mortgagor's equity of redemption had been finally foreclosed by the first mortgagee after due proceedings and expiry of the year of grace without redemption, and that they were, therefore, entitled to absolute possession, and failed on the ground that notice of foreclosure had not been duly served,—*Held*, they were not entitled to a decree as mortgagees for possession, subject to their accounting to the mortgagors, that being relief different from that prayed for in their plaint. BANK OF HINDUSTAN, CHINA, AND JAPAN *v.* SHOROSHIBALA DEBEE [I. L. R., 2 Calc., 311

MORTGAGE—*continued.*

9. FORECLOSURE—*continued.*

(*b*) DEMAND AND NOTICE OF FORECLOSURE —*continued.*

Notice of foreclosure—*continued.*

373. ——— *Service of notice.—Proof of service.—Beng. Reg. XVII of 1806, s. 8.*—The notice of foreclosure under section 8. Regulation XVII of 1806, is not merely a preliminary proceeding leading up to a judgment of foreclosure to be subsequently pronounced in Court. It not only fixes the date from which the period during which the mortgagor is to retain the right to redeem is to be computed, but it is of itself the operative act in the foreclosure proceeding. The service of the notice, therefore, should be evidenced by the clearest proof, and should be in all cases, if not personal, at least such as to leave no doubt in the mind of the Court that the notice itself must have reached the hands or come to the knowledge of the mortgagors. EUSUF ALI *v.* AZUMTOONISSA . **W. R., 1864, 49**

374. ——— *Service of notice.—Proof of service.*—The regulation as to service of a notice of foreclosure does not provide for any mode of service in substitution for personal service, though in some cases it has been held that personal service is not absolutely necessary; but to justify resort to any other mode of service it must be shown that in spite of efforts made for that purpose the notice cannot for some reason be personally served. A copy of the report of the Nazir of the Civil Court, copies of the depositions of witnesses not taken in the presence of the parties to the suit, and a copy of the final foreclosure proceeding, are not legal evidence to prove the service of a notice of foreclosure. MADHO SINGH *v.* MAHTAB SINGH **[3 N. W., 325**

375. ——— *Service of notice.—Mode of service.*—Where notice of foreclosure issues, and the serving officer finds that the mortgagor is not at home, it is sufficient if he affixes the notice on the door of the mortgagor's house, personal notice on the mortgagor not being essential. SOORJOO KANT BANERJEE *v.* KRISTO KISHORE PODDAR . . . . . **14 W. R., 423**

376. ——— *Service of notice.—Mode of service.—Sufficiency of service.—Beng. Reg. XVII of 1806, s. 8.*—Where notice of foreclosure was shown to have been served according to the usual course of business in the Sheriff's office, the Court presumed that a copy of the application had been duly served therewith; but where it appeared that, according to the practice of the High Court, mention of the application would have been made in the order if it had accompanied the notice, and no such mention was made, the Court refused to make such presumption. DENONATH GANGOOLY *v.* NURSING PROSHAD DASS . . **14 B. L. R., 87 [22 W. R., 90**

377. ——— *Service of notice.—Mode of service.—Beng. Reg. XVII of 1806.—Minor.*—Regulation XVII of 1806 giving no special direction as to the person on whom notice of foreclosure is to be served, when the person for the time being entitled to the equity of redemption is a minor, and no guardian of such minor has been appointed under Act XL of 1858, service of such notice of foreclosure upon the minor and his mother will be deemed sufficient service. DABEE PERSHAD *v.* MAN KHAN . . . . **2 N. W., 444**

378. ——— *Service of notice.—Sufficiency of service.—Beng. Reg. XVII of 1806.—Representative.*—The order of foreclosure having been served on the widow of the deceased mortgagor who had a life-interest, and also was the guardian of the minor adopted son and legal representative of the deceased, the service was held to be sufficient. RASMONEE DEBIA *v.* PRAN KISSEN DAS **[7 W. R., P. C., 66**

S. C. RAS MUNI DIBIAH *v.* PRANKISHEN DAS **[4 Moore's I. A., 392**

379. ——— *Service of notice.—Sufficiency of service.*—It cannot be said that, if a notice of foreclosure addressed to a deceased mortgagor has reached the hands of his representatives, they have not had the notice, nor that they were debarred from paying or were not required to pay the amount of the mortgage upon receiving that notice. RAM CHUNDER HALDER *v.* JONAB ALI KHAN . . . . . **17 W. R., 230**

380. ——— *Service of notice.—Sufficiency of service.*—Where the defendant denied having received notice of foreclosure, and the witnesses called to prove service denied all knowledge of the matter,—*Held* that the report of the peon in the formal proceedings before another Court was inadmissible as evidence in the case, and the acquiescence of one mortgagor was not binding on the other. Transferees in possession are entitled to have notice of foreclosure. TAZUN BIBEE *v.* SHIB CHUNDER DHUR . . . . **19 W. R., 170**

381. ——— *Service of notice.—Proof of service.—Suit by conditional vendee for possession.*—Where in a suit by a conditional vendee for possession after foreclosure the service of notice is denied by the mortgagor or his representative, it is incumbent on the former to prove such service independently of the copy of the foreclosure proceedings. SOOKHMUN *v.* CHOORAMAN **[1 Agra, 172**

382. ——— *Service of notice.—Fresh notice, Necessity of.—Purchase from mortgagor after notice served.*—Where the mortgagor sells his equity of redemption after foreclosure proceedings had been applied for and notices duly served on him, it is not necessary for the mortgagee to issue fresh notice on the purchaser: the requirements of the Regulation are satisfied by the

**MORTGAGE**—*continued.*

9. FORECLOSURE—*continued.*

(*b*) DEMAND AND NOTICE OF FORECLOSURE —*continued.*

**Notice of foreclosure**—*continued.*

service of the notice on the person who at the time of service is entitled to redeem. JYRAM GIR *v.* KRISHAN KISHORE CHUND . . 3 Agra, 307

383. ——————— *Service of notice.—Proof of service.—Beng. Reg. XVII of 1806, s. 8.*—The condition of foreclosure required by section 8, Regulation XVII of 1806, is that the mortgagor should be furnished with a copy of the petition referred to in the section, and should have a notification from the Judge in order that he may, within a year from the time of such notice, redeem the property. In an action brought to recover possession as upon a foreclosure, it is essential for the plaintiff to satisfy the Court that the above condition has been complied with. In such a case, the service of the notice must be established by evidence. The mere return of the Nazir on the back of the Judge's purwannah to the effect that the mortgagor had been duly served, is not legal evidence of service. The functions of the Judge under section 8 are merely ministerial. The year during which the mortgagor may redeem, runs not from the date of the purwannah, or the issuing of it by the Judge, but from the time of service. Where there are several mortgagors, and it is not sought to foreclose the individual shares of each as against each, but to foreclose the whole estate as upon one mortgage, one debt, and one entire right against all, service of the notice upon some only of the mortgagors is insufficient to warrant the foreclosure of the whole estate or of any part of it. *Quære,*—Whether there may not be cases of mortgages of separate shares, in which by proceedings properly framed foreclosure may take place in respect of some of such shares only. The mortgagee, when he seeks to foreclose, must discover and serve notice on those who are the then owners of the estate. NORENDER NARAIN SINGH *v.* DWARKALAL MUNDUR . I. L. R., 3 Calc., 397 [1 C. L. R., 369: L. R., 5 I. A., 18

384. ——————— *Sufficiency of notice.—Reg. XVII of 1806, s. 8.—Service of copy of petition and of purwannah.*—The provisions of section 8 of Regulation XVII of 1806 are not merely directory but imperative, prescribing conditions precedent to the right of the mortgagee to enforce forfeiture of the estate of the mortgagor, and have for their object the protection of mortgagors from fraud. The prescribed procedure must be strictly followed. *Norender Narain Singh* v. *Dwarka Lal Mundur, L. R., 5 I. A., 18: I. L. R., 3 Calc., 397,* referred to and followed. *Held* that, although the mortgagor at the hearing of the foreclosure suit in the Court of first instance had not insisted on the insufficiency of the notification of the mortgagee's application to foreclose, but had relied on another defence, this could not be construed as a binding admission that notice had been duly given; that service of the copy petition for foreclosure, and of the purwannah signed by the Judge, was essential; and that the mortgagor was not precluded from questioning the regularity of the proceedings in his subsequent appeal. MADHOPERSAD *v.* GAJUDHAR [I. L. R., 11 Calc., 111: L. R., 11 I. A., 186

385. ——————— *Sufficiency of notice.—Mortgage by conditional sale.—Suit for possession of mortgaged property.—Beng. Reg. XVII of 1806, s. 8.—Conditions precedent.—Demand for payment of mortgage-money.—Proof of service of notice.—Proof of notice being signed by the Judge.—Proof of forwarding copy of application with notice.—Transfer of Property Act (IV of 1882).*—The provisions as to the procedure to be followed in taking foreclosure proceedings under Regulation XVII of 1806 are not merely directory, but strict satisfaction of the prescribed conditions therein laid down precedes the right of the conditional vendee to claim the forfeiture of the conditional vendor's right, and the various requirements of that section have to be strictly observed in order to entitle a mortgagee to come into Court, and, upon the basis of the observance of those requirements, to assert an absolute title to the property of the mortgagor. *Norender Narain Singh* v. *Dwarka Lall Mundur, I. L. R., 3 Calc., 397;* and *Madho Pershad* v. *Gajadhar, I. L. R., 11 Calc., 111,* followed. In a suit for possession of immoveable property by a conditional vendee under a deed of conditional sale, alleged to have been foreclosed under Regulation XVII of 1806, it appeared that, except a recital in the application for foreclosure itself, there was nothing to show that any preliminary demand was ever made upon the mortgagors for payment of the mortgage-debt; that there was no proof of the "notice" itself having been served upon the mortgagors, which it lay upon the plaintiff to establish; that there was nothing to show that the notice which was issued was signed by the Judge to whom the application was made; and that it was not proved that a copy of the application was forwarded along with the notice to the mortgagors, or that its terms were ever brought to their knowledge. *Held,* applying to the case the principles stated above, that the provisions of Regulation XVII of 1806 had not been satisfied, and that the plaintiff had not fulfilled his obligation, namely, to prove affirmatively that those provisions were strictly followed. *Held,* also, that to treat the suit as one instituted under the Transfer of Property Act, and to allow the plaintiff to obtain such relief as he would be entitled to by that Act, would be to countenance an entire change in the nature and character of the suit as it was originally instituted, and that this was a course not sanctioned by the law. SITLA BAKHSH *v.* LALTA PRASAD [I. L. R., 8 All., 388

386. ——————— *Sufficiency of notice.—Foreclosure proceedings under Reg. XVII of 1806, and subsequent procedure under Transfer of Property Act.—Mortgage.—Condi-*

MORTGAGE—*continued.*

9. FORECLOSURE—*continued.*

(*b*) DEMAND AND NOTICE OF FORECLOSURE —*continued.*

**Notice of foreclosure**—*continued.*

*tional sale.—Suit for possession on foreclosure.—Beng. Reg. XVII of 1806, ss. 7, 8.—Act IV of 1882 (Transfer of Property Act), ss. 2, cl. (c), and 86.*—The procedure laid down in the Transfer of Property Act may be applied to the case of foreclosure of a mortgage executed before the Act came into operation, provided it be so applied as not to affect the rights saved by section 2, clause (c) of the Act Where, therefore, under the provisions of Regulation XVII of 1806 notice of foreclosure had been served on a mortgagor by conditional sale, the mortgage having been executed, and the foreclosure proceedings taken before the Transfer of Property Act came into force, and after the expiry of the year of grace the money not having been paid, the mortgagee instituted a suit for possession on foreclosure, and when such suit was defended by a third party who had purchased the mortgaged property at an execution sale and obtained possession before the commencement of the foreclosure proceedings and the necessary notice had not been served upon him,—*Held* that it was competent to the Court to apply the procedure prescribed by the Transfer of Property Act and grant the mortgagee a decree in the terms of section 86, substituting the period of "one year" for the period of "six months" therein mentioned. *Ganga Sahai* v. *Kishen Sahai, I. L. R., 6 All., 622,* referred to. PERGASH KOER *v.* MAHABIR PERSHAD NARAIN SINGH . . . I. L. R., 11 Calc., 582

387. ——————— *Sufficiency of notice.—Mortgage by agent.*—Where a mortgage was made by the lumberdar for himself and as agent for other sharers, it was held necessary to issue notice of foreclosure both to the lumberdar and his co-sharers. PUNCHUM SINGH *v.* MUNGLE SINGH [2 Agra, Pt. II, 207

388. ——————— *Omission to give notice, Effect of.*—Omission to give notice to the mortgagor or his representative is sufficient to vitiate the whole of the foreclosure proceedings. KHUKROO MISRAIN *v.* JHOOMUCK LALL DASS [15 W. R., 263

389. ——————— *Irregularity in foreclosure proceedings.—Beng. Reg. XVII of 1806, s. 8.*—The omission of the Court to send with a notice of foreclosure a copy of the mortgagee's petition as required by section 8, Regulation XVII of 1806, was held to be not such an irregularity as made void the foreclosure in a case where, subsequent to the issue of the notice, the mortgagor continued to live in the neighbourhood of the property, and the mortgagee erected buildings on it and used it as his own, without objection or claim on the part of the mortgagor. SALIGRAM TEWAREE *v.* BEHAREE MISSER . . . . W. R., 1864, 36

390. ——————— *Beng. Reg. XVII of 1806, s. 7.—Notice of foreclosure not signed by Judge.—Invalidity of foreclosure proceedings.*—A notice issued under Regulation XVII of 1806, which does not bear the signature of the District Judge, but bears the seal of his Court only, is informal and bad, and the foreclosure proceedings in which such a notice has issued are invalid *ab initio.* BASDEO SINGH *v.* MATA DIN SINGH [I. L. R., 4 All., 276

391. ——————— *Form of notice.—Omission to sign and seal by Judge.*—A notice of foreclosure, bearing the seal of the Court issuing it, but signed only by a Moonserim, is not a sufficient compliance with the law, which requires that the notice be given under the seal and official signature of the Judge. SEITH HUR LALL *v.* MANICKPAL [3 N. W., 176

392. ——————— *Beng. Reg. XVII of 1806.*—A notice of foreclosure signed by the serishtadar of the Judge's Court and bearing the seal of the Court, but not the signature of the Judge,—*Held,* following the principle of the decision in *Basdeo Singh* v. *Mata Din, I. L. R., 4 All., 276,* not to be a valid notice under Regulation XVII of 1806, section 8. DOMA SAHU *v.* NATHAI KHAN [I. L. R., 13 Calc., 50

10. ACCOUNTS.

393. ——— **Claim for account.**—*Suit on mortgage payable on demand*—Where a mortgage-debt is payable on demand, the mortgagee ought to sue, not for interest only, but for an account and payment of what remains due on the mortgage for principal and interest up to the filing of the plaint. ANNAPA *v.* GANPATI . I. L. R., 5 Bom., 181

394. ——— **Suit for account.**—*Suit by mortgagor.—Redemption.*—Ordinarily, a suit for an account upon a mortgage cannot be maintained by a mortgagor unless he asks for redemption also. HARI *v.* LAKSHMAN . I. L. R., 5 Bom., 614

*See* SHANKARAPA *v.* DANAPA [I. L. R., 5 Bom., 604

395. ——— **Obligation to account.**—*Mortgagee in possession.*—Though a mortgage be not an usufructuary mortgage, the mortgagee in possession is bound to give an account of the profits realised by him from the mortgaged property so long as it was in his possession, whether he took possession with or without the consent of the mortgagor. NILKANT SEIN *v.* JAENOODDEEN . 7 W. R., 30

396. ——— **Mode of taking account.**—*Beng. Reg. XV of 1793, s. 10*—According to section 10, Regulation XV of 1793, it is the duty of the Court to take an account of the receipts of the mortgagee in possession, and then to adjust the mortgage account of principal and interest. SHUMBOONATH ROY *v.* MONOWAR ALI . W. R., 1864, 109

**MORTGAGE**—*continued.*

10. ACCOUNTS—*continued.*

397. ——— **Form of account.**—*Mortgagee in possession.*—A mortgagee in possession should keep an account independent of the butwara accounts, which may be used as a test of the accuracy of the accounts filed by the parties. The mortgagee's account must be prepared by himself or by his own agent, and must comprise the gross receipts realised from the tenantry, and the account must be full and complete. RAM KISSEN SINGH *v.* KUNDUN LALL **[W. R., 1864, 177**

398. ——— *Suit by second mortgagee against mortgagor and third mortgagee.*—In a suit by a second mortgagee against his mortgagor and a third mortgagee, asking for an account and sale, the Court directed an account to be taken, not only of what was due to the plaintiff, but also of what was due to the third mortgagee. AUHINDRO BHOOSUN CHATTERJEE *v.* CHUNNOOLALL JOHURRY . . . **I. L. R., 5 Calc., 101**

399. ——— **Liability to account.**—*Duty of mortgagee of share of estate.*—It is the duty of a mortgagee of a fractional share of an estate held in joint tenancy to see that he receives out of the estate all that the mortgagor ought to have received; not only that all assets are realised and brought to account, but that the expenses are regulated with care. ALI REZA *v.* TARASOONDEREE **[2 W. R., 150**

400. ——— *Mortgagee in constructive possession.—Duty of mortgagee.—Held* that an usufructuary mortgagee in possession is liable to account for the profits, whether such possession be by himself or by his agent, and that the suit should not be dismissed merely because the mortgagee refused to give the account, but that the Court should give proper directions for the mortgagee's account to be taken, charging the mortgagee with the amount of the ordinary annual profits if received by him or his agent, but not so charging him if the profits were received by the agent of the mortgagor. JAFFREE BEGUM *v.* UJBEE BEGUM **[3 Agra, 153**

401. ——— *Waiver of right to account by mortgagor.—Usury laws, Repeal of.—Contract as to profits of estate.*—A mortgagor may give his usufructuary mortgagee the power to sue him personally, or to sell the land, or both, at any moment. Since the repeal of the usury laws a mortgagor and mortgagee may make what contract they please with reference to the profits of the mortgaged estate, and the mortgagor may by contract deprive himself of the right to compel the mortgagee in possession to account for the profits. MUNNOO LAL *v.* REET BHOOBUN SINGH . . **6 W. R., 283**

402. ——— *Usufructuary mortgage.— Redemption.— Interest.— Beng. Reg. XV of 1793, ss. 3, 4, 10, 11.—Stat. 13 Geo. III, c. 63, s. 30.—Act XXVIII of 1855, s. 7.—Novation of contract.— Recital of mortgage.*—*J*, the usufructuary mortgagee for R1,250 of certain land, of one-ninth of which he had purchased the equity of redemption, in 1854 gave a usufructuary mortgage of the land to *N.* for R2,700, of which R1,950 represented the mortgage-money of the land he held as mortgagee and R750 of the land he held as proprietor. By the instrument of mortgage it was provided that the mortgagee should take all the profits in lieu of interest, and the mortgage should be redeemable on payment by the mortgagor of the principal money. In 1880 *F.*, the representative of the original mortgagor in respect of eight ninths of the land, sued, with reference to Regulation XV of 1793, for possession of the land, on the ground that the mortgage had been redeemed, as the principal money and interest at twelve per cent had been received out of the profits, and claimed an account. *N.* set up as a defence that the provisions of that Regulation were not applicable, as after its repeal by Act XXVIII of 1855, the mortgagor had agreed not to claim an account. This agreement, he alleged, was contained in the wajib-ul-urz of 1871. *Held* that the wajib-ul-urz did not contain a new contract or ratification of the old contract of 1854 between the parties, but merely a recital of the mortgage, and therefore *F.* was entitled to an account. *Held* also that the account should be calculated on eight-ninths only of the land. Observations by STUART, *C. J*, on Regulation XV of 1793 and Statute 13 George III, Cap. 63. *Shah Makhan Lal* v. *Srikrishna Singh, 2 B. L. R., P. C., 44* and *Badri Prasad* v. *Murlidhar, I. L. R., 2 All., 593*, referred to. MAHTAB KUAR *v.* COLLECTOR OF SHAHJAHANPUR **[I. L. R., 5 All., 419**

403. ——— *Usufructuary mortgage.—Reservation of huk ajori.*—When a deed is essentially in the nature of a usufructuary mortgage, the reservation of huk ajori, which was held to be not in the nature of rent, to the proprietor, and any other arrangement between him and his lessee cannot alter the essential character of the deed, nor relieve the mortgagee from the liability of rendering an account. HYDER BUKSH *v.* HOSSEIN BUKSH **4 W. R., 103**

*See* FUZLOOL RUHMAN *v.* ALI KUREEM **[5 W. R., 163**

404. ——— **Right to an account.**—*Suit for redemption.— Usufructuary mortgage.*—In a redemption under the old law, for the possession of land, the subject of an usufructuary mortgage, the plaintiff is entitled to an account, even though the terms of the original agreement exempt the defendant from his liability to an account, and although the principal sum advanced is very small. DOORGA DABEE *v.* ISSUR CHUNDER CHATTERJEE **[10 W. R., 367**

PUNJUM SINGH *v.* AMEENA KHATOOM **[6 W. R., 6**

405. ——— *Right of purchaser for mortgagor to an account.*—The fact that

**MORTGAGE**—*continued.*

10. ACCOUNTS—*continued.*

**Right to an account**—*continued.*

a purchaser of the equity of redemption received a certain sum for payment to the mortgagee does not preclude him from claiming from the mortgagee an account of the income of the mortgaged property. JAFREE BEGUM *v.* GUNGA RAM . **3 Agra, 91**

**406.** ——— *Right of mortgagor to call on mortgagee to file account.—Beng. Reg. XV of 1793.—Beng. Reg. I of 1798.*—A mortgagor who has recovered possession of the mortgaged property by the deposit of the principal sum lent under Regulation I of 1798 is, in a suit subsequently brought by him for the adjustment of accounts during the period the mortgagee was in possession, entitled to force the defendant to file his accounts and swear to them according to the provisions of Regulation XV of 1793. TUFUZZOOL HOSSEIN *v.* MAHOMED HOSSEIN **[2 Hay, 17**

**407.** ——— **Production of accounts.**—*Beng. Reg. XV of 1793, s. 11.*—Under section 11 of Regulation XV of 1793 a mortgagee in possession is bound to produce the accounts of collection and disbursement, and to swear to them; and a plea of "no assets" will not exempt him from acting up to those requirements. BHEECHUCK SINGH *v.* LUTCHMINARAIN SINGH . . . . . **1 Hay, 182**

**408.** ——— *Beng. Reg. I of 1798, s. 3.*—In a suit for foreclosure brought by a mortgagee under a bye-bil-wafa, or conditional bill of sale, it is not incumbent on the mortgagee to produce his accounts; the language of section 3 of Regulation I of 1798 pointing to an adjustment of accounts in the event of accounting becoming necessary, in which case the lender is to account. FORBES *v.* AMEEROONISSA BEGUM **[1 Ind. Jur., N. S., 117: 5 W. R., P. C., 47 10 Moore's I. A., 340**

**409.** ——— **Objection to items in accounts.**—*Jummabundi papers.—Beng. Reg. IX of 1833.*—A mortgagor is not precluded from questioning the correctness of the jummabundi annually filed by the patwari in obedience to the provisions of Regulation IX of 1833 by reason of his not having brought the incorrect entries to the notice of the Collector at the time the papers were filed. TAIG ALI *v.* GOLAB CHOWDHREE . . . . . **3 Agra, 314**

**410.** ——— **Mode of filing accounts.**—*Conditional decree.—Reconveyance, Power of Court for.*—In a suit for redemption of mortgaged property it was held (by BAYLEY, *J.*) that the law only requires that the mortgagee's account of receipts and disbursements shall be made out, filed in Court, and then sworn to as correct by the mortgagee. *Held* (by PHEAR, *J.*) that mortgagees are bound to exhibit the detailed items of all their actual receipts and disbursements to the time of accounting, verified by themselves, and accompanied by all vouchers. *Held* (by BAYLEY, *J.*) to be a rule of law which had been followed in practice, and which this Court must follow, that no redemption can be decreed in such a suit as long as there is any balance found due. *Held* (by PHEAR, *J.*) that plaintiff ought to obtain a decree for reconveyance on payment of the balance found to be due, with interest and costs of suits within a time specified, and that the Court is not bound by the previous practice, but has power to mould its decrees in such a way as to meet the exigencies of each case. MOKUND LALL SOOKUL *v.* GOLUK CHUNDER DUTT . . **9 W. R., 572**

**411.** ——— **Nature and form of account.**—*Beng. Reg. I of 1798, s. 3.—Estate papers.*—In a suit for possession of mortgaged lands on the allegation of satisfaction of mortgage from the usufruct, the mortgagee is bound to furnish an account of the *bonâ fide* proceeds of the estate while in his possession. Toujees, mehal melanee papers, jaidars, and jumma-wasil-baki papers, are not *per se* such an account within the meaning of section 3, Regulation I of 1798, but may corroborate such account. GOLUCK CHUNDER DUTT *v.* MOHUN LALL SOOKUL **[5 W. R., 271**

RAM LOCHUN PATUK *v.* KUNHYA LAL **[6 W. R., 84**

**412.** ——— *Beng. Reg. XV of 1793, s. 11.*—To enable a Court to ascertain the amount received by the mortgagee whilst in possession, the mortgagee should file his jumma-wasil-baki papers, and proceed generally in accordance with section 11, Regulation XV of 1793. AMEEROODDEEN *v.* RAM CHUND SAHOO . . . **5 W. R., 53**

**413.** ——— **Proof of accounts.**—*Beng. Reg. XV of 1793, s. 11.—Co-sharers.—Nature of proof.*—Mortgagees in actual possession should, under section 11, Regulation XV of 1793, be examined as to the truth of mortgage accounts, excluding persons who, according to the manners and customs of the country, are unable to appear in Court, or others who from their position are not likely to be acquainted with the actual state of facts. Where one of the cosharers has a competent knowledge of the facts, his deposition is sufficient to prove the truth of the accounts. RAM PHUL PANDEY *v.* WAHEED ALI KHAN **[14 W. R., 66**

**414.** ——— *Interest on sum due.—Beng. Reg. XV of 1793, s. 10.*—The assignee of the mortgagor's rights in certain properties, of which a zur-i-peshgi lease for twenty-four years ending in 1286 had been granted, sued for an account and for possession on payment of what might be due (if anything). No rate of interest was specified in the zur-i-peshgi lease. *Held*, following the rule laid down by the Privy Council in *Shah Mukhun Lall* v. *Sreekishen Singh, 12 Moore's I. A., 157*, that, under section 10 of Regulation XV of 1793, the lessee was entitled to simple interest, at 12 per cent. on the money found due. *Held*, further, that under section 11 of the Regulation it was sufficient for the lessee to tender accounts showing the collections and disbursements and to

**MORTGAGE**—*continued.*

10. ACCOUNTS—*continued.*

**Proof of accounts**—*continued.*

swear to their correctness, and that it was not necessary in the first instance for him to put in the original accounts on which the accounts tendered were prepared. TASADUK HOSSAIN *v.* BENI SINGH [13 C. L. R., 128

415. ——— *Decision on insufficient proof.*—The Zillah Courts, in coming to a conclusion as to the state of the mortgage accounts, having proceeded, not upon proof of the actual collections which were or ought to have been made by the mortgagees, but upon materials which were in a great measure speculative and conjectural, their decision was set aside. MOHUN LALL SOOKOOL *v.* GOLUCK CHUNDER DUTT [1 W. R., P. C., 19 : 10 Moore's I. A., 1

416. ——— *Onus of proof. Income tax papers.*—Where the accounts of a mortgagee who has been in possession are being taken,, his income tax papers are inadmissible as evidence in his favour, though they may be used against him. It is the mortgagee's duty to keep regular accounts, and the onus lies in the first instance upon him. If he has not kept proper accounts, the presumption will be against him; but this does not mean that all statements of the mortgagor against him must therefore be taken as true. GHOLAM NUZUF *v.* EMANUM [9 W. R., 275

417. ——— *Usufructuary mortgage.—Mesne profits.*—In the case of an usufructuary mortgage executed prior to Act XXVIII of 1855, where the mortgagor sues for redemption on the ground that the usufruct had paid off the debt, and claims mesne profits on the allegation that the mortgagee in possession has already collected more than his legal dues, the mortgagee is bound to produce the accounts of actual collections made by him during his possession. On the failure of the mortgagee in this respect, the mortgagor is expected to adduce some proof to justify a decree in his favour for redemption, as well as for mesne profits. HASHUM ALI *v.* RAMDHAREE SINGH . . 7 W. R., 82

418. ——— **Mode of taking accounts.** —*Mortgagee in possession.*—As to the mode of taking accounts when the defendant is mortgagee in possession. HUNOOMAN PERSHAD PANDEY *v.* MUNDRAJ KOONWEREE [18 W. R., 81, note Moore's I. A., 393

419. ——— *Mortgagee in possession.*—Mode of taking account when the mortgagee was in possession of the estates as mortgagee, and also as lessee under a lease. HUNOOMAN PERSAUD PANDAY *v.* MUNRAJ KOONWEREE [6 Moore's I. A., 393 18 W. R., 81, note

420. ——— *Arrangement by some of the mortgagors and the mortgagee.*—Where a mortgagee comes to an arrangement with three out of five joint mortgagors by which he consents to take

**MORTGAGE**—*continued.*

10. ACCOUNTS—*continued.*

**Mode of taking accounts**—*continued.*

as payment a money-decree against three of them, the amount of the decree must, in taking an account of what is due on the mortgage, be considered as a sum paid in reduction of the liability of the five. RAM KANTH ROY CHOWDHRY *v.* KALEE MOHUN MOOKERJEE [22 W. R., 310

421. ——— *Government revenue.—Annual rests.—Surplus receipts.—Wrongful payments by mortgagee.—Transfer of Property Act, IV of 1882, s. 76 (c) and (h).*—By the terms of an usufructuary mortgage it was provided that the annual profits of the mortgaged property should be taken to be a certain amount; that out of this amount the revenue should be paid annually by the mortgagee; that the balance should be taken by the mortgagee as representing interest on the principal amount of the mortgage-money; and that the mortgage should be redeemed on payment of the principal of the mortgage-money in a lump sum. It was further provided that the mortgagor should not be entitled to claim mesne profits nor the mortgagee to claim interest. *J.*,—alleging that he had purchased the equity of redemption of the mortgaged property in 1869; that since the purchase the mortgagee had not paid any revenue, and therefore he, *J.*, had been compelled to pay it; and that consequently the mortgage-money had been paid out of the profits of the mortgaged property and a surplus was due,—sued the original mortgagor and the mortgagee for possession by redemption of the mortgaged property and for surplus profits, or for possession of the mortgaged property on payment of any sum which might be found due. One of the defences to the suit was that the mortgage had already been redeemed in 1877 by the original mortgagor, and the suit was therefore not maintainable. *Held* (i) that, assuming that such redemption had taken place, that fact could not prejudice the plaintiff's rights arising out of the mortgage, whatever the effect of such redemption might be as between the original mortgagor and the mortgagee, and such redemption was therefore not a bar to the suit; (ii) that the plaintiff was entitled to take into account the amount of revenue which he had been compelled to pay by reason of the mortgagee's default; (iii) that in the accounting the plaintiff was entitled to avail himself of annual rests; and (iv) that the mortgagee having had notice of the plaintiff's purchase, any payments which he might have made to the original mortgagor on account of revenue after the purchase were improperly made, and could not be taken into account against the plaintiff. JAIJIT RAI *v.* GOBIND TIWARI [I. L. R., 6 All., 303

422. ——— *Equity of redemption.—Charge created by mortgagors.—Power of executors.—Property subject to a trust.*—*R.* died leaving a will, under which he gave certain legacies and left the remainder of his property to two sons, *A.* and *P.*, whom he appointed executors. *P.* died leaving his brother *A.* and his widows executors to his will, under which his adopted sons, *M.* and *S.*,

**MORTGAGE**—*continued.*

10. ACCOUNTS—*continued.*

**Mode of taking accounts**—*continued.*

became entitled to his property. In consequence of some alleged mismanagement on the part of *A.*, *M.* and *S.* filed a bill in the late Supreme Court and obtained a decree ordering the master of the Court to take an account of the rents and profits which had come into the hands of *P.'s* executors. While these accounts were being taken, *A.* died, leaving a will by which he appointed his widow and his grandsons executors, and after certain devises, not comprising a property in Tumlook, gave the residue of his immoveable property to the said grandsons, who took it subject to payment—(1) of such of the legacies as remained unpaid under *R.'s* will, and (2) of what might be due by *A.* to *P.'s* estate After *A.'s* death, the above suit in equity was revived against his executors. The said executors borrowed money from one Mackintosh on the security of a bond and a mortgage of certain property which he obtained (including the Tumlook property) by an indenture, which recited that the said executors were still accountable in respect of the above legacies and debts, and provided that in the event of any default, or of any sale by Mackintosh, the said debts and legacies were to be paid out of the proceeds in the first instance before either mortgage-money, or interest, or costs, or expenses. After this a decree in the above suit was made against *A.'s* executors for R1,32,000, and this not being paid, a writ of *fieri facias* was issued, under which the Sheriff sold to *M.* (benami) the equity of redemption in the Tumlook property subject to Mackintosh's mortgage. The latter then obtained a decree of foreclosure and commenced another suit against *M.* which was compromised, and a decree made by consent in favour of Mackintosh, who then sold his interest in the mortgaged property to *M.* Under these circumstances, *M.* claimed the right of proving the whole amount of the sum due to him in the equity proceedings without taking into account the Tumlook property; on the other hand, the creditors of *A.* insisted that *M.* was bound to treat the Tumlook property as an asset of *A.'s* estate. *Held* that *M.* was bound to hold the property on the same terms as those on which he acquired it,—*viz.*, that it was subject to a trust in his own favour for the payment of his own debt. MONOMOTHO NATH DEY *v.* GREENDER CHUNDER GHOSE . . **24 W. R., 366**

**423.** ——————— *Suit for possession of property mortgaged by zur-i-peshgi.—Form of suit.*—Directions as to the nature of accounts to be taken in a suit for possession of property the subject of a zur-i-peshgi mortgage, and as to the form of suit in such a case. SUYEEDUN *v.* ZUHOOR HOSSEIN **[W. R., 1864, 44**

**424.** ——————— *Interest.—Beng. Reg. XV of 1793, s. 10.—Suit for redemption.*—Where a mortgage deed stipulates for interest at 9 per cent., but other and collateral deeds, forming part of the same transaction, provide for further profits to the mortgagee,—*Held* that the mortgagor cannot, unless there be a positive legal enactment to that effect, be heard to plead that the

**MORTGAGE**—*continued.*

10. ACCOUNTS—*continued.*

**Mode of taking accounts**—*continued.*

written engagement, though not extending to the whole profit stipulated, must be adhered to as against the mortgagee, though the mortgagor may go beyond it to show the full extent of the profit, and so to be relieved from the consequences of his actual contract. The mortgagee may retain his pledge until he has received out of it his debt with interest at 12 per cent., the maximum allowed by section 10 of Regulation XV of 1793. In a suit for redemption, on the ground that the debt has been satisfied with interest, the onus is on the plaintiff. A mortgagee is not an assurer of the continuation of the same rate of profit as his mortgagor was able to raise; hence an estimate of the rental preceding the mortgagor's possession is not sufficient proof of the profits in his time. The nature of the accounts which a mortgagor may call for from the mortgagee, explained. The mortgagee need not personally attest the accounts, if he has no personal knowledge of them. Presumptions against mortgagees for non-production of accounts must have reasonable limits, and not be mere conjectures or based on inexact data. MAKHANLAL *v.* SRIKRISHNA SING **[2 B. L. R., P. C., 44: 11 W. R., P. C., 19 12 Moore's I. A., 157**

**425.** ——————— *Suit for redemption against mortgagee in possession.—Account.—Evidence.*—In a mortgage suit, where the defendant admitted that he was in possession of the property in dispute as a mortgagee under the plaintiff, but refused to put in evidence the mortgage-deed, which was insufficiently stamped,—*Held* that the plaintiff was entitled to redeem, on paying what was due from him on the mortgage, together with the costs of the suit; and that if the mortgagee refused to pay the penalty and put the mortgage-deed in evidence, he could only be credited in the account with the sum which the plaintiff admitted to be the amount of the principal, and must be debited with the income derived from the land since he (mortgagee) had been in possession. In taking the account on a mortgage, it lies upon the mortgagee to prove what is due from the mortgagor in respect of principal and interest. GANGA MULIK *v.* BAJAJI **[I. L. R., 6 Bom., 669**

**426.** ——————— *Confiscation of mortgagee's rights.—Suit for redemption.—Account.*—A mortgagee's rights being confiscated by Government for rebellion were given to defendants. *Held*, on plaintiff's claim for redemption, that the defendants must account for excess of profits over interest in the years when they were in possession. MAHOMED SALAMUT HOSSEIN *v.* SOOKH DAYEE **[2 Agra, 116**

**427.** ——————— *Decree in mortgage suit giving mortgagee possession in default of payment of mortgage-debt.—Relation between mortgagor and mortgagee.—Mortgagee in possession under decree.—Decree for possession in mortgage suit, Effect of.*—The plaintiff mortgaged

**MORTGAGE**—*continued.*

10. ACCOUNTS—*continued.*

**Mode of taking accounts**—*continued.*

certain land to the defendant in 1864. In 1874 the defendant (mortgagee) obtained a decree against the plaintiff upon the mortgage, ordering the plaintiff to pay the defendant the sum of R40; in default of payment the defendant (mortgagee) to take possession of the land until the said sum should be paid. In pursuance of the said decree the defendant took possession. The plaintiff brought the present suit to redeem the said land, alleging that the amount of the mortgage debt had been fully liquidated out of the surplus profits of the land. *Held* that the defendant (mortgagee) was not liable to account to the plaintiff for such profits. Under the former decree the defendant was entitled to take possession, and retain it with the attendant benefits until the plaintiff should pay a definite sum which he had never paid. The defendant held under the said decree a complete title to the land until such payment was made. NAVLU *v.* RAGHU

**[I. L. R., 8 Bom., 303**

**428.** ——————— *Mortgagee in possession.—Liability to account for profits, and to what extent.*—A mortgagee in possession of the mortgaged land, who, instead of letting it to ryots and realising the rents in the ordinary way, cultivates it himself, is not responsible or liable to account for the whole of the profits arising to him by farming the land, but only for such profits as he would have realised had he let it to a tenant, or as the mortgagor would have realised had he let it. RUGHOONATH ROY *v.* BARAIK GEEREEDHAREE SINGH

**[7 W. R., 244**

**429.** ——————— *Mortgagee's charges.—Mortgagee in possession, Duty of.—Cultivation.—Held* that a mortgagee in possession of land was bound to cultivate the best crop which it was ordinarily capable of yielding. GIRJOJI BHIKAJI SONAR *v.* KESHAVERA RAVJI PATIL HENGE

**[2 Bom., 211**

**430.** ——————— *Suit for redemption of zur-i-peshgi mortgage.—Balance which might have been recovered by mortgagee.*—Under the terms of a zur-i-peshgi mortgage,—*Held* that the mortgagee was not entitled to demand the payment of so much of the balances as had become irrecoverable by reason of his own *laches*, but that he was entitled to retain possession of the mortgaged estate till the balances recoverable at the time of the commencement of the redemption suit were paid by the mortgagor. RAM PERSHAD *v.* KISHNA

**[3 Agra, 146**

**431.** ——————— *Mortgagee's charges.—Obligation of mortgagee in possession to repair.*—A mortgagee in possession of mortgaged premises is bound to keep them in necessary repair, and is at liberty to charge for the same with interest. JOGENDRONATH MULLICK *v.* RAJ NARAIN PALOOYE

**[9 W. R., 489**

**432.** ——————— *Allowances to mortgagee.—Suit for redemption.—Costs of repairs.*

**MORTGAGE**—*continued.*

10. ACCOUNTS—*continued.*

**Mode of taking accounts**—*continued.*

—In a redemption suit a mortgagee is entitled to credit for reasonable costs of repairs, if he renders an account of rents and profits. LAKSHMAN BHISAJI SIRSEKAR *v.* HARI DINKAR DESAI

**[I. L. R., 4 Bom., 584**

**433.** ——————— *Allowances to mortgagee.—Conditional sale.—Expense of repairs.*—In a suit brought to redeem certain property which had been conveyed by the ancestors of the plaintiff to the ancestor of the defendant, it was held that the deed of conditional sale amounted in effect to a mortgage of the property, and that, according to the Courts of Equity, a mortgagee in possession ought to be allowed for proper and necessary repairs to the estate. Where portion of the mortgaged premises was accidentally burned, and portion of them fell down, and the mortgagee rebuilt them, it was held that the mortgagor was not entitled to redeem, unless upon payment of the sum so expended by the mortgagee, though such sum amounted to more than double the price for which the premises had been conditionally sold to the mortgagee. MANCHARSHA ASHPANDIARJI *v.* KAMRUNISSA BEGAM

**[5 Bom., A. C., 109**

**434.** ——————— *Allowances to mortgagee.—Expenses of improvements and repairs.*—Though a mortgagee without any agreement is not allowed to charge the mortgagor with all sums which he may think fit to expend in the repair or the improvement of the mortgaged property, whether such expenditure be made by him voluntarily or in pursuance of some official order which he was not legally bound to comply with, yet he may charge the mortgagor for necessary repairs, and the latter will also be liable for any expenditure which he may himself have sanctioned. AMEEROOLLAH *v.* RAM DOSS DOSS

**[2 Agra, 187**

RAGHO BAGAJI *v.* ANAJI MANAJI PATIL

**[5 Bom., A. C., 116**

**435.** ——————— *Allowance for improvements and repairs.*—Claims made by a mortgagee in respect of money laid out in improvements after the expiry of the day fixed for repayment must depend on an equitable consideration of all the circumstances of the case. The English rule should be adopted under which the mortgagee is only allowed to claim for such outlay as has been required in order to keep the mortgaged premises in a good state of repair and to protect title. RAMJI BIN TUKARAM *v.* CHINTO SAKHARAM . **1 Bom., 199**

**436.** ——————— *Directions for account.—Mortgagee in possession.—Buildings and improvements, Allowance for.*—The rule of Courts of Equity in England as to allowance to a mortgagee in possession not applied, because the mortgagee was led into a belief by the course of decisions in the late Sudder Adawlut, and the general understanding caused by those decisions, that, upon the non-payment by the mortgagor of the money at the time

MORTGAGE—*continued.*

10. ACCOUNTS—*continued.*

**Mode of taking accounts**—*continued.*

fixed, he had, according to the terms of the mortgage instrument, become the absolute owner of the property. The mortgagee was allowed the benefit for buildings erected, or permanent improvements made by him upon the mortgage premises. ANANDRAV *v.* RAVJI . . . . . **2 Bom., 214**

**437.** ——————— *Suit for redemption.—Mortgagee in possession.*—A mortgagee in possession is liable to account for profits arising from trees planted by himself on the mortgagor's land. A mortgagee in personal possession is, in the absence of any special contract to the contrary, chargeable with a fair occupation rent, in the case of buildings personally occupied by him for the purpose of residence or carrying on trade or business; and in the case of land personally occupied or cultivated by him, either with a fair occupation rent or with the actual net profits realised from the use of the land. In ascertaining what those profits are, with which the mortgagee ought to be credited in reduction of his mortgage debt with interest thereon, the mortgagee ought to be credited for his expenses in obtaining produce from the land and a moderate interest on the amount of such expenses. Principles laid down on which an account should be taken from a mortgagee in possession. PRABHAKAR CHINTAMAN DIKSHIT *v.* PANDURANG VINAYAK DIKSHIT **[12 Bom., 88**

**438.** ——————— *Improvements and accretions, Right to.—Fruit trees.*—The holder of a field, on the survey tenure, mortgaged it with possession, secured by a registry of the mortgagee's name as occupant. Certain fruit trees, coming under the operation of No. 3 of the Revised Survey Rules, were sold, by the Government, to the mortgagee as occupant. *Held* that the trees, by the sale, became a portion of the mortgaged estate, and, as such, were liable to redemption, on payment of the amount of the mortgage-money with interest, of the money laid out in purchasing the trees, and of other reasonable expenses. BAKSHIRAM GANGARAM *v.* DARKU TUKARAM . . . **10 Bom., 369**

**439.** ——————— *Village mortgaged without specifying boundaries.—Accretions to village.—Rights of parties on redemption or foreclosure.*—Where a village without specification of boundaries, is mortgaged as a whole, the mortgagee is, on the one hand, entitled to it as a security with any casual increase or decrease which may occur to it; and is, on the other hand, subject to its redemption by the mortgagor to the same extent. SADASHIV ANANT *v.* VITHAL ANANT . **11 Bom., 32**

**440.** ——————— *Expenses of revenue survey.—Held* that a mortgagee in possession was entitled to be allowed for expenses incurred in connection with the revenue survey of the land mortgaged to him. BAPUSA BIN SADASHIV *v.* RAMJI BIN GOPALJI . . **2 Bom., 220**

**441.** ——————— *Mortgagee, Obligation of.—Expenses incurred in protecting title*

MORTGAGE—*continued.*

10. ACCOUNTS—*continued.*

**Mode of taking accounts**—*continued.*

*—Stipulations not creating fresh obligations.*—Under the ordinary law of mortgage the mortgagor is bound, so long as the equity of redemption remains with him, to indemnify the estate against expenses incurred in protecting the title. So that where a mortgage-bond contains stipulations under which the mortgagor engages to repay to the mortgagee any costs he may incur in suits brought against him by the mortgagor's co-sharers, and also any debts charged upon the mortgaged property which the mortgagee may pay, the stipulations do not create any fresh obligation. DAMODAR GUNGADHAR *v.* VAMANRAV LAKSHMAN **[I. L. R., 9 Bom., 435**

**442.** ——————— *Right of purchaser of equity of redemption to set off sums paid in reduction of mortgage.*—The only payments which purchasers of the equity of redemption can claim to deduct from the mortgage-debt, are sums actually received by the mortgagee in reduction thereof, not money owed by the mortgagee to the mortgagor on some other account. TARINEE KANT BHUTTACHARJEE *v.* GANODA SOONDUREE DEBEE **[24 W. R., 460**

**443.** ——————— *Suit by purchaser of equity of redemption.—Costs of a redemption suit.—Compensation to mortgagee.*—The plaintiffs sued as purchasers of the equity of redemption from *S.*, a Hindu widow, to redeem a mortgage effected by her husband *B.* The mortgage-deed recited that a portion of the mortgaged land was held by *B.*, not as owner but as mortgagee, from a third party. *S.* was alive when the suit was instituted, but she died after the settlement of issues. The plaintiff then filed a supplementary claim to succeed as *B.'s* next heir. The defendants (the sons of the mortgagee) contended that the plaintiff could not redeem, because the sale by *S.* was invalid. They also claimed compensation for loss of the rents and profits of a portion of the mortgaged property redeemed from *B.* by the original owner. The Subordinate Judge allowed the plaintiff's claim. On appeal, the District Judge confirmed his decree, being of opinion that the sale was valid as against the defendants, because there were no collateral heirs. On appeal to the High Court,—*Held* that the defendants were not entitled to any compensation on account of the redemption of a portion of the mortgaged property by the original owner, because they were aware that the mortgage to *B.* was liable to be redeemed, and they (defendants) took such a precarious security at their own risk. In a redemption suit the defendant (mortgagee) is ordinarily entitled to his costs, unless he has refused a tender of the amount due to him, or has so misconducted himself in the course of the suit as to induce the Court to subject him to a penalty. DHONDO RAMCHANDRA *v.* BALKRISHNA GOBIND **[I. L. R., 8 Bom., 190**

**444.** ——————— *Interest.—Proof of accounts.—Failure to keep or omission to produce*

**MORTGAGE**—*continued.*

10. ACCOUNTS—*continued.*

**Mode of taking accounts**—*continued.*

*accounts.*—In seeking to have the account taken and to have it ascertained whether the mortgagee has by means of the usufructuary mortgage obtained more than 12 per cent. interest, and if so, that the surplus may be applied in reduction of the principal, the mortgagee is not asking the Court to authorise a departure from the agreement of the parties (where there is one) that the mortgage debt should bear no interest during a certain period. The onus is on the mortgagor to prove that the principal sum has been paid or satisfied; and on the mortgagee to show what, if anything, is due to him for interest. Failure of the mortgagee in his duty, as trustee for the mortgagor, to keep accounts, and to produce proper accounts, is to be regarded as misconduct which ought to be taken into consideration upon the question of costs. KALLYAN DASS *v.* SHEO NUNDUN PURSHAD SINGH . **18 W. R., 65**

**445.** ——————— *Usury laws.—Beng. Reg. XXXIV of 1803.—Obligation on mortgagee to file accounts.*—In a mortgage dated in 1852 of malikanah fixed for the period of settlement, it was agreed that the mortgagee should collect the village jumma, pay the Government demand, and take the malikanah, of which part was to be received by him as interest on the money lent at one per cent. per mensem, and the balance, *viz.*, R565 per annum, was to be retained by him as the costs of collection. No accounts were to be rendered of the malikanah collected during the time of the mortgagee's possession If this agreement had been a contrivance for securing to the mortgagee a higher rate of interest than that to which he was then by law entitled, it would have been void under the usury laws (in force under Regulation XXXIV of 1803 until the passing of Act XXVIII of 1855), and would not have prevented the accounts from being taken. But as the Courts found that the R565 per annum constituted a fair percentage, which it had been *bonâ fide* agreed should be allowed to the mortgagee for the costs of collection, it was held that the agreement had been rightly treated as a sufficient answer to a suit based on the assumption that the whole of the mortgage-money, principal and interest, would be satisfied if the accounts (contrary to the agreement) were taken on the basis of charging the mortgagee with the R565, or so much thereof as he should fail to prove had been actually expended in the collection. If the amount received by the mortgagee had been fluctuating, production of the accounts might have been necessary for a decision on the validity of the agreement set up. But it could not be said that by no agreement could a mortgagee relieve himself from the obligation of filing accounts under the 9th and 10th sections of Regulation XXXIV of 1803; and in this case he had done so: the only sum that he was to receive beyond the interest allowed by law being an unvarying balance found to be a fair allowance for the costs of collection. BADRI PRASAD *v.* MURLI DHAR

**[I. L. R., 2 All., 593**
**L. R., 7 I. A., 51**

**MORTGAGE**—*continued.*

10. ACCOUNTS—*continued.*

**Mode of taking accounts**—*continued.*

**446.** ——————— *Mortgagee in possession.—Interest.—Beng. Reg. XV of 1793.*—In taking the accounts as between a mortgagor and a mortgagee in possession, the interests may be set off from time to time against the rents and profits, the mortgagee only accounting to the mortgagor for any rents, profits, and interest on the same which he may have received over and above the interest due to him upon the debt. RADHABENODE MISSER *v.* KRIPAMOYEE DABEE

**[10 B. L. R., 386 : 17 W. R., 262**
**14 Moore's I. A., 443**

**447.** ——————— *Interest on collections by mortgagee.—Commission on amount collected.—Held* that in cases of redemption of mortgage the mortgagee should not be charged with interest on the money collected by him, but that the money so collected should first be applied in payment of interest accruing due on the mortgage-debt; and, if there is any surplus, in reduction of the principal mortgage-debt. *Held* further, that the mortgagee is entitled to commission on the gross amount of collections to cover the expenses of collection, &c., and this he is entitled to get at the rate of 10 per cent., unless there is any express stipulation to the contrary, or it is shown to be unreasonable. ROGHONATH *v.* LUCHMUN SINGH . . . . . **1 Agra, 132**

**448.** ——————— *Redemption after expiry of time and under new interpretation of law.—Improvements.*—Where under the old law of mortgage by which the mortgagee after the expiry of the time for redemption acquired a proprietary right in the property, there was an absolute delivery of possession to the mortgagee, and the mortgagor afterwards stood by and allowed the property to be sold as unincumbered, the Court in allowing the mortgagor after twenty years to have redemption of the property under the new interpretation of the law of mortgage, yet considered that, under the peculiar circumstances of this case, the Court would not be justified in calling upon the mortgagee to furnish accounts of the rents and profits on the one hand, and of the principal and interest on the other. Interest on the value of improvements made since the time the property came into the hands of *A.* disallowed. RAMSHET BACHASHET *v.* PANDHARINATH

**[8 Bom., A. C., 236**

**449.** ——————— *Suit by mortgagor for possession under usufructuary mortgage.*—In a suit to recover possession of land with surplus collections, by redemption of a mortgage created by a zur-i-peshgi lease, which was executed before the usury law of 1855 was passed, where the lessee claimed the surplus collections as his profits.—*Held* that the question should be decided on the principle of the Privy Council ruling in the case of *Hoonooman Persaud, 6 Moore's I. A., 393, viz.*, that the mortgagee should be charged in the account for actual rents and profits, and receive interest at the highest rate sanctioned by the law then existing. Finding, on adjust-

MORTGAGE—*continued.*

10. ACCOUNTS—*continued.*

**Mode of taking accounts**—*continued.*

ment of the account between the parties, that there was a balance in favour of the mortgagee, and that therefore plaintiff was not entitled to a decree for re-entry, the Court (following *Kullyan Dass* v. *Sheo Nundun Purshad Singh, 18 W. R., 65*) determined to declare the state of the account between the parties up to the end of the year to which the evidence extended. PERLADH SINGH BAHADOOR *v.* BROUGHTON [24 W. R., 275

450. ——— *Mortgagee in possession.—Interest.*—The proper sum to be allowed a mortgagee for surinjamee is what he has actually spent as expenses of his management. No decree should be given against a person as being the real mortgagee without evidence of the benami holding. A mortgagee is entitled to interest on account of the balance of putni rents paid by him. BROJONATH SINGH ROY *v.* BHUGOBUTTY DOSSEE [1 W. R., 133

451. ——— *Interest.—Mode of calculation.*—There is no law restricting a mortgagee to the receipt by way of interest of the amount of principal lent. The mode of calculation to be followed in such cases is every year to add the amount of interest to the principal sum, and then deduct the value of the usufruct. ENAET ALI *v.* KUHUR ROY [2 W. R., 289

DOORGA CHURN PAHAREE *v.* CHUTOORBHOOJ DOSS [5 W. R., 200

452. ——— *Mortgage transactions before Act XXVIII of 1855.—Bom. Reg. V of 1827, ss. 11 and 12.—Arrears of interest.*—In mortgage transactions in which the mortgage contracts have been entered into before Act XXVIII of 1855 came into operation, and to which Regulation V of 1827, sections 11 and 12, applies, and in which an account of principal and interest on the one side, and of rents and profits on the other side, is not directed, the arrears of interest must be limited to six years. VITHAL MAHUDEB *v.* DAND VALAD MAHOMMED HOSSEIN . . . 6 Bom., A. C., 90

453. ——— *Provision for payment of interest out of usufruct.*—Where the usufruct of mortgaged property was to be enjoyed in lieu of interest, the fact of the mortgagees having had possession was held to be no ground for the inference that any portion of the debt, save the interest, was paid off from the usufruct. BAMA SUNDUREE DOSSEE *v.* BAMA SUNDUREE DOSSEE . 10 W. R., 301

454. ——— **Mortgage with decree for account and sale.**—*Withdrawal of execution-proceedings.—Principle on which accounts are to be taken.*—A mortgagee, who has obtained a decree for an account and sale, is not entitled to withdraw from the taking of accounts in his execution-proceedings when these accounts appear to be going against him. DOOLEE CHAND *v.* OMDA KHANUM *alias* BABU SHUBIBU I. L. R., 6 Calc., 377: 7 C. L. R., 375

MORTGAGE—*continued.*

10. ACCOUNTS—*continued.*

455. ——— **Right to re-open accounts.**—*Suit by mortgagor for possession under usufructuary mortgage.*—In a suit to recover possession of land in the possession of the mortgagor under a usufructuary mortgage (which is in reality a suit between the mortgagor and mortgagee for an adjustment of the account between them), if upon taking an account it appears that the mortgagee has been fully satisfied, the mortgagor is not only entitled to have the property back, but (the decision in *Motee Soondurce* v. *Indrajeet Kowaree, Marsh., 112,* being overruled), the Court is bound as a Court of Equity, and acting upon the principle that it is always the aim of a Court of Equity to finally determine as far as possible all questions concerning the subject of the suit, to cause an account to be taken up to the time of the decree, the account so taken being considered binding and the parties not being at liberty, except under peculiar circumstances, to re-open it in another suit. KULLYAN DASS *v.* SHEO NUNDUN PURSHAD SINGH . . 18 W. R., 65

And *see* ROY DINKUR DYAL *v.* SHEO GOLAM SINGH [22 W. R., 172

And LUTAFUT HOSSEIN *v.* CHOWDHRY MAHOMED MOONEM . . . . 22 W. R., 269

456. ——— **Realisation by mortgagee of sum in excess.**—*Interest.—Usufructuary mortgage.*—Where a mortgagee under a usufructuary mortgage has realised a sum of money in excess of the amount due to him, it is an equitable practice to allow to the mortgagor interest on such sum at the same rate at which interest has been allowed to the mortgagee on his mortgage-debt. BECHOO SINGH *v.* ROY SHEO SAHOY . 1 N. W., 56: Ed. 1873, 111

457. ——— *Suit for account and redemption.—Form of decree.*—In a suit for account and redemption, if the mortgagee, on taking the accounts, is found to have been overpaid, the general practice is to order the payment, by him, of the balance due to the mortgagor, with interest from the date of the institution of the suit. JANOJI *v.* JANOJI . . . . I. L. R., 7 Bom., 185

458. ——— **Binding effect of account.**—*Mortgagor and mortgagee.—Puisne mortgagee.—Quære,*—Whether the account arrived at in a decree obtained by the prior mortgagee against the mortgagor only is binding on a puisne mortgagee who had no notice of the subsequent incumbrance. SANKANA KALANA *v.* VIRUPAKSHAPA GANESHAPA [I. L. R., 7 Bom., 146

459. ——— *Assignee of mortgagee.—Suit for redemption.*—In India, as in England, a mortgagee may transfer his rights to a third person by way of assignment, but such transfer must be without prejudice to the rights of the mortgagor, and in a suit by a mortgagor for redemption where the assignment has been made without the knowledge of the mortgagor, the assignee is bound by the state of the account between the mortgagor and

**MORTGAGE**—*continued.*

10. ACCOUNTS—*continued.*

**Binding effect of account**—*continued.*

mortgagee. CHINNAYYA RAWUTAN *v.* CHIDAMBARAM CHETTI . . . I. L. R., 2 Mad., 212

460. ——— **Error in account.**—*Ground for reforming account.—Wrong statement of account in agreement to pay mortgage-debt by instalments.*—In a written agreement by a debtor to pay his debt by instalments securing the payment by a mortgage of land, the amount of the debts was erroneously stated to be greater than it actually was. In a suit on the agreement,—*Held* that such an error was ground for reforming the account but not for setting aside the agreement. SETH GOKUL DASS GOPAL DASS *v.* MURLI . I. L. R., 3 Calc., 602; 2 C. L. R., 156 [L. R., 5 I. A., 78

**MORTGAGE-BOND CREATING CHARGE ON IMMOVEABLE PROPERTY.**

*See* CASES UNDER REGISTRATION ACT, 1877, s. 17.

——— **Suit on—**

*See* RES JUDICATA—CAUSES OF ACTION.
[I. L. R., 3 Calc., 363
14 B. L. R., 408: 23 W. R., 187
23 W. R., 344
8 B. L. R., Ap., 92
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**MORTGAGE-DEBT.**

——— **Apportionment of—**

*See* CONTRIBUTION, SUITS FOR—PAYMENT OF JOINT DEBT BY ONE DEBTOR.
[3 B. L. R., A. C., 357

*See* CASES UNDER MORTGAGE—MARSHALLING.

——— **Payment of portion of—**

*See* LIMITATION ACT, 1877, ART. 146 (1871, ART. 149).
[I. L. R., 4 Calc., 283

**MORTGAGED PROPERTY.**

——— **Decree against—**

*See* CASES UNDER DECREE — FORM OF DECREE—MORTGAGE.

*See* CASES UNDER DECREE—CONSTRUCTION OF DECREE—MORTGAGE.

——— **out of jurisdiction.**

*See* CASES UNDER JURISDICTION—SUITS FOR LAND—GENERAL CASES—FORECLOSURE.

*See* JURISDICTION—SUITS FOR LAND—GENERAL CASES—REDEMPTION.
[I. L. R., 1 All., 431
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**MORTGAGED PROPERTY**—*continued.*

——— **Sale of, to different persons.**

*See* CONTRIBUTION, SUITS FOR—PAYMENT OF JOINT DEBT BY ONE DEBTOR.
[I. L. R., 4 Calc., 369
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**MORTGAGEE.**

——— **in possession.**

*See* INDIGO FACTORY.
[I. L. R., 3 Calc., 231

*See* LIMITATION ACT, 1877, s. 10 (1859, s. 2) . . B. L. R., Sup. Vol., 901

*See* CASES UNDER MORTGAGE—ACCOUNTS.

——— **Lien of, on sale of mortgagor's interest.**

*See* MORTGAGE—SALE OF MORTGAGED PROPERTY—MONEY DECREES ON MORTGAGES . . I. L. R., 1 Calc., 337

——— **of portion of under-tenure, Rights of—**

*See* SALE FOR ARREARS OF RENT—RIGHTS AND LIABILITIES OF PURCHASERS.
[I. L. R., 4 Calc., 520

——— **Purchase by, of proprietary right in sír land.**

*See* RIGHT OF OCCUPANCY—TRANSFER OF RIGHT . I. L. R., 1 All., 448, 459

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*See* ESTOPPEL—ESTOPPEL BY JUDGMENT.
[I. L. R., 4 Calc., 692

——— **Right of, to notice of sale.**

*See* SALE FOR ARREARS OF RENT—UNDER-TENURES, SALE OF—
[I. L. R., 4 Calc., 438

——— **Suit by, against mortgagor and purchaser of mortgaged property.**

*See* DECREE—FORM OF DECREE—MORTGAGE . . 3 B. L. R., A. C., 357

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*See* CASES UNDER EQUITY OF REDEMPTION.

*See* FRAUD—WHAT CONSTITUTES FRAUD, AND PROOF OF FRAUD.
[I. L. R., 1 All., 303

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*See* PARTIES TO CONVEYANCE.
[12 B. L. R., Ap., 7

*See* RIGHT OF OCCUPANCY—TRANSFER OF RIGHT . I. L. R., 1 All., 448, 459

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*See* HINDU LAW—GUARDIAN—RIGHT OF GUARDIANSHIP . I. L. R., 5 Calc., 43 [7 W. R., 73 3 W. R., 194

*See* HINDU LAW—INHERITANCE—SPECIAL HEIRS—FEMALES—MOTHER. [12 W. R., 78 2 Mad., 402 6 Bom., A. C., 215

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*See* CASES UNDER SMALL CAUSE COURT, MOFUSSIL—JURISDICTION — MOVEABLE PROPERTY.

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1. ——— **Misjoinder of causes of action.**—*Different causes of action against different parties.*—When a plaint discloses different causes of action against different parties, it is bad in law, and the suit is not maintainable. SARAT SOONDERY DEBI *v.* SURJUKANT ACHARJI CHOWDHRY [2 B. L. R., Ap., 53: 11 W. R., 397

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S. C. MOTEE LALL *v.* RANEE . 8 W. R., 64

2. ——— *Causes of action accruing against parties separately.—Rejection of plaint.*—A plaint against several defendants for causes of action which have accrued against each of them separately, and in respect of which they are not jointly concerned, should be rejected. RAJARAM TEWAR *v.* LUCHMUN PRASAD [B. L. R., Sup. Vol., 731: 2 Ind. Jur., N. S., 216 8 W. R., 15

PANCH COWREE MAHTOON *v.* KALEE CHURN [8 W. R., 490

PEGOO JAN *v.* MULLICK WAIZOODDEEN [18 W. R., 464

3. ——— *Separate claims against separate parties.*—A suit against five defendants, including claims of the most miscellaneous character against each defendant, was dismissed by the first Court on the ground of multifariousness. The Subordinate Judge, on appeal, held that plaintiff was in any case entitled to a decision on one of his claims; and further held that the suit was not multifarious. *Held,* on special appeal, that the Court could not select one claim on which to proceed when plaintiff insisted on pressing all. *Held,* also, that the plaint was multifarious; and the suit was properly dismissed by the first Court. MANIRUDDIN AHMED *v.* RAM CHAND . . . 2 B. L. R., A. C., 341

**MULTIFARIOUSNESS. — Misjoinder of causes of action—*continued.***

RAM DOYAL DUTT *v.* RAM DOOLAL DEB [11 W. R., 273

4. ——————— *Distinct causes of action against separate defendants.*—It is illegal to join different causes of action in the same suit against different parties where each has a distinct and separate interest,—*e.g.*, to a joint action for the price of timber against defendants who purchased each one pair of timber from the plaintiff separately from the other. BAROO SIRCAR *v.* MASSIM MUNDUL [21 W. R., 206

5. ——————— *Suit to set aside alienation by guardian to different alienees.*—Several causes of action against different defendants cannot be joined in one suit; therefore, where a suit was brought to set aside several transactions entered into by a guardian with different persons, and no relief was sought against the guardian, it was held that the suit was bad by reason of misjoinder. MATA PERSHAD *v.* BHUGMANEE [1 N. W., 75; Ed. 1873, 128

*See* RUTTA BEEBEE *v.* DUMBEE LAL [2 N. W., 153

LOOLOO SINGH *v.* RAJENDUR LAHA [8 W. R., 364

GOLAM MUSTAFA KHAN *v.* SIBO SOONDUREE BURMONEE . . . 10 W. R., 187

HURRO MONEE DOSSEE *v.* ONOOKOOL CHUNDER MOOKERJEE . . . 8 W. R., 461

6. ——————— *Suit to set aside separate alienations.*—A suit to set aside two sale transactions of different dates and made to different vendees will be dismissed for misjoinder. BANEE KRISHUN *v.* KOONDUN LALL . 2 N. W., 221

7. ——————— *Joinder of causes of action.—Claim against different portions of property.*—Where the plaintiff claims to recover possession of two distinct portions of a property from which he has been dispossessed at different periods and under different circumstances, and claims them under the same title and from the same party, there is no impropriety in the two claims being joined in one suit. JUNOKEE CHOWDHRANEE *v.* DWARKANATH CHOWDHRY . . . 1 Hay, 555

8. ——————— *Separate alienations of property.—One suit against several alienees.*—A suit brought against a number of alienees of a deceased member of an undivided family, for the recovery of family property illegally alienated by him, is not such a suit as ought to be dismissed on the ground of multifariousness. It is most desirable that the whole of the alienations should be at once before the Court called upon to decide the question, in order to secure the soundness of the particular decision, and perhaps the avoidance of discordant decisions in different cases upon facts nearly the same. VASUDEVA SHANBHAGA *v.* KULKADI NARNAPAI [7 Mad., 290

**MULTIFARIOUSNESS. — Misjoinder of causes of action—*continued.***

9. ——————— *Suit against different alienees.*—Where a plaintiff sued to recover an estate in possession of several persons, who held, not collectively, but in different portions by virtue of several auction and private sales and mortgages,—*Held* that the Court of first instance should have dismissed the plaint for misjoinder, leaving the plaintiff to bring separate suits in respect of the several pieces of property in possession of each defendant or set of defendants. TEWAREE RAGHOONATH SAHAI *v.* MAHOMED NAZEER . 4 N. W., 108

10. ——————— *Suit for portions of property in different hands.*—The auction-purchaser of a talook seeking to obtain possession against the former proprietors, many of whom are cultivators holding separate possession of specific portions and having their houses on the land, must sue them specially for those portions to which they lay claim. He cannot sue the whole community in the aggregate for all the lands of the village. RAMCHUNDER PAUL *v.* OMORA CHURN DEB . . 16 W. R., 155

11. ——————— *Suit for mesne profits in respect of several estates.*—Plaintiff having obtained a decree establishing his title to a number of villages constituting one talook, subsequently brought one suit against all the persons severally in possession of the several estates constituting the talook for mesne profits during their wrongful possession. *Held* that, there being no common liability, the suit must be dismissed for misjoinder. KOONDUN LAL *v.* HIMMUT SINGH . 3 N. W., 86

12. ——————— *Suit by son against several purchasers to set aside sale by father.*—In a suit by a son against a father and certain purchasers to obtain a declaratory decree in respect to certain property, the fact of each purchaser being concerned only in a portion of the case does not render the suit multifarious. KANTH NARAIN SINGH *v.* PREM LALL PAUREY . . 3 W. R., 102

13. ——————— *Suit against several alienees of property.*—Plaintiff alleged that, his father having died while he was a young child, during his minority his father's widows (defendants 1, 2, and 3) aliened the whole of the estate, in portions, to different people at different times. He therefore brought this suit against all the alienees to recover the estate as a whole. The District Judge dismissed the suit on the ground of misjoinder of causes of action. *Held*, on appeal, that the Judge was wrong; that plaintiff's cause of action, the right, was his relation to the family to which the property appertained; and on this right, if established, and if he be not otherwise barred, he would be entitled to recover; the fact that various persons, during his minority, affected to purchase portions of the property, did not destroy the unity of his ground of action. SAMI CHETTI *v.* AMMANI ACHY [7 Mad., 260

14. ——————— *Civil Procedure Code, 1882, s. 45.—Hindu law.—Suit for partition*

**MULTIFARIOUSNESS. — Misjoinder of causes of action—*continued.***

—*Alienees made parties to suit.*—Where a suit was brought by a Hindu for partition of family property against his father, brothers, and fifteen others to whom, it was alleged, the father had improperly alienated numerous parcels of the said property at different times,—*Held* that the better course was for the Court to have ordered, under section 45 of the Code of Civil Procedure, separate trials to be held in respect of each alienation. SUBRAMANYA *v.* SADASIVA . . . . . **I. L. R., 8 Mad., 75**

15. ——————— *Suit to recover property sold in execution of decree.*—Certain properties were sold to *A.* by private contract. Subsequently the properties were attached in execution of a decree against *A.'s* vendors and sold in execution to various purchasers. *A.* instituted a suit against his vendors, the decree-holders, and the purchasers, to set aside the execution sale. *Held* that the suit was not defective by reason of misjoinder of causes of action. *Rajaram Tewari* v. *Luchmun Prasad, B. L. R., Sup. Vol., 173 : 8 W. R., 15,* distinguished. HARANUND MOZOOMDAR *v.* PROSUNNO CHUNDER BISWAS

**[I. L. R., 9 Calc., 763 : 12 C. L. R., 556**

16. ——————— *Suit against several alienees of property.*—In a suit to have certain properties declared liable for the amount of certain decrees, plaintiff's case being that the properties were those of his judgment-debtor, and had passed, in fact, to his admitted representative—the other defendants being men of straw, fraudulently set up as ostensible purchasers,—*Held* that plaintiff had in reality but one cause of action against one party; that even if his suit had been multifarious, the defect or irregularity was not, under the circumstances, such as to warrant his being put out of Court. WISE *v.* GUBREB HOSSEIN CHOWDRY

**[13 W. R., 271**

17. ——————— *Suit to set aside different leases to different persons.*—The claims of different parties setting up different leases from *A.*, and thus opposing the purchaser of the estate from *A.* in obtaining possession, may be joined in one suit brought to set aside their leases, and to recover the profits which they had misappropriated. SHOROOP CHUNDER PAUL *v.* MOTHOOR MOHUN PAUL CHOWDHRY . . . . . **4 W. R., 109**

18. ——————— *Joinder of different causes of action against different parties.*—Under five different pottahs, *A.* granted to *B.* putni leases of five different mehals. The rents of the mehals falling into arrear, the mehals were sold on two different dates. *A.* purchased two of the mehals, *C.* purchased two of the mehals, and *D.* purchased one of the mehals. In a suit brought by *B.* against *A.*, *C.*, and *D.*, to set aside the sales on the ground of irregularity,—*Held*, the suit was bad for multifariousness, and must be dismissed. IMRIT NATH JHA *v.* ROY DHUNPUT SING

**[9 B. L. R., 241 : 18 W. R., 288**

**MULTIFARIOUSNESS. — Misjoinder of causes of action—*continued.***

19. ——————— *Suit for possession of different portions of property after ejectment.*—In a suit to recover possession on the ground of dispossession by all the defendants in consequence of certain Act X decisions,—*Held* that there was but one cause of action, and that the fact that the defendants each claimed to hold portions of the property under different titles could not make the suit bad for misjoinder. ACKJOO BIBEE *v.* LALLAH RAM CHUNDER LALL SAHAI . . **23 W. R., 400**

20. ——————— *Suit for declaration that lands were wukf.—Defendants holding under distinct titles.*—In a suit instituted for a declaration of the Court, under section 15 of Act VIII of 1859, that certain lands and premises in Calcutta were wukf lands, under a certain towliatnamah executed by the ancestor of the plaintiff, the authenticity of which was admitted, and that the defendants who were in possession might be restrained by injunction from recovering the rents of, or intermeddling with, the said lands or premises, and that it might be referred to the Court in chambers to appoint a proper person to act as mutwalli under the said towliatnamah, and that such mutwalli, when so appointed, might be declared entitled to the said lands and premises, the causes of action were alleged to have arisen at various times within the last twelve years, and were distinct as to the several defendants who held by different titles. On objection having been taken to the frame of the suit, the Court held that it was informal, as there was a joinder in one suit of several distinct causes of action, and no grounds were disclosed for relief in a suit in equity, and that the proceeding should have been by way of ejectment against each of the defendants. The suit was accordingly dismissed. If the defendants in such a suit be intruders and strangers, there is no common cause against them, and they must be turned out by action of ejectment against each separately. MUZHUR HOSSAIN *v.* DINOBUNDHO SEN

**[Bourke, O. C., 8 : Cor., 94**

21. ——————— *Held* that there was no misjoinder of different causes in a suit including plaintiff's whole claim, where his cause of action was that the Revenue Commissioners had taken possession of his lands and given it in pottah to other people. IN THE MATTER OF RUTNESSUR DASS . . . . . **14 W. R., 381**

22. ——————— *Suit to enforce the right of pre-emption.—Civil Procedure Code, s. 45.*—Two co-sharers of a village, holding separate shares, sold their shares separately to the same person, upon which a third co-sharer of the village sued them and the vendor jointly to enforce his right of pre-emption in respect of the sales. *Held* that the frame of the suit was bad by reason of misjoinder of defendants and causes of action, and the suit had been properly dismissed on that ground. BHAGWATI PRASAD GIR *v.* BINDESHRI GIR

**[I. L. R., 6 All., 106**

23. ——————— *Civil Procedure Code, 1877, s. 45.—Pre-emption, Suit for.—Irregu-*

**MULTIFARIOUSNESS. — Misjoinder of causes of action—*continued.***

*larity not affecting merits or jurisdiction.*—The sons of *R.* and of *K.* and of *S.* possessed proprietary rights in two mehals of a certain mouzah. *P.* possessed proprietary rights in one of those mehals. In April 1879 the sons of *R.* sold their proprietary rights in both mehals to *G.* In August 1879 the sons of *K.* sold their proprietary rights in both mehals to *G.* Later in the same month the sons of *S.* sold their proprietary rights in both mehals to *N.* *G.* sued *N.* to enforce a right of pre-emption in respect of the sale to the latter, and obtained a decree. *P.* then sued to enforce a right of pre-emption in respect of the three sales mentioned above, so far as they related to the mehal of which he was a co-sharer, joining as defendants *G.* and *N.* and the vendors to them. *G.* alone objected in the Court of first instance to the frame of the suit. That Court overruled the objection and gave *P.* a decree. The lower Appellate Court reversed this decree on the ground of misjoinder. *Held* that in respect of *G.* there was no misjoinder, but that, in respect of the other defendants, there was misjoinder of both causes of action and parties. KALIAN SINGH *v.* GUR DAYAL [I. L. R., 4 All., 163

*24. ——— *Suit against several defendants for possession.—Dispossession under forged document.*—A suit in which the plaintiff alleged that the defendants (including ryots against whom he had been unsuccessful in the Collector's Court) had, in combination, fraudulently availed themselves of a fabricated jummabundi paper as evidence to support certain mokurrari claims, and had thereby ousted him from the full enjoyment of his milkiat right, was held to be simple in its character and not multifarious. GUJADHUR PERSHAD NARAIN SINGH *v.* SAHEB ROY . 19 W. R., 203

In the same case after remand, the plaintiff having failed to prove the allegation of forgery, claimed a declaration that the defendants had not a right to occupy the land at a fixed rent. *Held* that such a declaration could rightfully be asked for only in a separate suit against each separate occupant. SAHEB ROY *v.* GUJADHUR PERSHAD NARAIN SINGH [22 W. R., 221

25. ——— *Joint trespassers.*—At an auction sale for arrears of rent, on the 11th July 1865, plaintiffs purchased a tenure which, on the zemindar's serishta, stood in the name of one Sheikh Miajan, and proceeded to take steps to obtain possession, but were resisted by the defendants. Against one of the defendants who claimed a particular portion of the lands under the tenure in question, they brought a suit in 1869; but this suit was finally dismissed in June 1876, on the ground that all the persons, who were claimants of any part of the lands, ought to have been joined as defendants. Accordingly a fresh suit was brought against all the claimants of the tenure. To this suit the defendants set up various and distinct defences, some alleging one defence and some another, and so on. The Subordinate Judge dismissed the suit for multifariousness. *Held* that there was no multifariousness, the plaintiffs' claim being to recover possession against persons who were alleged to be joint trespassers. OMUR ALI *v.* WEYLAYET ALI . . . 4 C. L. R., 455

**MULTIFARIOUSNESS. — Misjoinder of causes of action—*continued.***

26. ——— *Civil Procedure Code, 1882, s. 28.—Suit for declaratory decree.—Specific Relief Act (I of 1877), s. 42.*—The plaintiffs having obtained a decree for the possession of certain lands, and having received formal possession thereof, brought a suit against eighty-six persons holding distinct and separate tenures in those lands, on the allegations that, "on the plaintiffs attempting to measure the lands, and calling on the tenants to pay rent, ten of the defendants described as prodhans or headmen formed a combination and gained over the other defendants with a view to injure the plaintiffs; that through their help and endeavour the remaining defendants failed to recognise the plaintiffs as landlords, and declined to pay any rent or to allow them to measure the lands, driving away an Ameen who went to measure the lands on behalf of the plaintiffs, and thereby preventing the plaintiffs from exercising their proprietary rights; that the plaintiffs brought suits for rent against some of the defendants, and in those suits the defendants denied the plaintiffs' title as landlords, whereupon the plaintiffs, seeing the necessity of instituting a suit for declaring the defendants tenants of the land, withdrew the suits for rent." They stated their cause of action to be "the defendants' act of not recognising us as their landlords and thereby preventing us exercising our proprietary rights in respect of the land in suit, and not allowing us to make a measurement of that land, and also withholding the payment of rent;" and prayed for a decree establishing their proprietary right and declaring the defendants to be their tenants. *Held* that there was but one and the same cause of action against all the defendants,—*viz.*, a combination to keep the plaintiffs out of the enjoyment of the property they had purchased; and that the suit was not multifarious within section 28 of the Civil Procedure Code. LOKE NATH SURMA *v.* KESHAB RAM DOSS . . I. L. R., 13 Calc., 147

27. ——— *"Multifarious" suit.—Act X of 1877 (Civil Procedure Code), ss. 28, 45.*—Defendant No. 1, the tenant of certain land at fixed rates, on the 12th November 1877 sold his interest in the land to the plaintiff. At the time of the sale the land was in the actual possession of defendant No. 2, defendant No. 1's sub-tenant, against whom, however, defendant No. 1 had obtained an order for ejectment on the 25th June preceding. On the 25th March 1878 defendant No. 1 applied a second time for the ejectment of defendant No 2, and while this matter was pending the plaintiff endeavoured to obtain possession of the land, but was resisted by defendant No. 2. He thereupon instituted a charge of criminal trespass against the latter. This criminal proceeding was pending when, on the 14th September 1878, defendant No. 1 obtained a second order for defendant No. 2's ejectment. Under this order he obtained possession of the land, and also of the crop planted by defendant No. 2, which he sold to defendant No. 3 on the 22nd Sep-

**MULTIFARIOUSNESS. — Misjoinder of causes of action—*continued.***

tember 1878. On the 25th of the same month the plaintiff's charge of criminal trespass against defendant No. 2 was dismissed, on the ground that defendant No. 1 was in possession, and the plaintiff had never obtained possession under his purchase. Defendant No. 1 subsequently let the land to defendant No. 4. The plaintiff, alleging that three causes of action had accrued to him,—*viz.*, (i) on the 12th November 1877, the date of the sale to him; (ii) on the 30th March 1878, when defendant No. 1 applied a second time for the ejectment of defendant No. 2; and (iii) on the 22nd September 1878, when defendant No. 1 took possession of the land,—sued defendants Nos. 1, 2, 3, and 4, claiming (i) possession of the land as against them all; (ii) mesne profits by way of damages for the year 1285 Fasli (September 1877—September 1878) as against defendants Nos. 1 and 2; (iii) mesne profits by way of damages for 1286 Fasli (September 1878—September 1879) against defendants Nos. 1 and 3; and (iv) mesne profits by way of damages for 1287 Fasli (September 1879—September 1880) against defendants Nos. 1 and 4. *Held* by the Full Bench (MAHMOOD, *J.*, dissenting) that the Court of first instance had properly rejected the plaint, the suit being open to the objection that different causes of action against different defendants separately had been joined, for which procedure no sanction was to be found in the Code of Civil Procedure. NARSINGH DAS *v.* MANGAL DUBEY . **I. L. R., 5 All., 163**

**28.** ——————— *Detention in jail.—Suit by thirteen persons jointly for damages for detention.—Plaint taken off the file.—Separate causes of action.—Practice.—Act XIV of 1882, s. 26.*—Thirteen persons who had been committed to jail under one warrant, and for the same offence, jointly sued the Superintendent of the Presidency Jail for their wrongful detention in jail after the term of imprisonment to which they had been sentenced had expired, claiming R2,600 as damages. The defendant applied to have the plaint taken off the file on the ground that the plaintiffs had improperly joined in one suit several distinct and separate causes of action accruing to them as separate individuals. *Held* that the plaint must be taken off the file. ALI SERANG *v.* BEADON . **I. L. R., 11 Calc., 524**

**29.** ——————— *Suit on foreign judgment against members of a firm against some of whom only the judgment was obtained.—A.* obtained a decree against *B.* and *C.* in Ceylon, and having realised a portion of the sum decreed by sale of property in Ceylon, instituted a suit for the balance upon the foreign judgment in British India against *B., C., D., E., F., G.*, on the ground that all were members of one firm. *Held* that the suit would not lie against *D., E., F., G.*, upon the foreign judgment, and that, if the intention was to sue *D., E., F., G.*, upon the original cause of action, and *B., C.*, upon the foreign judgment, the suit was bad for misjoinder. LAKSHMANAN CHETTI *v.* KARUPPAN CHETTI **[I. L. R., 6 Mad., 273**

**30.** ——————— *Suit for share of zemindari cesses realised by auction sale in execution of decree.—Joinder of causes of action.—Joint decree-holders.*—The plaintiff claimed from the defendants as joint decree-holders a fourth share of the proceeds realised by auction sale through the Court of the Munsif of certain houses situate on land subject to a village custom whereby a proprietary due of the above amount was payable to the zemindar of the said land. *Held* by the Division Bench that the claim was not bad for misjoinder, as the due was payable out of the sale-proceeds taken out of Court by the decree-holders. NANKU *v.* BOARD OF REVENUE . . . **I. L. R., 1 All., 444**

**31.** ——————— *Suit for sale-proceeds after rateable distribution.*—In execution of a decree against six persons, the plaintiffs had certain property brought to sale, the proceeds of which were brought into Court. The defendants, who held five separate decrees against some of the persons against whom the plaintiffs' decree was obtained, applied to have the amount in Court rateably distributed, and this was done in accordance with an order of the Court, the proceeds being distributed in proportion to the amount of the decrees. In a suit brought against the defendant, on the allegation that the plaintiffs were entitled to the whole of the proceeds, or in the alternative for distribution on a different principle,—*Held* that there was no misjoinder of causes of action by reason of all the defendants being included in one suit. GOURI PROSAD KUNDU *v.* RAM RATAN SIRCAR **[I. L. R., 13 Calc., 159**

**32.** ——————— *Separate liability of defendants for rent.*—In a suit to recover rent from defendants, with whom engagements had been entered into separately, plaintiff obtained a decree making each of them liable for the whole sum claimed. *Held* that there was a misjoinder of the defendants, and that the decree was wrong in law; but that if the first Court had made each defendant liable in proportion to the rent he had engaged to pay, the objection of misjoinder would not have been allowed to prevail. JUMOONA DOSS *v.* POOKHUR SINGH . . . . **22 W. R., 133**

**33.** ——————— *Suit for contribution.*—The plaintiff was compelled to pay the whole costs of a suit in which there was a misjoinder of causes of action, and which resulted in his and his co-defendants being charged with costs relating to causes of action with which they had no concern. The plaintiff sued, after deducting R71 as his own proper share, to recover the balance from his co-defendants. The plea of misjoinder was allowed. BENI RAM *v.* HIDAYAT HOSSEIN . **7 N. W., 82**

**34.** ——————— *Suit for contribution.*—In a suit against *A. K.* for contribution of moneys paid in satisfaction of two decrees under which the present plaintiffs and defendants were jointly liable, and one of which decrees was founded on an ikrar executed by the parties to the present suit and by one *F.*, not a party, who was expressly excluded from liability in the decree last mentioned, the

**MULTIFARIOUSNESS. — Misjoinder of causes of action—*continued.***

Judge considering that *F.* was liable under the ikrar, but not liable under the bond on which the other decree was founded, decided that there were two distinct causes of action, and dismissed the suit. *Held* that the cause of action on which plaintiffs relied was simply the joint liability of the parties under the decree, and the suit was not multifarious. MAHOMED MIRZA *v.* ABDOOL KUREEM [25 W. R., 41

35. ——————— *Parties.—Suit for contribution.*—The purchaser of a share in a mortgaged estate, who has paid off the whole mortgage-debt in order to save the estate from foreclosure, can claim from each of the mortgagors a contribution proportionate to his interest in the property, but he cannot claim from the other mortgagors collectively the whole amount paid by him. HIRA CHAND *v.* ABDAL . I. L. R., 1 All., 455

*See* RUJAPUT RAI *v.* MAHOMED ALI KHAN [5 N. W., 215

36. ——————— *Institution of suit to redeem, pending a suit by plaintiff to establish his title as representative of the mortgagee.*—The ancestor of the defendants held as mortgagee a 10-biswa share of a mouzah; of this share 5 biswas were recovered and held by the plaintiffs as proprietors. Of the remaining 5 biswas, 3 biswas 6¾ biswansees belonged to *D.*, and 1 biswa 13¼ biswansees to *H.* These 5 biswas were in the defendants' possession. The plaintiffs sued to recover possession of them, alleging that the mortgage had been redeemed out of the usufruct, and that they had acquired *D.'s* rights by auction-purchase in the year 1848, and *H.'s* rights by private purchase from his sons in 1873. They also sued for mesne profits. The defendants pleaded that they held the 5 biswas in suit as proprietors, having acquired *D.'s* rights by private purchase in 1847, and *H.'s* rights similarly in 1851. They also pleaded that, inasmuch as the plaintiffs had brought a suit to establish the sale alleged to have been made to them by *H.'s* sons, and that suit was still pending, the claim for possession of *H.'s* share could not be maintained; and they lastly pleaded that, inasmuch as the plaintiffs admitted that the rights of *D.* and *H.* were acquired by them under separate sales, their claims to those rights could not be joined in one suit. The plaintiffs replied that, assuming the claim to *H.'s* share could not be maintained on the basis of the alleged sale to them, they were nevertheless entitled to possession of *H.'s* share in virtue of their right to *D.'s* share, both shares having been jointly mortgaged. *Held* that the plaintiffs were entitled to ask in one suit for a determination of their claim to the possession of the shares, and to any surplus mesne profits which might be found due in respect of them on taking account, and that the pendency of the suit to establish their purchase of *H.'s* share did not deprive them of the right to sue to recover possession from the mortgagees, although it might have been necessary to determine incidentally in the suit the question at issue in the suit respecting the purchase. *Held*, also, that if the plaintiffs established their right to the share of *D.*, but failed to prove their title as purchasers of *H.'s* share, they could not obtain possession of the share on the ground that it was mortgaged jointly with the shares they already held, and with the share of *D.*, for, according to their own allegation, the mortgage-debt had been redeemed, and there was no longer any common liability which they were required to discharge. MOHUN LALL *v.* JHUMMUN LALL . . . 6 N. W., 246

**MULTIFARIOUSNESS. — Misjoinder of causes of action—*continued.***

37. ——————— *Form of suit.—Joinder of defendants.—Joinder of causes of action.—Civil Procedure Code, 1882, s. 28.*—*A.* leased certain lands to *B.* for a term of seven years commencing with the year 1288 Fasli (19th September 1880). On the 23rd October 1883 *A.* sold the lands to *D.*, who, under his purchase, became entitled to the rents of the lands from the commencement of the year 1291 Fasli (17th September 1883). When some of the instalments of the rent for the year 1291 Fasli became due, *D.* applied for payment thereof to *B.*, who informed him that he had paid the whole of the rent for the year 1291 in advance to *A.* on the 21st May 1883. *D.* then sued *A.* and *B.* for the rent due, praying a decree for rent against *B.*, and in the alternative for a decree against *A.* if it should turn out that *B.'s* allegation of payment was correct. The lower Courts found that *B.* had paid *A.* in good faith, and they dismissed the suit as against him. They also dismissed the suit as against *A.* on the ground that the claims against *A.* and *B.* could not be joined in one suit. On appeal to the High Court,—*Held* that the frame of the suit was unobjectionable, and that on the facts found by the lower Courts *D.* was entitled to a decree against *A.* MADAN MOHUN LALL *v.* HOLLOWAY . . I. L. R., 12 Calc., 555

38. ——————— *Suit for money on contract for money deposited on kistbundi, and for cancellation of kistbundi.*—There is no misjoinder of causes of action in a suit for money contracted to be paid, and for the cancellation of a kistbundi, and for money deposited on the kistbundi. Combined causes of action may be brought in the Court which has jurisdiction to the full amount of such combined causes of action. KINNOO MONEE DEBIA *v.* SHOHORAM SIRKAR . . 3 W. R., 128

BROJO KISHORE CHOWDHRAIN *v.* KHEMA SOONDUREE DOSSEE . . . 7 W. R., 409

39. ——————— *Suit for declaration of right to redeem and for damages.*—A plaintiff cannot bring, in one suit, a claim for a declaration of his right to redeem, and also a claim to a declaration of his right to damages. KESHAREE LALL *v.* GOVINDRAM . . . . 4 N. W., 70

40. ——————— *Claims for arrears of rent and to remove cloud on title.*—A claim for rent in arrear and a claim to remove clouds on the title to demise raised by the tenant are not objectionable on the ground of multifariousness, and may therefore be included in the same plaint. RAJENDUR KISHWUR SINGH *v.* SHEOPURSHUN MISSUR [1 Ind. Jur., N. S., 273: 5 W. R., P. C., 65 10 Moore's I. A., 438

**MULTIFARIOUSNESS. — Misjoinder of causes of action—*continued.***

41. ——————— *Suit on hundis.—Persons parties to hundi in separate capacities.*—Where the payee of a hundi, in a suit to recover the amount of the same, made four persons defendants,—*viz.*, the drawer and the acceptor of the hundi, his own endorsee, and a party whom plaintiff alleged to be the principal, whose agent was the drawer,—the suit was held to be a combination of four suits in one, not allowed by the Civil Courts. HABEEL BEPAREE *v.* CHOALMUN MAH

[10 W. R., 263

42. ——————— *Suit for partition and to eject ryots.*—In a suit for partition of the joint inam lands of a Hindu family, it was not disputed that the plaintiffs were entitled to the share which they claimed, but they joined as defendants a number of cultivating ryots whom they sought to eject. The ryots pleaded that the suit was bad for multifariousness. *Held* that the ryots were improperly joined as defendants in the suit. SAMINADA PILLAI *v.* SUBBA REDDIAR

[I. L. R., 1 Mad., 333

43. ——————— *Suit for misappropriation and breach of contract against two defendants.*—Plaintiffs, members of a pagoda committee appointed under Act XX of 1863, sued defendants for the recovery of R4,480-2-0. The plaint alleged that, in October 1865, the first defendant and another agreed to travel and collect subscriptions for the purpose of erecting a tower at the entrance of the pagoda in question, paying to the pagoda R130 a month during the period they should be engaged in the work, irrespective of the actual collections; that an agreement to this effect was executed, and first and second defendants deputed to collect subscriptions; that both were engaged in the work until November 1869; that under the terms of the said agreement a sum of R6,500 was due, of which only R2,019-14-0 were credited in the accounts of the pagoda; that first and second defendants, when required to account for the balance, informed the plaintiffs that they had paid to the third defendant, the then manager of the said temple, R5,330, and that only R1,170 was due by them. The present suit was accordingly filed against the defendants for the sum of money due by them. The Court of first instance decreed against third defendant alone. On appeal the Civil Judge dismissed the suit as against the third defendant on the ground of multifariousness, he having been sued on the ground of misappropriation, while the cause of action against the first defendant was breach of contract. *Held*, on special appeal, that the suit was not multifarious; that the third defendant was properly included in the suit as a defendant, and did not appear to have been prejudiced in his defence by the course of the proceedings. ARUNACHELLA TEVAR *v.* VENKATASAMI NAIK

[7 Mad., 123

44. ——————— *Civil Procedure Code (Act X of 1877), s. 45.*—The plaintiffs sued for a declaration that the several alienations made by defendant No. 1 (a Hindu widow) to the other defendants were void, and that they, the plaintiffs, were entitled to the several properties after her death; also for an injunction restraining her from making similar unlawful alienations in the future. *Held* that the suit as framed was not maintainable, inasmuch as it included within it several distinct causes of action which, under section 45 of Act X of 1877, could not be joined together in the same suit. The course which should be adopted by a Court or Judge, where there has been such a misjoinder of causes of action, discussed. KACHAR BHOJ VAIJA *v.* BAI RATHORE

[I. L. R., 7 Bom., 289

45. ——————— *Property situated in different districts.—Civil Procedure Code, 1877, ss. 28, 31.*—*A.*, *B.*, *C.*, and *D.* were the proprietors of a 2 annas 13 gundas share in mouzah E., and also of a 2 annas 13 gundas share in mouzah F., both in the district of Bhaugulpore. On 19th September 1872 *A.* mortgaged a 1 anna 4 pie share of E. to *H.* On the 20th September 1872 *A.*, *B.*, *C.*, and *D.* mortgaged their shares in E. and F., together with property in the district of Tirhoot, to the plaintiff. On the 24th March 1873 *A.* mortgaged his share in E. and F. to *J.* On the 13th November 1874 *A.* and *B.* mortgaged their shares in E. to *K.* On the 25th March 1874 *J.* obtained a decree on his mortgage, and the interests of *A.* and *B.* were purchased on the 5th January 1875 by *L.* On the 17th April 1874 *M.*, to whom the first mortgage had been assigned, obtained a decree and attached the property mortgaged. *L.* objected that he had already purchased the interest of *A.*, and on the objection being allowed, *M.* brought a suit against *L.* for a declaration of priority, and obtained a decree on the 9th August 1876. In execution of this decree the property first mortgaged was sold on the 4th March 1878, and after satisfying the mortgage a surplus of R7,664 remained. After the institution of the first suit and before *L.'s* purchase the plaintiff instituted a suit upon his mortgage in the Tirhoot Court without having obtained leave to include that portion of the mortgaged property situate in the Bhaugulpore district. On the 17th July 1874 a decree was made in this suit. On the 17th January 1877 *K.* obtained a decree on his mortgage, and the shares of *A.* and *B.* in E. were sold and purchased on the 3rd September 1877 by *N.* The plaintiff had his decree transferred for execution to the Bhaugulpore Court and he attached the surplus sale-proceeds and a 1 anna 9 gundas share in E. This attachment was withdrawn on the objection of *L.* who drew out the surplus sale-proceeds. The share purchased by *N.* was also released from attachment. The plaintiff now sued *L.*, *N.*, and the mortgagors for a declaration that his decree of the 17th July 1874 affected the E. property, to recover the surplus sale-proceeds from *L.*, and in case the decree should not be valid to the extent mentioned, for a decree declaring his prior lien on the property in E. *Held* that the suit was not bad by reason of multifariousness. BUNGSEE SINGH *v.* SOODIST LALL

[I. L. R., 7 Calc., 739 : 10 C. L. R., 263

**MULTIFARIOUSNESS. — Misjoinder of causes of action—*continued.***

46. ——————— *Civil Procedure Code, s. 26.*—Section 26 of the Code of Civil Procedure does not authorise the joinder of plaintiffs with antagonistic claims arising out of distinct causes of action. Where one of two widows of a deceased Hindu and her adopted son sued as co-plaintiffs claiming in the alternative either to recover the whole family estate for the latter, if the adoption was valid, or if the adoption was invalid, one-half of the estate for the former. *Held* that the suit was bad for misjoinder. LINGAMMAL *v.* CHINNA VENKATAMMAL **[I. L. R., 6 Mad., 239**

47. ——————— *Suit for maintenance and marriage expenses.—Misjoinder of parties.*—A Hindu widow, with her two daughters as co-plaintiffs, sued the son of her deceased husband by another wife, alleging that he was in possession of his father's property, for maintenance, and for the marriage expenses of the daughters, both of whom were of marriageable age. The Court of first instance gave the plaintiffs a decree for a monthly allowance, and R540 to the widow as arrears of maintenance, and R1,000 for the marriage expenses of the daughters. *Held* that, inasmuch as the mother was the natural guardian of the two other plaintiffs, and it was proper for them to reside with and be provided for by her, and the common maintenance was, so to speak, a joint matter, the suit was not, at any rate at the stage of appeal, open to objection on the ground of misjoinder of parties and causes of action; nor, looking at the peculiar circumstances of this family, which made the mother the most natural and proper person to arrange the marriages of the two minor plaintiffs, was the prayer for marriage expenses improperly added. TULSHA *v.* GOPAL RAI **[I. L. R., 6 All., 632**

48. ——————— *Joinder.—Civil Procedure Code, 1877, ss. 28, 31, and 45.—Alternative relief.—Parties.*—In a suit instituted against six different parties, the plaintiff prayed for khas possession of a four-anna share in a certain lot, or in the alternative, for a decree for arrears of rent against the defendants or such of the defendants as should on inquiry appear to be respectively liable. It appeared that the plaintiff had been kept out of possession by one only of the six defendants, and that, if he was entitled to a decree for arrears of rent, another of the defendants was liable for a portion only of such arrears. *Held* that the suit was not improperly framed; that there was no objection to the prayer for alternative relief; and that the suit should not have been dismissed for misjoinder. JANOKINATH MOOKERJEE *v.* RAM RUNJUN CHUCKERBUTTY . . **I. L. R., 4 Calc., 949**

49. ——————— *Civil Procedure Code, 1882, ss. 32, 45, and 46.—Adding parties.—Striking off parties.—Causes of action, Joinder or severance of.—Non-joinder or misjoinder of parties.—Practice.—Procedure.*—*C.* sued *P.* to recover possession of certain lands. The plaintiff and defendant were members of the same family, and at the hearing of the suit the appellants, who were also members of the family, applied to be made parties, alleging that the suit was collusive, and that they were in possession of some of the lands which the plaintiff sought to recover, and wished to defend their possession. The Subordinate Judge granted their application, and made them co-defendants in the suit. They filed written statements setting forth their right, and time was allowed in order that the plaintiff might put in a counter-statement. Before the case came on again, the Subordinate Judge had been removed, and his successor was of opinion that the causes of action, as against the original defendant *P.* and as against the new defendants (the appellants), were different, and ought to be the subject of different suits. He accordingly dismissed the appellants from the suit under section 45 of the Civil Procedure Code (XIV of 1882), and ordered that they should bear their own costs. *Held*, on appeal to the High Court, that the order dismissing the appellants from the suit should be reversed, and that section 45 did not apply. When the parties concerned, though in different relation, in a particular litigation are all before the Court, and their cases have been stated, the Court, if it finds the several causes as between plaintiff and the several defendants cannot properly or conveniently be tried together, should deal with them separately as sub suits under the title and number of the principal suit from which they spring. The dismissal of defendants added without objection, or the addition of whom has been submitted to, is not contemplated, and would tend to further needless expense. The power given by section 45 does not extend to an order for the dismissal of defendants, and that a fresh suit should be brought against them. Such an order would not be one for the "separate disposal" of the several causes of action; it would be an order preventing the disposal of them in the suit before the Court. Section 45 is meant to apply to cases in which questions arise as to the joinder or severance of several causes of action against the same defendant. For non-joinder or misjoinder of parties provision is made in section 32, and the plaintiff had not resisted the joinder of the appellants as defendants. The Subordinate Judge could only strike out the name of a party upon an application being made, and no such application had been made. KHADAR SAHEB *v.* CHOTIBIBI **[I. L. R., 8 Bom., 616**

50. ——————— *When objection can be taken.*—It is too late for defendants to object with effect to a suit on the ground of multifariousness after it has been fully tried and decided on the merits; but the objection is one which a defendant has a right to raise on the settlement of issues, or on a motion to take the plaint off the file. RAM DOYAL DUTT *v.* RAMDOOLAL DEB . . **11 W. R., 273**

**MUNICIPAL BOARDS, CONTROL OVER—**

*See* JURISDICTION OF CIVIL COURT—MUNICIPAL BODIES . **19 W. R., 309**

**MUNICIPAL COMMISSIONERS.**

*See* COLLECTOR . I. L. R., 1 Bom., 628

*See* MAGISTRATE, JURISDICTION OF—SPECIAL ACTS—ACT XXVI OF 1850.
[5 Bom., Cr., 10
8 Bom., Cr., 39

*See* PUBLIC SERVANT . 4 Bom., A. C., 93
[5 Bom., Cr., 33

*See* RULES MADE UNDER ACTS.
[8 Bom., Cr., 39

——— **Appeal against assessment by—**

*See* JURISDICTION OF CIVIL COURT—MUNICIPAL BODIES . I. L. R., 1 Calc., 409

——— **Notice of suit against—**

*See* APPELLATE COURT—OBJECTION TAKEN FOR FIRST TIME ON APPEAL.
[I. L. R., 1 All., 269

*See* MADRAS TOWNS IMPROVEMENT ACT, 1871, s. 168 . I. L. R., 2 Mad., 124

——— **Power to administer oath.**

*See* BENGAL MUNICIPAL ACT, 1864, s. 6.
[19 W. R., 309

——— **Power to close or divert public highway.**

*See* BENGAL MUNICIPAL ACT, 1864.
[I. L. R., 2 Calc., 425

——— **Suit against, for land—**

*See* BENGAL MUNICIPAL ACT, 1864, s. 87.
[5 B. L. R., Ap., 50
I. L. R., 6 Calc., 8

*See* RES JUDICATA—JUDGMENTS ON TECHNICAL POINTS . 5 B. L. R., Ap., 50

1. ——— **Liability of Commissioners for negligence or misconduct.**—*Beng. Act III of 1864.*—Municipal Commissioners under Bengal Act III of 1864 and their servants incur no personal responsibility for what they do so long as they act in the line of their duty. But if they do, or order to be done, that which is not within the scope of their authority, or if they are guilty of negligence or misconduct in doing that which they are empowered to do, then they render themselves personally liable to an action. There is no special law extending to members of Municipalities which protects them so long as they act *bond fide.* SOONDER LALL *v.* BAILLIE . . . . . 24 W. R., 287

2. ——— **Liability of Corporation for breach of statutory duty.**—*Calcutta Municipality Act (Beng. Act IV of 1876), ss. 189, 191, 213, 252.—Obstruction in public way.—Damages.*—Under section 189 of Bengal Act IV of 1876 the roads and streets in Calcutta are vested in the Commissioners of the Corporation of the Town of Calcutta, and section 191 provides that the "Commissioners shall, so far as the municipal funds permit, from time to time, cause the public streets to be maintained and repaired, and for such purpose may do all things

**MUNICIPAL COMMISSIONERS.—Liability of Corporation for breach of statutory duty—*continued.***

necessary for the public safety and convenience." Sections 252 and 213 respectively direct the Commissioners on opening up the roads, and persons to whom they have given permission so to do, to fence and light any excavations so made. In March 1882 the Commissioners, at the request of the Executive Engineer of the Public Works Department of the Government of Bengal, permitted the latter to open up one of the roads in Calcutta for the purpose of carrying off surplus water from a tank which was under the charge and control of such Executive Engineer aforesaid, and for the purpose of connecting the tank with the public sewer. Permission was granted on the usual condition that a contractor licensed to do such works by the Municipality (but who was not in their employ further than that the Commissioners had power to cancel his license, nor was he in the employ of the Secretary of State for India), should be employed in the work. Such a contractor was employed by the Secretary of State and obtained a license from the Commissioners empowering him to break open the road. The road was open, but was left unfenced and insufficiently lighted at night. The plaintiff in driving along this road after dusk, drove into the hole and was badly injured, and sued the Corporation, the contractor, and the Secretary of State for damages. *Held* by the Court of first instance (1) that the Secretary of State was not liable, because he came within the established rule that one who employs another to do what is perfectly legal must be presumed to employ that other to do this in a legal way; (2) that the Corporation who had a statutory obligation imposed upon them to repair and maintain the roads, were liable to the plaintiff for a breach of their statutory duty; that where there is a dangerous obstruction, *à fortiori* where such dangerous obstruction results from a permission accorded by the Commissioners, they are to be held liable for damage caused by it; (3) that the contractor also was liable. *Held* on appeal that the fact that the Commissioners gave permission to another person to open up the road, although for a perfectly proper purpose, would not relieve them from their statutory duty under section 191 of Bengal Act IV of 1876. CORPORATION OF TOWN OF CALCUTTA *v.* ANDERSON . I. L. R., 10 Calc., 445

3. ——— **Commissioner acting as Magistrate, Power of.**—*Procedure.—Proceeding against absent party.*—A Municipal Commissioner, acting as a Magistrate, may enquire into a charge of the breach of a bye-law and may punish the accused party by inflicting a fine; but the procedure to be followed is that of the Code of Criminal Procedure, which does not contemplate a proceeding against an absent party *ex parte.* TARINEY CHURN BOSE *v.* MUNICIPAL COMMISSIONERS OF SERAMPORE
[24 W. R., Cr., 25

4. ——— **Editor of newspaper.**—*Trial of case on which he has written strong opinion in newspaper.*—The High Court declined to interfere, under section 296, Act X of 1872, with the order of a Municipal Commissioner, who was the editor of a newspaper, who had, prior to the disposal of the

**MUNICIPAL COMMISSIONERS.—Editor of newspaper—*continued.***

case, made very strong remarks on the case in the newspaper of which he was the editor, holding that there was nothing illegal in his order; though he would have exercised a wise discretion if he had refused to sit as one of the Commissioners in the case. QUEEN *v.* TARINEE CHURN BOSE [21 W. R., Cr., 31

**MUNICIPAL COMMITTEE.**

*See* CASES UNDER RIGHT OF SUIT—SUITS AGAINST MUNICIPAL OFFICERS.

*See* RIGHT OF SUIT—SUITS TO REMOVE OBSTRUCTIONS TO PUBLIC HIGHWAY. [I. L. R., 1 All., 557

**MUNICIPAL CORPORATION.**

*See* SANCTION TO PROSECUTION—WHERE SANCTION IS NECESSARY. [I. L. R., 3 Calc., 758

**MUNICIPAL COURTS, JURISDICTION OF—**

*See* CASES UNDER ACT OF STATE.

**MUNICIPAL DEBENTURES.**

——— *Agreement to exchange land for debentures.—Quit-rent.—Liability for interest on debentures.*—The Port Canning Municipal Commissioners invited loans on debentures convertible into leasehold titles to lands in the town. The Port Canning Land Company subscribed to the loan declaring their desire to take land in lieu of the debentures. After the debentures were issued a correspondence commenced between the parties with the object of effecting the conversion, in which correspondence the Commissioners intimated to the Company the construction they put upon the Company's tender, *viz.*, that they elected to take land to the full value of their debentures. The Commissioners also intimated to the Company that the latter had selected lots amounting to a part only of their debentures, and required them to select others, giving notice at the same time that they did not consider themselves liable to pay interest. The Company after this proposed to defer exchanging the debentures till their due date, and if the Commissioners consented, not to call for the interest in the meantime, but agreeing to pay a quit-rent equivalent to the interest. The Commissioners agreed to this and asked the Company to declare the lots which they would receive in commutation. A selection was made, but not in accordance with the contract: the lots selected being of more value than the debentures. The Commissioners then proposed that the Company should return the debentures, and pay quit-rent upon the additional lots. This was not accepted, but the matter was left in an imperfect state. The Port Canning Land Company subsequently brought an action against the Port Canning Municipality for two years' interest on the debentures. *Held* that the non-acceptance of the proposal as to the additional lots could not affect the previous agreement to exchange debentures then held for equivalent lots; and that such previous agreement had been made involving quit-rent which extinguished the interest. PORT CANNING LAND COMPANY *v.* SMITH [21 W. R., 315: L. R., 1 I. A., 124

**MUNICIPAL DEBENTURES—*continued.***

**MUNICIPAL NOTICE.**

*See* BOMBAY DISTRICT MUNICIPAL ACT, s. 74 . . I. L. R., 2 Bom., 527

**MUNICIPAL TAX.**

*See* FINE . . . 8 W. R., Cr., 17

*See* JURISDICTION OF CIVIL COURT—MUNICIPAL BODIES. [I. L. R., 2 Mad., 37

*See* MADRAS TOWNS IMPROVEMENT ACT (ACT III OF 1871), s. 85. [I. L. R., 1 Mad., 158

*See* STATUTES, CONSTRUCTION OF— [8 Bom., A. C., 213

——— *Bombay Acts II of 1865 and IV of 1867.—Liability of Railway Company for rates and taxes.*—The Great Indian Peninsula Railway Company, which, under an agreement with Government, holds the land upon which their railway is constructed, free of rent for ninety-nine years, are occupiers only, and not owners, of such land within the meaning of section 2 of Bombay Act II of 1865, and are therefore not liable to be rated as owners of the ground used by them for the purposes of the railway within the city of Bombay. Principles upon which Railway Companies are liable to be rated considered and laid down. JUSTICES OF THE PEACE FOR THE CITY OF BOMBAY *v.* GREAT INDIAN PENINSULA RAILWAY COMPANY . . . 9 Bom., 217

**MUNSIF.**

*See* WITNESS — CIVIL CASES — PERSON COMPETENT TO BE WITNESS. [6 Mad., Ap., 42

——— **Dismissal of—**

*See* ENGLISH COMMITTEE OF HIGH COURT. [10 B. L. R., 79, 80, 82, note

——— **Jurisdiction of—**

*See* PUBLIC SERVANT [4 Bom., A. C., 93

1. ——— **Execution proceedings before Act XVI of 1868.**—*Suit pending on abolition of office.*—Where execution had been issued by a Sudder Ameen, and notwithstanding the proceedings were struck off the file, a consequent attachment was still pending when that office was abolished (by Act XVI of 1868),—*Held* that the Sudder Munsif, who succeeded to the jurisdiction of the Sudder Ameen, had power to take up the case and issue execution proceedings. SREENATH BANERJEE *v.* PURRUM SOOKH CHUNDER . . 25 W. R., 105

2. ——— **Suit pending when Act XVI of 1868 came into operation.**—A suit, of which the subject-matter did not exceed in amount or value

**MUNSIF.—Suit pending when Act XVI of 1868 came into operation—*continued.***

R1,000, instituted one day after Act XVI of 1868 received the assent of the Governor-General in Council, was held to be cognisable by the local Munsif, and not by the Sudder Munsif of the district. BUNGSHEE BUDDEN DEY *v.* TARINEE CHURN DEY [14 W. R., 375

3. ——— **Appeal pending when Act XVI of 1868 came into operation.**—*Execution of decree.—Act XVI of 1868, s. 12.*—At the time of the passing of Act XVI of 1868, which abolished the Courts of Sudder Ameens, an appeal was pending against the decree of the Sudder Ameen which resulted in a modified decree afterwards executed by the Sudder Munsif. *Held* that, although the appeal was pending in a superior Court, yet the proceedings in the suit were pending in the original Court of trial within the meaning of section 12, and the Sudder Munsif's Court was the only Court which had jurisdiction to execute the decree. GOBIND SINGH *v.* MUNNO RAM DOSS . . . 19 W. R., 414

4. ——— **Suit against public servant for acts done by him officially.**—A Munsif had not jurisdiction to try an action brought against a public servant for acts done by him in his official capacity. *Semble,*—The only judicial officers having jurisdiction to try such cases would be the Judge or Assistant Judge of the district in which the suit arose. VALLABRAHM JAGJIVAN *v.* WOODHOUSE [1 Bom., 144

5. ——— **Suit for rent.**—*Dekkan Agriculturists' Act, XVII of 1879.—Village Munsif.*—A Village Munsif has no jurisdiction to try a suit for rent under the Dekkan Agriculturists' Relief Act, XVII of 1879. VITHAL RAMCHANDRA *v* GANGARAM VITHOJI . . I. L. R., 5 Bom., 180

6. ——— **Order enforcing award as to determination of rent.**—A Munsif has no jurisdiction to entertain an application and pass an order on the enforcement of an arbitration award relating to the determination of rent. When a Munsif acts without jurisdiction, the question may be the subject of an appeal to the Appellate Court of the district. ALTAF HOSSEIN *v.* GRISH CHUNDER ROY . . . . . 15 W. R., 556

7. ——— **Suit for dissolution of partnership.**—*Jurisdiction.—Arbitration.—Finality of decree in accordance with award.*—A suit for dissolution of a partnership, taking the accounts of the firm, and a declaration of the plaintiff's right to a certain share in the debts due to the firm, was, with reference to the value of the subject-matter of the suit, instituted in the Court of a Munsif. The matters in difference in the suit were eventually referred to arbitration under Chapter XXXVII of the Code of Civil Procedure, and an award was made declaring the plaintiff entitled to recover a certain sum from the defendant. Judgment and a decree were given in accordance with the award. *Held* that, the award notwithstanding, the question whether the suit was cognisable in the Munsif's Court was entertainable.

**MUNSIF.—Suit for dissolution of partnership—*continued.***

*Bhagirath* v. *Ram Ghulam, I. L. R., 4 All., 283,* referred to. KALIAN DAS *v.* GANGA SAHAI [I. L. R., 5 All., 500

8. ——— **District Munsif.**—*Villages under attachment for breach of duty by karnam.—Fine.*—A District Munsif's Court has not authority to inflict fines on karnams of villages which are under attachment by that Court for breach of duty on the karnam's part. RAMAKISTNAM *v.* RAGAVACHARI [I. L. R., 3 Mad., 406

9. ——— **Power to take voluntary depositions.**—*Application to restore appeal.*—A Munsif has no power to take voluntary depositions, *e. g.,* the deposition of a party to show his illness where he wishes for restoration of an appeal in the High Court which has been struck off for his absence from that cause. IN THE MATTER OF THE PETITION OF KULNO KHOND KAR . . . . . 7 W. R., 47

10. ——— **Power to transfer suit.**—*Mad. Reg. IV of 1816, s. 26.—Village Munsif.—Jurisdiction.*—In a suit under Regulation IV of 1816 the defendant having objected to the Village Munsif trying the suit on the ground of personal hostility, the Munsif transferred the suit to another Village Munsif. *Held* that the transfer was illegal *Per* HUTCHINS, *J.—Semble,*—In such a case the Village Munsif should report the facts to the District Court, and the District Judge should transfer the case for trial to another Village Munsif. LAKSHMAKKA *v.* BALI . . . . . I. L. R., 8 Mad., 500

11. ——— **Attachment and sale of land.**—*Mad. Reg. IV of 1816, s. 30.—Village Munsif.—Decree.—Execution.*—Immoveable property can be attached and sold in execution of a decree of a Village Munsif under the provisions of section 30 of Regulation IV of 1816. RAMASAMI CHETTI *v.* ANGAPPA CHETTI . . I. L. R., 7 Mad., 220

12. ——— **Suit for share of annual allowance.**—*Question of title.*—In an action brought to recover a third share of arrears of a varshasan or annual allowance paid by the Gaikwar of Baroda to the defendant, and in which the plaintiff alleged that he was entitled to a third share,—*Held* that such an action can be maintained in a Munsif's Court, although it may be necessary to determine the title of the plaintiff to share in such varshasan. RATAN SHANKAR REVASHANKAR *v.* GULABSHANKAR LALSHANKAR [4 Bom., A. C., 173

13. ——— **Suit for money charged on immoveable property.**—*Held* that a suit for money charged on immoveable property in which the money did not exceed R1,000, although the value of the immoveable property did exceed that sum, was cognisable by a Munsif, provided the property was situate within the local limits of his jurisdiction. JANKI DAS *v.* BADRI NATH . I. L. R., 2 All., 698

14. ——— **Suit for redemption of usufructuary mortgage.**—*Question of title.*—Where the question in dispute in a suit for redemption of a

**MUNSIF.—Suit for redemption of usufructuary mortgage—*continued.***

usufructuary mortgage is not only whether the property has been redeemed out of the usufruct, but whether the property and the right to redeem belongs to the plaintiff, and the value of the property exceeds R1,000, such suit is not cognisable by a Munsif. KALIAN DAS *v.* NAWAL SINGH [I. L. R., 1 All., 620

15. ——— **Mortgage set up by defendant exceeding limit of jurisdiction.**—*Court Fees Act, s. 7, cl. 9.—Ejectment.—Mad. Civil Courts Act (Act III of 1873).*—In a suit brought in a District Munsif's Court to recover several parcels of land from the defendant, plaintiff alleged that defendant held a valid mortgage of R206 on two parcels which he offered to redeem. As to the other parcels, he alleged that if any charges had been created in defendant's favour over them by his predecessor in title, such charges were invalid. The suit, as valued by the plaintiff, was within the pecuniary limit of the Munsif's jurisdiction. Defendant pleaded that he held a mortgage for R3,000 over the land, and therefore the Munsif's Court had no jurisdiction to try the suit. The Munsif tried the question of the validity of the defendant's mortgage, and decreed possession to plaintiff on payment of R906 due on account of mortgages, and R1,647-11-9 on account of improvements. On appeal, the District Judge held that the Munsif had no jurisdiction, reversed the decree, and ordered the plaint to be returned to be presented in the proper Court. *Held* that the Munsif's Court had jurisdiction. CHANDU *v.* KOMBI . I. L. R., 9 Mad., 208

16. ——— **Suit regarding minors.**—*Act IX of 1861.*—Suits regarding minors are cognisable by principal Civil Courts of districts. Munsifs have no jurisdiction to try them. KRISTO CHUNDER ACHARJEE *v.* KASHEE THAKOORANEE [23 W. R., 340

HARASUNDARI BAISTABI *v.* JAYADURGA BAISTABI . 4 B. L. R., Ap., 36 : 13 W. R., 112

17. ——— *Act IX of 1861.—Civil Procedure Code, ss. 11, 15.—Parent and child.—Suit for recovery of minor by parent.*—Act IX of 1861 does not debar a District Munsif's Court from entertaining a suit by a Hindu father to recover possession of his minor son alleged to be illegally detained by the defendant. KRISHNA *v.* READE . . . . . I. L. R., 9 Mad., 31

18. ——— **Mad. Act IV of 1863.**—*Small Cause Court Judge.—Act XI of 1865.*—A District Munsif is a Small Cause Court Judge under Madras Act IV of 1863 within Act XI of 1865. HARAJAI KUMARA VENKATA PERUMAL RAJ *v.* KANNIAPPAH. ZEMINDAR OF KARVATINUGGAR *v.* KANNIAPPAH . . . . . 4 Mad., 149

19 ——— Madras Act IV of 1863 did not take away the former jurisdiction given to the District Munsif in respect of causes of action arising within the limits of his jurisdiction. MAGAM TIMMAYA *v.* TANGATTUR KANDAPPA [2 Mad., 82

**MUNSIF.—Mad. Act IV of 1863—*continued.***

20. ——— *Suit for money paid to use of undivided brother.*—Plaintiff sued for R31-2-3½, money paid for the use of defendant, his undivided brother. The defence was that plaintiff held family property, defendant's share of which exceeded in value the debt sued for, as also the amount for which a suit would lie before a Munsif under Act IV of 1863. *Held* that, provided it was proved in evidence that the money was paid out of plaintiff's self-acquired property, the suit was cognisable by the Munsif under Act IV of 1863. *Held*, also, that the share of the defendant being both in nature and amount beyond the District Munsif's Small Cause jurisdiction, it was not available as a defence, even if it formed a fit object of set-off. KATTAPERUMAL PILLAI *v.* PANCHANADAM PILLAI [3 Mad., 339

21. ——— **Suit against Government.**—*Small Cause Court Act, XI of 1865, s. 9.*—A Munsif has jurisdiction to try a suit against Government which, but for section 9, Act XI of 1865, would be cognisable by a Court of Small Causes. KOMALOODEEN SHEIKH *v.* COLLECTOR OF MIDNAPORE [11 W. R., 233

22. ——— **Suit cognisable in Small Cause Court.**—*Defendant residing out of jurisdiction.*—A Munsif has no jurisdiction as a Small Cause Court to take cognisance of a suit against defendants not resident within his jurisdiction. ANONYMOUS . . . . , 3 Mad., Ap., 24

correcting as to this point. MAGAM TIMMAYA *v.* TANGATTUR KANDAPPA . . . 2 Mad., 82

23. ——— **Suit cognisable in Small Cause Court, but erroneously dismissed there.**—A plaint was rejected by a Court of Small Causes on the ground that that Court had no jurisdiction. It was then filed in the Court of a District Munsif, who decreed for the plaintiff. On appeal to the Principal Sudder Ameen, it was objected that the Munsif had no jurisdiction, as the suit was one cognisable by the Small Cause Court. *Held* (the Court having decided that the Small Cause Court had jurisdiction) that the District Munsif's Court had no jurisdiction; that the erroneous dismissal of a former suit for the same cause of action by a Small Cause Court did not warrant the institution of the suit in the District Munsif's Court; and that the Principal Sudder Ameen rightly concluded that the suit ought to be dismissed. PANAPPA MUDALI *v.* SRINIVASA MUDALI . . . . . 3 Mad., 86

24. ——— **Jurisdiction where Small Cause Court exists.**—*Civil Procedure Code, 1859, s. 6.*—Where a Munsif is vested under Act VI of 1871 with powers up to R50 in a place in which there is a Court of Small Causes constituted under Act XI of 1865 with jurisdiction extending up to R500, a suit of the nature cognisable by Small Cause Courts being in amount or value below R50, ought, by the operation of Act VIII of 1859, section 6, to be instituted in the Court of the Munsif exercising Small Cause Court powers. DWARKANATH DUTT

**MUNSIF.—Jurisdiction where Small Cause Court exists**—*continued.*

*v.* BHATHEE HAWALDAR. CHUNDOO VISTEE *v.* SODAGUR VISTEE . . . **22 W. R., 457**

**25. ——— Power of Munsif sitting as Small Cause Court to transfer case to Munsif's Court.**—When a District Munsif has jurisdiction to try a suit as a Small Cause Court Judge, he cannot transfer it to the District Munsif's Court on any ground of expediency. RODI RAMAYYA *v.* PERMA JANAKIRAMUDU . **5 Mad., 172**

**MURDER.**

*See* ATTEMPT TO COMMIT OFFENCE.
**[4 Bom., Cr., 17**
**8 Bom., Cr., 164**

*See* CRIMINAL PROCEDURE CODE, 1882, s. 376 (1872, s. 288).
**[I. L. R., 1 Bom., 639**

*See* CASES UNDER CULPABLE HOMICIDE.

*See* JURISDICTION OF CRIMINAL COURT—OFFENCES COMMITTED ONLY PARTLY IN ONE DISTRICT—MURDER.
**[I. L. R., 2 All., 218**
**I. L. R., 10 Bom., 258, 265**

*See* CASES UNDER UNLAWFUL ASSEMBLY.

**1. ——— Motive, Proof of.**—The evidence as to the motives with which a prisoner commits an offence should be of the strictest kind. QUEEN *v.* ZAHIR . . . . . **10 W. R., Cr., 11**

**2. ——— Motive or ill-will, Proof of.**—Proof of motive or previous ill-will is not necessary to sustain a conviction for murder in a case where a person is coolly and barbarously put to death. QUEEN *v.* JAICHAND MUNDLE . **7 W. R., Cr., 60**

**3. ——— Absence of premeditation.**—*Culpable homicide.*—The absence of premeditation will not reduce a crime from murder to culpable homicide not amounting to murder. QUEEN *v.* MAHOMED ELIM . . . **3 W. R., Cr., 40**

**4. ——— Suffering death by consent.** *Penal Code, s. 300, excep. 5.*—In a case of a wife consenting, while in violent grief for the loss of her child, to suffer death at the hands of her husband,—*Held* that evidence of consent which would be sufficient in a civil transaction must be equally sufficient in exculpation of a prisoner's guilt. QUEEN *v.* ANUNTO RUBNAGAT . . **6 W. R., Cr., 57**

**5. ——— Grievous hurt, Murder arising from.**—*Inseparable acts.*—In order to convict a person of murder arising out of grievous hurt, it is indispensable that the death should be clearly and directly connected with the act of violence. QUEEN *v.* MAHOMED HOSSEIN
**[W. R., 1864, Cr., 31**

**6. ——— Act by which death is caused occurring in dacoity.**—*Penal Code, s. 300.*—If the act by which death is caused does not in itself constitute the crime of murder, it does not constitute murder because it is coupled with dacoity. QUEEN *v.* RAM COOMAR CHUNG . **1 Ind. Jur., O. S., 108**

**MURDER.—Act by which death is caused occurring in dacoity**—*continued.*

**7. ——— Murder in committing dacoity.**—When murder is committed in the commission of a dacoity, every one of the persons concerned in the dacoity is liable to be punished with death. QUEEN *v.* KUCHEE AHEN . **2 W. R., Cr., 39**

**8. ——— Culpable homicide.**—*Distinction between it and murder.*—Culpable homicide and murder distinguished. QUEEN *v.* GORACHAND GOPE
**[B. L. R., Sup. Vol., 443 : 5 W. R., Cr., 45**
**1 Ind. Jur., N. S., 177**

**9. ——— Grave and sudden provocation.**—*Actual intention to kill.*—Under the Penal Code, no constructive but an actual intention to cause death is required to constitute murder. Thus, when a boy of fifteen years old, in the heat of discovering the deceased in the act of adultery with the wife of a near relative, and, without the use of any weapon, joined that relative in committing an assault upon the deceased which caused his death, the offence committed was held to have been culpable homicide not amounting to murder. QUEEN *v.* GOREEBOOLLAH
**[5 W. R., Cr., 42**

**10. ——— *Grievous hurt.***—A man who, by a single blow with a deadly weapon, killed another man who, at dead of night, was entering his room for the purpose of having criminal intercourse with his wife, was held guilty not of murder but of causing grievous hurt on a grave and sudden provocation. QUEEN *v.* CHULLUNDEE PORAMANICK . . . . **3 W. R., Cr., 55**

**11. ——— *Culpable homicide.***—Culpable homicide not amounting to murder is when a man kills another being deprived of self-control by reason of grave and sudden provocation. But when the act is done after the first excitement had passed away, and there was time to cool, it is murder. QUEEN *v.* YASIN SHEIKH
**[4 B. L. R., A. Cr., 6 : 12 W. R., Cr., 68**

**12. ——— *Culpable homicide not amounting to murder.***—*Penal Code, ss. 300, excep. 1, 302, 304.*—Upon the trial of a person charged with the murder of his wife, it was proved that the accused had entertained well-founded suspicions that his wife had formed a criminal intimacy with another person; that one night the deceased, thinking that her husband was asleep, stealthily left his side; that the accused took up an axe and followed her, found her in conversation with her paramour in a public place, and immediately killed her. *Held* that the act of the accused constituted the crime of murder, the facts not showing "grave and sudden provocation" within the meaning of section 300, exception 1 of the Penal Code, so as to reduce the offence to culpable homicide not amounting to murder. *Queen-Empress* v. *Damarua, Weekly Notes, All., 1885, p. 197,* distinguished by STRAIGHT, *Offg. C. J.* QUEEN-EMPRESS *v.* MOHAN
**[I. L. R., 8 All., 622**

**MURDER.—Grave and sudden provocation—*continued.***

**13. ———— *Culpable homicide not amounting to murder.—Penal Code, ss. 300, excep. 1, 302, 304.*—**An accused person was convicted of culpable homicide not amounting to murder in respect of the widow of his cousin, who lived with him. The evidence showed that the accused was seen to follow the deceased for a considerable distance with a gandasa or chopper, under circumstances which indicated a belief on his part that she was going to keep an assignation, and with the purpose of detecting her in doing so. He found her in the act of connection with her paramour, and killed her with the chopper. *Held* that the conviction must be altered to one of murder, as the accused went deliberately in search of the provocation sought to be made the mitigation of his offence, and under the circumstances disclosed it could not be said that he was deprived of self-control by grave and sudden provocation. *Queen-Empress* v. *Damarua, Weekly Notes, All., 1885, p. 197,* and *Queen-Empress* v. *Mohan, I. L. R., 8 All., 622,* referred to. QUEEN-EMPRESS *v.* LOCHAN . . . . **I. L. R., 8 All., 635**

**14. ———— Absence of intention to kill. —*Indication of intention by acts.*—**It is not murder if a person kills another without intending to take his life, and if the acts done were not such as conclusively indicated an intention to cause such injury as was likely to cause death. QUEEN *v.* SOLIM **[5 W. R., Cr., 41**

**15. ———— Intention to kill another person.—**Where an accused killed *A.*, whom he had no intention of killing, by a blow with a highly lethal weapon intended to kill *B.*, he was held guilty of the murder of *A.* QUEEN *v.* PHOMONEE AHUM **[8 W. R., Cr., 78**

**16. ———— Exposure of child.—*Penal Code, s. 317.—Remote cause of death.—Held* that** where, from the circumstances, it appeared that a child had been exposed by the prisoner died, but that death was not caused except very remotely by the exposure, the prisoner, though guilty under section 317 of the Penal Code, could not be convicted of murder. That section contemplates cases in which death is caused from cold or some other result of exposure. QUEEN *v.* KHODABUX FAKEER **[10 W. R., Cr., 52**

**17. ———— Neglect of child.—*Culpable homicide.—Death from starvation.*—**Where it appeared that the prisoner, a Rajpoot, had allowed his female child, after the mother's death, to gradually languish away and die from want of proper sustenance, and had persistently ignored the wants of the child, although repeatedly warned of its state and the consequences of his neglect of it, and there was nothing to show that the prisoner was not in a position to support the child,—*Held* that the offence which the prisoner committed was murder, and not simply culpable homicide not amounting to murder. QUEEN *v.* GANGA SINGH . . **5 N. W., 44**

**18. ———— Exercise of right of private defence on thief.—**The prisoners detected a weak half-starved old woman stealing their rice, and so used their right of private defence that she died from the injuries they inflicted. The prisoners were held guilty by the majority of the Court of murder (*dissentiente*, CAMPBELL, *J.*). QUEEN *v.* GOKOOL BOWREE . . . . . **5 W. R., Cr., 33**

**19. ———— Right of private defence.—*House-breaking by night.*—**Prisoner found deceased in act of house-breaking by night in his house, and killed him with a kodali which he had called for, as he admitted, for that purpose. He was convicted of murder, and sentenced to death by the Sessions Judge. The sentence being referred to the High Court for confirmation, it was held that the prisoner had been legally convicted of murder, that he had intentionally done to the deceased more harm than was necessary for any purpose of defence, and that not whilst deprived of power of self-control. But the sentence was mitigated to transportation for life, than which, it was held, no less sentence could be legally passed. The Judge, however, in a letter to Government, suggested the mitigation of the punishment, which was accordingly reduced to imprisonment for six months. REG. *v.* DURWAN GEER **[1 Ind. Jur., N. S., 253 : 5 W. R., Cr., 73**

*See* QUEEN *v.* FUKEERA CHAMAR **[6 W. R., Cr., 50**

**20. ———— Death from blow in a fight. —**A conviction for murder was held to be wrong in a case where a prisoner, taking advantage of an incident which occurred in what till then had been a fair fight, struck his opponent and knocked him over, thereby causing his death. QUEEN *v.* KEWAL DOSAD **[W. R., 1864, Cr., 36**

**21. ———— Fatal blow after quarrel.—*Penal Code, s. 300, cls. 2 and 3.*—**Two persons met each other in a drunken state and commenced a quarrel, during which they became grossly abusive to each other. This lasted for about half an hour, when one of them ran to his own house, distant 30 yards from the spot, and came back with a heavy pestle, with which he struck the other a violent blow on the left temple as the latter was rising, or had just risen from the ground, causing instant death. *Held* that the act was done with the intention of causing such bodily injury as was likely to cause death, and also with the knowledge that such act was likely to cause death, and that the offence committed was murder within the provisions of clauses 2 and 3, section 300, Penal Code. QUEEN *v.* DASSEE BHOOYAN **[8 W. R., Cr., 71**

**22. ———— Blow with knowledge of likelihood to cause death.—*Absence of intention to kill.*—**When a Judge acquits a prisoner of intention to kill, but admits that the prisoner struck the deceased with a highly lethal weapon, with the knowledge that the act was likely to cause death, the conviction should be of murder, and not of culpable homicide not amounting to murder. QUEEN *v.* SOBEEL MAHEE . . . **5 W. R., Cr., 32**

**MURDER**—*continued.*

23. ——— **Beating with knowledge of likelihood to cause death.**—*Held* by the majority, that when four men beat another at intervals so severely as to cause death, they must be presumed to have known that by such acts they were likely to cause death, and that when such acts were done without any grave or sudden provocation, or sudden fight or quarrel, the offence was murder, and was not reduced to culpable homicide not amounting to murder by the absence of intention to cause death. QUEEN *v.* POOSHOO . . . **4 W. R., Cr., 33**

24. ——— **Blow struck by order of another person.**—*Death by beating.*—Where a blow is struck by *A.* in the presence of and by the order of *B.*, both are principals in the transaction; and where two persons join in beating a man and he dies, it is not necessary to ascertain exactly what the effect of each blow was. QUEEN *v.* MAHOMED ASGER **[23 W. R., Cr., 11**

QUEEN *v.* GOUR CHUNDER DAS **[24 W. R., Cr., 5**

25. ——— **Presumption from consequences of act likely to cause death.**—*Culpable homicide.*—Appellant having armed himself with a sword, struck in the dark at certain persons in a house, causing wounds which resulted in the death of one person. *Held, per* JACKSON, *J.*—That such conduct raises an inference that he intended to cause death. *Per* AINSLIE, *J.*—That though he probably did not see how his blows were directed, as he struck them with a deadly weapon regardless of consequences, he must have known that his act was imminently dangerous, and that it must, in all probability, cause such bodily injury as was likely to cause death. *Per* CUNNINGHAM, *J.*—That the offence was culpable homicide, and not murder, being an unpremeditated act of reckless violence rather than an act done with the knowledge or intention which is essential to constitute murder. BEJADHUR RAI *v.* EMPRESS . . . . . **2 C. L. R., 211**

26. ——— **Conspiracy to kill.**—*Penal Code, s. 302.*—*L., C., K.*, and *D.* conspired to kill *S.* In pursuance of such conspiracy *L.* first and then *C.* struck *S.* on the head with a lathi and *S.* fell to the ground. While *S.* was lying on the ground *K.* and *D.* struck him on the head with their lathis. *Held* (STUART, *C. J.*, dissenting) that, inasmuch as *K.* and *D.* did not commence the attack on *S.*, and it was doubtful whether *S.* was not dead when they struck him, transportation for life was an adequate punishment for their offence. EMPRESS *v.* CHATTAR SINGH **[I. L. R., 2 All., 33**

27. ——— **Knowledge of likelihood to cause death.**—*Penal Code, s. 300, cl. 4, and s. 314.*—To bring a case under clause 4, section 300 of the Penal Code, it must be proved that the accused in committing the act charged knew that it must, in all probability, be likely to cause death, or that it would bring about such bodily injury as would be likely to cause death. Where a poisonous drug was administered to a woman to procure miscarriage, and death resulted, and it was not proved that the accused knew

**MURDER.**—**Knowledge of likelihood to cause death**—*continued.*

that the drug would be likely to cause death, &c., they were acquitted by the High Court of murder and convicted of an offence under section 314 of the Penal Code. QUEEN *v.* KALA CHAND GOPE **[10 W. R., Cr., 59**

28. ——— **Death caused by snake-charmers.**—*Culpable homicide.*—Certain snake-charmers, by professing themselves able to cure snake-bites, induced several persons to let themselves be bitten by a poisonous snake. From the effect of the bite, three of these persons died. *Held* that the offence was murder under clauses 2 and 3 of section 300 of the Penal Code, unless it could be brought within the 5th exception to that section. If the prisoners, really believing themselves to have the powers they professed to have, induced the deceased to consent to take the risk of death, the offence would be culpable homicide not amounting to murder. QUEEN *v.* PUNAI FATTAMA **[3 B. L. R., A. Cr., 25 : 12 W. R., Cr., 7**

29. ——— *Penal Code, ss. 304, 304a.*—*Culpable homicide.*—*Causing death by negligence.*—A snake-charmer exhibited in public a venomous snake, whose fangs he knew had not been extracted; and to show his own skill and dexterity, but without any intention to cause harm to any one, placed the snake on the head of one of the spectators; the spectator tried to push off the snake, was bitten, and died in consequence. *Held*, the snake-charmer was guilty, under section 304 of the Penal Code, of culpable homicide not amounting to murder, and not merely of causing death by negligence, an offence punishable under section 304*a*. EMPRESS *v.* GONESH DOOLEY . **I. L. R., 5 Calc., 351 : 4 C. L. R., 580**

30. ——— **Running-a-muck.**—*Punishment.*—Where a quiet, peaceable man, suddenly, and without the least motive or provocation, runs amuck against all around him, his case is different from an ordinary case of deliberate murder deserving of the extreme penalty. QUEEN *v.* BISHONATH BUNNEKA **[8 W. R., Cr., 53**

31. ——— **Presumption of death.**—In a case where a man was struck on the head in a boat with a heavy paddle and knocked overboard in a large river in the height of the rains, and had never been heard of since, it was held impossible to suppose that the man was still alive and the conviction of murder was upheld. QUEEN *v.* POORUSOOLAH SIKHDAR **[7 W. R., Cr., 14**

32. ——— **Sacrifice of son by father.**—Curious case of murder where a father sacrificed his son, because wealth had not accompanied its birth, and afterwards cut his own throat as a protest against his deity's injustice. QUEEN *v.* BISHENDHAREE KAHAR **[7 W. R., Cr., 100**

33. ——— **Charge of murder where no body is found.**—*Penal Code, s. 302.*—"*Corpus delicti.*"—The mere fact that the body of the murdered person has not been found is not a ground

**MURDER.—Charge of murder where no body is found—*continued.***

for refusing to convict the accused person of the murder. EMPRESS *v.* BHAGIRATH [I. L. R., 3 All., 383

34. ——— Although, under some circumstances, a charge of murder may be sustained, when the body of the person said to have been murdered is not forthcoming, still, when that is the case, the strongest possible evidence as to the fact of the murder should be insisted on before an accused is convicted. ADU SHIKDAR *v.* QUEEN-EMPRESS [I. L. R., 11 Calc., 635

35. ——— **Conviction of murder where body is not found.**—*Sentence of death.*—A Judge was held to have exercised a proper discretion in not passing sentence of death in a case in which the dead body was not found. QUEEN *v.* BUDDEROODEEN . . . 11 W. R., Cr., 20

**MUTARAFA.**

*See* TAX . . I. L. R., 9 Mad., 14

**MUTINY ACT.**

*See* ATTACHMENT—SUBJECTS OF ATTACHMENT—SALARY . I. L. R., 1 All., 730

*See* SMALL CAUSE COURT, MOFUSSIL—JURISDICTION—MILITARY MEN. [2 B. L. R., S. N., 3, 7 6 Mad., 83

——— s. 101.

*See* JURISDICTION OF CRIMINAL COURT—EUROPEAN BRITISH SUBJECTS. [I. L. R., 5 Calc., 124

——— s. 103.

*See* SMALL CAUSE COURT, MOFUSSIL—JURISDICTION—MILITARY MEN. [2 Mad., 389

**MUTUAL DEALINGS.**

*See* CASES UNDER LIMITATION ACT, 1877, ART. 85 (1859, s. 8).

**MUTWALLI, REMOVAL OF—**

*See* MAHOMEDAN LAW—ENDOWMENT. [2 N. W., 420 4 Mad., 44 10 W. R., 458 11 W. R., 333

**MUTWALLI, SUIT TO REMOVE—**

*See* ACT XX OF 1863 s. 18. [15 B. L. R., 167

**MUTUAL BENEFIT SOCIETY.**

1. ——— *Power of majority to alter rules.—Payment of pensions in England.—Adjustment of payments in accordance with rate of exchange.—Interest of subscriber to society.*—The U. S. F. P. Fund, a Society established, as stated in rule 2 of the Rules of the Society, "to provide for the maintenance of the widows and children of those who shall subscribe to it upon the terms and conditions specified below, or upon such others as may be determined upon by the subscribers or by a majority of them," had, prior to 1850, passed a rule (33) that "widows, being incumbents on the Fund, shall be paid their pensions at any place they may desire, subject to the usual charges of remittance; the pensions of children, being incumbents on the Fund, shall also be so paid, and on the same condition." The subscriptions were then, and continued to be, paid in rupees, and the pensions were calculated in rupees according to certain tables. On being admitted, a subscriber had to "promise and engage to submit to, and abide by, the rules and bye-laws of the Institution" (rule 22), and by rule 27 had to" pay a fee equal to ten per cent. on the amount of monthly pension insured." Rule 60 gave power to alter any existing rule by the duly recorded votes of a majority of the subscribers. In 1850, exchange between India and England being then about par, rule 33 was repealed, and a new rule (41) was substituted for it, which provided that "incumbents on the Fund shall be paid their annuities in India at par, or in Europe at the fixed rate of two shillings in the rupee." On the 1st July 1876, exchange being adverse on remittances from India to England, a rule was passed, which provided that "incumbents on the Fund shall be paid their annuities in India in full, and those residing in Europe at the rate of exchange fixed for the official year by the Secretary of State; annuities already due or hereafter becoming due on risks accepted before the 1st July 1876, shall be payable to incumbents residing in Europe at the fixed rate of two shillings to the rupee." Exchange continuing to decline, on the 22nd May 1880, the Society, by the votes of 553 against 505 of the subscribers, passed the following rule: "Annuities already due, or becoming due before the 1st May 1880, on risks accepted before the 1st July 1876, shall be payable to incumbents residing in Europe at the fixed rate of two shillings to the rupee: but all other annuities due, or becoming due, shall be paid, if to incumbents in India, in full, and if to incumbents residing in Europe, in London, at the market rate of exchange." The plaintiffs were the widow and children of *F.*, a member of the society, who was admitted as a subscriber for the benefit of his widow in November 1871, for the benefit of his son in September 1873, and for the benefit of his daughter in November 1874. He commenced to pay an increased subscription for the benefit of his son in September 1878. He was not one of the majority who voted in favour of the rule of the 22nd May 1880, though he attended the meeting of subscribers. He died on the 20th June 1880, having up to that time duly paid his subscription to the Fund. In a suit in which the plaintiffs, who were residing in England, claimed to be paid their pensions at the rate of two shillings in the rupee,—*Held* that *F.* had no vested interest at the time of the passing of the rule of the 22nd May 1880; that the plaintiffs were, with respect to their pensions, bound by the terms of that rule, which a majority of the subscribers had full powers to pass so as to affect the nominees of all existing subscribers, and therefore the suit should be dismissed.

**MUTUAL BENEFIT SOCIETY**—*continued.*

Rule 41 gave an undue advantage to one class of subscribers, which was *extra vires*, and open to correction under rule 60 by a majority of the subscribers. The Society being one for the equal benefit of all subscribers, even if rule 60 did not give power to adjust payments in accordance with the rate of exchange, such a power might be implied for the purpose of continuing the business of the Association. FALLE *v.* MACEWEN

[I. L. R., 7 Calc., 1: 8 C. L. R., 577

2. ——— **Madras Civil Service Annuity Fund.**—*Refund of excess subscriptions, Right to*—The Madras Civil Service Annuity Fund was established in 1825 for the purpose of providing annuities to the Civil Servants of the East India Company in the Madras Presidency on retiring from service. The annuities were to be provided for by subscriptions of the Civil Servants to that Fund to the amount of one half and by contributions by the East India Company to the extent of the other half. These contributions were to be received by trustees and applied by them to make good the deficiency which was to be supplied by the Company. It appeared that in some instances the trustees of the Fund, where an excess of subscriptions had been paid by a subscriber entitled to an annuity beyond the half value of the annuity had returned the excess. *R.*, a subscriber from the commencement, had contributed beyond the half value of his annuity. Held that, although the regulations of the Fund did not justify a refund to a subscriber of the amount of his subscriptions in excess of the prescribed amount, yet that the practice which had prevailed of refunding the contributions in excess, and the acquiescence of the East India Company in such practice, precluded the Company from disputing the right of the subscriber to repayment of the surplus of his subscriptions in excess of the half value of the annuity payable out of the Fund. *Held*, also, that *R.* having become entitled to his annuity in 1852, his right to such repayment could not be affected by rules passed in 1853 prohibiting such refund, although *R.* remained a subscriber in 1853. EAST INDIA COMPANY *v.* ROBERTSON

[4 W. R., P. C., 10: 7 Moore's I. A., 361

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**NADI BHARATI.**

*See* ACCRETION — NEW FORMATION OF ALLUVIAL LAND—RIVERS OR CHANGE IN COURSE OF RIVERS.

[8 B. L. R., Ap., 116

**NAIB.**

*See* PRINCIPAL AND AGENT—AUTHORITY OF AGENTS . . . 1 W. R., 56
[2 W. R., 155, 225
3 W. R., Act X, 1
7 W. R., 394

**NARVA TENURE.**

——— *Its history and incidents.—Grant of narva village in inam.—Alienations by narvadars.—Baharkhali.—Gam majmun.—Pati majmun.—Revenue survey in a narva village.—Suit by inamdar to recover rent as settled by the survey.—Landlord and tenant.*—The narva tenure and its incidents discussed and explained. The inamdar of the narva village of Dakor desired that the revenue survey should be introduced into it. The usual measurements and assessments were made, and the Superintendent of the Revenue Survey, following the analogy of the system prevalent in Government villages, held a conference with the narvadars and drew up a scheme, to which the narvadars assented, for the future management of the village and for settling the future relations between the narvadars and the inamdars as representing the fiscal interests of the Government. The narvadars agreed to retain their narva tenure along with an assessment made upon the principles of the revenue survey; and they resigned their right over baharkhali lands aliened from the several narva shares, on the understanding that the inamdar was to levy from the tenants one fourth of the difference between the quit-rent actually paid and the full assessment as ascertained by the survey. The narvadars and their tenants, the actual holders of the baharkhali lands, having refused to pay this one fourth, the inamdar sued them to recover it or the full assessment as ascertained by the survey. *Held* that the inamdar was entitled to recover the one fourth according to the scheme, which was binding on the whole body of narvadars, even though the defendant and others, being a minority, had not assented to the action of the majority. The inamdar's fiscal rights include the right to levy the ordinary assessment, except where a contract stands in the way, and he can raise the assessment to a limit which is fair and equitable according to the custom of the country. As between the narvadars and the Government there is nothing to prevent the former from consenting to the exclusion of any part of the village lands from the contract. The severance of such part makes it immediately subject to full taxation on ordinary principles, and any agreement with an incumbrancer in limitation of the narvadar's right to take rent can operate only as a ground of action against the narvadars themselves. MANOHAR GANESH TAMBEKAR *v.* CHUTABHAI MITHABHAI . . I. L. R., 8 Bom., 347

**NATIVE CHRISTIANS.**

*See* SUCCESSION ACT, s. 331 . 7 Mad., 121
[I. L. R., 2 Mad., 209

**NATIVE STATE OR PRINCE IN ALLIANCE.**

*See* CIVIL PROCEDURE CODE, 1882, ss. 387, 391 (1859, s. 177).

[2 B. L. R., A. C., 73
10 W. R., 385

**NAVIGABLE RIVER.**

*See* FISHERY, RIGHT OF—

[I. L. R., 4 Calc., 53
W. R., 1864, 243
15 W. R., 212
11 C. L. R., 11
I. L. R., 8 Mad., 467
I. L. R., 11 Calc., 434

**NAVIGABLE RIVER**—*continued.*

——— **Re-formation in—**

*See* CASES UNDER ACCRETION—NEW FORMATION OF ALLUVIAL LAND—CHURS OR ISLANDS IN NAVIGABLE RIVERS.

**NAWAB NAZIM OF BENGAL DEBTS ACT (XVII OF 1873).**

*See* SUPERINTENDENCE OF HIGH COURT —CHARTER ACT, s. 15—CIVIL CASES. [24 W. R., 311

1. ——— *Right of appeal.*—Act XVII of 1873 was not intended to deprive the Nawab Nazim of Moorshedabad of any right of appeal to the High Court which he had before it was passed. NAWAB NAZIM OF BENGAL *v.* AMRAO BEGUM [21 W. R., 59

2. ——— *Submission of decree of Court as a claim to Commissioners.—Power of High Court.*—Certain judgment-creditors were held to have committed an error of judgment in submitting their decree to Commissioners appointed under Act XVII of 1873, as if it were a new and unascertained claim. Where this was done, and the Commissioners expressed their opinion upon the matter involved (although it had already been determined), the High Court held that it had no authority to enquire into their award. OMRAO BEGUM *v.* COMMISSIONERS APPOINTED UNDER ACT XVII OF 1873 . 24 W. R., 394

——— s. 11.—*Agreement for appropriation of payments.—Contract Act (IX of 1872), s. 60.—Suit for rent.*—So far as the Nawab Nazim's Debts Act is concerned, rent due by the Nawab is on the same footing as any other debt incurred by him, and before his property can be made liable to satisfy such rent debt, the consent of the Governor General in Council must first be obtained to the issue of execution. ROOKMINY BULLUB ROY *v.* MULK JAMANIA BEGUM . I. L. R., 9 Calc., 914: 12 C. L. R., 534

——— s. 12.—*Jurisdiction of Commissioners.—Parties.*—The Commissioners appointed under the Nawab Nazim's Debts Act (XVII of 1873) (an Act to provide for the liquidation of the debts of the Nawab Nazim, and for his protection from legal process), having ascertained and certified that a certain zamindari was nizamut property (*i.e.*, held by the Government for the purpose of upholding the dignity of the Nawab Nazim for the time being), the fact that this property had, before the passing of the Act, been conveyed by the Nawab Nazim to his son, did not deprive the Commissioners of jurisdiction to deal with the question. The plain language of section 12 of the Act is not controlled by any words in the preamble. A suit brought by a claimant against the Government and the grantee to recover the property, without the Nawab Nazim having been joined as a party, could not proceed. OMRAO BEGUM *v.* GOVERNMENT OF INDIA [I. L. R., 9 Calc., 704: 12 C. L. R., 595 L. R., 10 I. A., 39

**NAWAB OF CARNATIC'S ACT, XXX OF 1858.**

——— *Claims against Nawab.—Onus of proof.*—Act XXX of 1858 of the Legislative Council of India for the administration of the estate and payment of the debts of the late Nawab of the Carnatic, empowered the Supreme Court at Madras to investigate in a summary manner claims against the Nawab's estate. *Held* that the provisions of the Act not only limited the extraordinary remedy which it gave to certain defined classes of debt, but threw upon a claimant more than the ordinary burden of proof by compelling the holder of any written acknowledgment, or security, to prove the actual consideration given for it: and upon those claiming the price of the goods delivered, proof of the fair and actual value of such goods. GHOOLUM MOORTAZAH KHAN *v.* GOVERNMENT . . . 9 Moore's I. A., 456

**NAWAB OF SURAT.**

——— *Act XVIII of 1848.—Sanction of Government to bring suit.*—The permission of Government in 1858 to the Agent for the Governor of Bombay at Surat to pay certain moneys of the widow of the late Nawab of Surat to whomsoever a certificate of heirship to her might be granted by the Civil Court is not a sufficient authority under Act XVIII of 1848 for the institution against her granddaughters of a general civil suit under Regulation IV of 1827 or Act VIII of 1859. Nor does permission given in 1871 to institute a suit authorise the continuation of a suit instituted in 1869. AJMUDDIN KHAN *v.* ZIAUNNISSA BEGAM . 12 Bom., 156

——— **Administration of private estate of—**

*See* APPEAL TO PRIVY COUNCIL—CASES IN WHICH APPEAL LIES—APPEALABLE ORDERS . . 5 Moore's I. A., 499

**NAZIR.**

1. ——— **Guardian.**—*Minors Act, XX of 1864.—Bom. Civil Courts Acts, XIV of 1869 and X of 1876).—Officer of Government.—Civil Procedure Code, 1877, s. 456.*—The Nazir of a Civil Court, who is appointed guardian of the estate of a minor under Act XX of 1864, is not an officer of Government within the meaning of section 32 of Act XIV of 1869 as amended by section 15 of Act X of 1876. An officer of Government, in order to come within those enactments, must be a party to a suit in his official capacity. A Subordinate Judge who, under section 456 of the Civil Procedure Code (Act X) of 1877, as amended by section 73 of Act XII of 1879, appoints the Nazir or any other officer of his Court to act as guardian of a minor plaintiff or defendant in a suit in his Court, has no jurisdiction to hear it and pass a decree against that officer as guardian *ad litem* of the minor. *Trimbak Nimbaji* v. *Shivram, I. L. R., 4 Bom., 642, note,* followed. MOHAN ISHWAR *v.* HAKU RUPA . . . . I. L. R., 4 Bom., 638

2. ——— **Liability of Nazir.**—*Avoidance of responsibility.*—A Nazir is the head of an important department, and must be solely responsible for the

**NAZIR.—Liability of Nazir—*continued.***

truth of what he reports or admits. He cannot be permitted to avoid responsibility by urging that his mohurrir deceived him. QUEEN *v.* TOFUZZAL ALI [7 W. R., Cr., 109

3. ——————— *Attachment of property in execution of decree.—Failure to return property attached in satisfaction of decree.—Beng. Act V of 1863, ss. 4 & 8.*—In a suit brought against the plaintiff in the Collector's Court for arrears of rent, a decree was obtained, and a warrant was issued for the attachment of certain moveable property belonging to the plaintiff. The warrant was addressed to the Nazir of the Collector's Court, and was by him delivered to one of the registered peons of the Court for execution. The peon reported to the Nazir that he had attached the property in question, and had placed it in charge of certain persons, whose receipt for it he produced and filed. Subsequently, the plaintiff paid the amount of the decree into Court and an order was made releasing his property from the attachment. A peon was sent to restore the property to the plaintiff, but the persons in whose charge it was said to have been left alleged that they had never taken possession of the property, and the peon was unable to restore the property to the plaintiff. In a suit brought by the plaintiff against the Nazir to recover the property or its value—*Held* that the Nazir was not liable, Bengal Act V of 1863 having altered the relation which formerly existed between the Nazir and the peons of the Revenue Courts, and put them in the position of paid servants of Government. KALEE COOMAR CHATTERJEE *v.* SIDDHESSUR MUNDUL [11 B. L. R., 256: 19 W. R., 335

4. ——————— *Warrant of arrest of judgment-debtor.—Escape of debtor.—Negligence.*—The plaintiff sued out a warrant for the arrest of his judgment-debtor on the 4th December 1876. The warrant was lodged with the Nazir on the 16th December, and was to be in force till the 4th January 1877. On the 22nd December 1876, the Nazir was informed that the judgment-debtor was already in the civil jail under a writ of execution issued by another creditor. The Nazir then returned the warrant to the Subordinate Judge who had issued it. On the 29th December the Subordinate Judge again sent it to the Nazir's office, where it was duly received by the Nazir's karkun (defendant No. 2). This fact was not reported by the karkun to the Nazir (defendant No. 1) until the 4th January 1877. On the 1st January 1877 the judgment-debtor's debt was paid by Government, and he was released in honour of Her Majesty's assumption of the title of Empress of India. The judgment-debtor thereupon left the district, and could not be found, and the plaintiff's warrant remained unexecuted. The plaintiff sued the Nazir and his karkun for allowing his judgment-debtor to escape. *Held* that the Nazir ought not to have sent the warrant back to the Subordinate Judge, and that there was no necessity for a fresh order on it until the time which it had to run had expired. *Held*, further, that if the Nazir forgot the existence of this unexecuted warrant on the 1st January 1877, and thus allowed the debtor

**NAZIR.—Liability of Nazir—*continued.***

to be released from the former process, when he ought to have been re-arrested under the plaintiff's warrant, there was actual negligence on his part, making him liable in damages to the plaintiff. *Quære,*—Whether or not the Nazir could have been made responsible for the negligence of the karkun, who was not his servant, but the servant of and paid by Government and appointed by the District Judge, if the warrant had been lodged with the karkun in the first instance, and that fact had never been communicated to the Nazir, and if he had never known of the existence of the warrant. KASTURCHAND *v.* RAVJI SADASHIV . I. L. R., 4 Bom., 65

5. ——————— *Misrepresentation of solvency of surety by witness to surety-bond.*—The plaintiff held a money-decree against *M.*, who was arrested in execution of it. On being brought to the Court, however, *M.* applied for his discharge as an insolvent under section 273 of the Civil Produre Code (Act VIII of 1859). He was released on the security of *G.*, who executed a bond for the appearance of *M.* at the inquiry into his insolvency. The defendant attested the bond, and wrote in the attestation that *G.* was a solvent person. In consequence of the non-appearance of *M.*, the plaintiff sought to execute his decree against the surety *G.*, who, on his arrest, also applied for his discharge on the ground of his insolvency, and was discharged after inquiry. The plaintiff thereupon sued the defendant for the amount of his decree and cost of execution, on the ground of his representation in the attestation that *G.* was solvent. *Quære,*—Whether the Nazir was liable to the plaintiff for negligence in not taking a proper surety. NAGO MAHADEV *v.* NARAYAN RAMCHANDRA . I. L. R., 4 Bom., 465

6. ——————— **Nazir of Small Cause Court.**—*Power to receive plaints.*—A Nazir of a Court of Small Causes is not authorised to receive plaints. RAJ CHUNDER GOPE *v.* JOOGAL GOPE [18 W. R., 172

——————— **Misappropriation by—**

*See* SURETY—LIABILITY OF SURETY. [9 B. L. R., Ap., 26

## NECESSITY FOR ALIENATION.

*See* CASES UNDER HINDU LAW—ALIENATION—ALIENATION BY WIDOW—WHAT CONSTITUTES NECESSITY.

*See* CASES UNDER HINDU LAW—ENDOWMENT—ALIENATION OF ENDOWED PROPERTY.

*See* CASES UNDER ONUS PROBANDI—HINDU LAW—ALIENATION.

## NEGLIGENCE.

*See* BILL OF LADING.

[13 B. L. R., 394
4 Bom., O. C., 169
5 Bom., O. C., 113
24 W. R., 74
I. L. R., 10 Calc., 489
6 Mad., 353
10 Bom., 60

**NEGLIGENCE**—*continued.*

*See* CALCUTTA MUNICIPAL ACT, 1863, s. 151 . . . 8 B. L. R., 433

*See* CALCUTTA MUNICIPAL ACT, 1863, s. 226 . . . 8 B. L. R., 265

*See* CARRIERS . I. L. R., 6 Calc., 227
[2 N. W., 237
3 N. W., 195
22 W. R., 39

*See* CULPABLE HOMICIDE.
[I. L. R., 1 Mad., 224
I. L. R., 4 Calc., 764, 815
5 N. W., 38
7 Mad., 119
I. L. R., 2 All., 766
I. L. R., 3 All., 597, 776
I. L. R., 6 All., 248

*See* LANDLORD AND TENANT—DAMAGE TO PREMISES LET.
[3 B. L. R., A. C., 277
5 B. L. R., 401

*See* RAILWAY COMPANY.
[4 B. L. R., O. C., 97
14 B. L. R., 1
Bourke, O. C., 39
I. L., R., 3 Bom., 96, 109, 120

*See* ZEMINDAR, DUTY OF—
[14 B. L. R., 209

1. ——— **Requisites for action for negligence.**—*Act contrary to law.*—To sustain an action for negligence, there must be an obligation on the part of the defendant to use care, and a breach of that obligation to the plaintiff's injury is an act contrary to law. SVAMI NAYUDU *v.* SUBRAMANIA MUDALI . . . . . 2 Mad., 158

2. ——— **Sending goods by railway company.**—*Carrier.—Duty of persons sending goods of a dangerous nature.—Notice.—Act XVIII of 1854, s. 15.—Action for compensation for destruction of life.—Held* (PEARSON, *J.*, dissenting) that a person who sends an article of a dangerous and explosive nature to a railway company to be carried by such company, without notifying to the servants of the company the dangerous nature of the article, is liable for the consequences of an explosion, whether it occurs in a manner which he could not have foreseen as probable or not. *Held* also (PEARSON, *J.* dissenting), that such a person is liable for the consequences of an explosion occurring in a manner which he could not have foreseen, if he omits to take reasonable precautions to preclude the risk of explosion. LYELL *v.* GANGA DAI . I. L. R., 1 All., 60

3. ——— **Hire of boats.**—*Damage.—Liability of bailee.*—*A.* contracted with *B.* for the hire of certain cargo boats. While being towed by a steamer which *A.* had chartered according to agreement the boats sustained great damage by reason of gross negligence on the part of *C.* whom *A.* had placed in charge. *Held* that *A.* must be held responsible to *B.* for the negligence of *C.* GREESH CHUNDER BANNERJEE *v.* COLLINS . 2 Hyde, 79

**NEGLIGENCE**—*continued.*

4. ——— **Railway Company.**—*Injury to persons travelling.*—The plaintiff was a passenger travelling on the defendants' railway, and received severe injuries from a fall which he experienced in stepping upon the platform when the train stopped. *Held* that the Railway Company was guilty of negligence in not keeping the station properly lighted, in allowing the train to overshoot the station, and in not warning the plaintiff against alighting; also that the injuries sustained by the plaintiff were caused by the negligence in question, and that the plaintiff did not by his own want of care contribute to the accident. WOODHOUSE *v.* CALCUTTA AND SOUTH EASTERN RAILWAY COMPANY
[9 W. R., 73

5. ——— **Penal Code, s. 289.**—*Negligence with respect to animals.*—To sustain a charge under section 289 of the Penal Code there should be evidence not only of negligence, but also that such negligence would probably lead to danger to human life or of grievous hurt. ANONYMOUS
[3 Mad., Ap., 33

6. ——— *Pony negligently tied up in bazar.*—The High Court refused to interfere with an order passed under section 289 of the Penal Code by a Magistrate fining the owner of a pony which had been tied negligently, which was running about loose in a crowded bazar, and thereby endangering the lives and limbs of persons, that section referring not only to savage animals but to any animal. QUEEN *v.* CHAND MANAL
[19 W. R., Cr., 1

7. ——— **Penal Code, s. 286.**—*Negligent dealing with explosive.—Probable danger to human life.—Loaded gun left in open place.*—*C.* having returned to his house after dawn from watching his crops at night with a loaded gun, and finding his house-door locked, placed the gun, loaded, with the hammer down on the cap, on a cot outside his house and went for a short time to a neighbouring house. *A.*, the child of a neighbour, four years old, was killed by the gun exploding. *C.* was convicted under section 286 of the Penal Code for negligently omitting to take order with the gun sufficient to guard against probable danger to human life. *Held* that the conviction was bad in law. QUEEN-EMPRESS *v.* CHENCHUGADU . . I. L. R., 8 Mad., 421

**NEGOTIABLE INSTRUMENTS, SUMMARY PROCEDURE ON—**

Act V of 1866, the Act mentioned in the following cases, was repealed and its provisions re-enacted in the Civil Procedure Code. *See* Civil Procedure Code 1882, ss. 532, 538.

1. ——— **Return of summons.**—*Procedure.*—In a suit under Act V of 1866, the summons should be returned in the usual way; and after the expiration of the required time, an order of the Court or a decree should be obtained. SCHILLER *v.* MARKER . . . I Ind. Jur., N. S., 283

**NEGOTIABLE INSTRUMENTS, SUMMARY PROCEDURE ON—*continued.***

2. ——— **Time to obtain leave to defend.**—*Act V of 1866, s. 3.*—Although Act V of 1866, section 3, only gives the defendant seven days to get leave to come in and defend an action on a bill, note, &c., the Court must be satisfied before granting a decree that the defendant has had a full opportunity to obtain leave to defend. GROB *v.* PALMER [1 Ind. Jur., N. S., 395

3. ——— *Extension of time for appearance.—Jurisdiction.*—Where, in a suit under Act V of 1866, the defendant is at such a distance as would make it impossible for him to put in an appearance within the seven days allowed by the Act, the Court will stay execution for a time long enough to allow him to appear. Suits cannot be brought under this Act against persons resident out of the jurisdiction. CHANDRAKANT ROY *v.* POGOSE [3 B. L. R., O. C., 83

4. ——— **Leave to appear and defend.**—*Practice.—Costs.*—The Court will give leave to a defendant to appear and defend in suits under Act V of 1866, where he shows a detence apparently real; but where there is a doubt as to the *bona fides* of the defence, payment of money into Court will be ordered, or security directed to be given. The Court has, in giving leave to defend, a discretion to order security for costs, not only where it doubts the *bona fides* of the defence, but also if it considers the matter of defence raised is unnecessary, though allowable. If the plaintiff has not been heard at first against the defendant's application, the Court will always allow him to come in afterwards and show that the leave ought not to have been granted, or, if granted at all, in more stringent terms. VONLINTZGY *v.* NARAYAN SING . . . 6 B. L. R., Ap., 64

5. ——— **Leave to defend.**—In an action on a promissory note under this Act the defendant was allowed to come in and defend after the plaintiff had obtained a decree; the decree was set aside and written statements ordered. JOSEPH *v.* SOLANO [9 B. L. R., 441: 18 W. R., 424

6. ——— **Notarial protest.**—*Evidence of dishonour.—Hundi.—Bill of exchange.*—A notarial protest of any bill of exchange noted at any time after the passing of Act V of 1866 is *primâ facie* evidence that the bill has been dishonoured under section 13 of that Act, although the sections relating to summary procedure on bills of exchange did not come into operation till May 1st, 1866. A hundi, which contains a direction on sufficient consideration to the drawee, and accepted by him, is within the terms of the Act, and such a document is assignable without any regular form of endorsement, if sufficient cause appears in the handwriting of an endorser to indicate an intention to assign it. EAST INDIA BANK *v.* KHOJAH VULLIE GOOLWANY [1 Ind. Jur., N. S., 247

7. ——— **Decree.**—*Right of plaintiff suing under the Act.*—Under the summary procedure on Bills of Exchange Act (V of 1866) the plaintiff is entitled to claim by his summons and obtain by his decree whatever sum, principal and interest, is, on the legal construction of the instrument, demandable DESOUZA *v.* RANGAIAN . . 6 Mad., 257

**NEGOTIABLE INSTRUMENTS, SUMMARY PROCEDURE ON.—Decree—*continued.***

8. ——— *Promissory note.—Consideration.—Evidence.*—In a suit under the Bills of Exchange Act to recover R1,200 on a promissory note the Court gave a decree for R700 only, that being shown to have been the full consideration received for the note. RAMLAL MOOKERJEE *v.* HARAN CHANDRA DHAR [3 B. L. R., O. C., 130: 12 W. R., O. C., 9

9. ——— *Promissory note—Endorsement struck out.—Evidence.*—A plaint was presented under Act V of 1866 by the endorsees of a promissory note endorsed as follows: "Received from the Chartered Mercantile Bank.—J. M. Reid, Agent." The note had not been paid when presented, and the endorsement was struck out. Admission of the plaint was refused, unless evidence was given that the note had been paid, and to explain why the endorsement was struck out. As under Act V of 1866 evidence could not be received, the plaint was not admitted. CHARTERED MERCANTILE BANK *v.* SECONDÉ . . . 3 B. L. R., O. C., 146

10. ——— **Suit on promissory note payable by instalments.**—Where a promissory note is payable by instalments, and contains a stipulation that, on default in payment of the first instalment, the whole amount is to become due, a suit to recover the whole amount on default made in payment of the first instalment cannot be brought under Act V of 1866. REMFRY *v.* SHILLINGFORD [I. L. R., 1 Calc., 130

11. ——— **Costs.**—*Suit under R500.—Jurisdiction of Small Cause Court.*—In an undefended suit brought under Act V of 1866 on a promissory note for R342, there was nothing in the petition to show that the suit could not have been brought in the Small Cause Court, the High Court gave a decree for amount of note and costs. DUFF *v.* FISHER [8 B. L. R., Ap., 10

**NEGOTIABLE INSTRUMENTS ACT (XXVI OF 1881).**

——— **ss. 35, 43.**

*See* MAJORITY, AGE OF— [I. L. R., 7 All., 490

——— **s. 61.**

*See* HUNDI—ENDORSEMENT. [I. L. R., 11 Calc., 344

——— **ss. 93, 94, 98.**

*See* HUNDI—NOTICE OF DISHONOUR. [I. L. R., 6 All., 78

**NEPHEW.**

*See* HINDU LAW—INHERITANCE—SPECIAL HEIRS—MALES—NEPHEW.
[I. L. R., 2 Calc., 379
3 Agra, 101, 143, 188
9 W. R., 463
15 W. R., 70
6 B. L. R., 303

**NEW TRIAL.**

*See* CASES UNDER SMALL CAUSE COURT, MOFUSSIL—PRACTICE AND PROCEDURE—NEW TRIALS.

*See* SMALL CAUSE COURT, PRESIDENCY TOWNS—PRACTICE AND PROCEDULE—NEW TRIALS.

——— in criminal case.

*See* CRIMINAL PROCEDURE CODE, 1882, s. 376 (1872, s. 288).
[I. L. R., 1 Bom., 639

*See* REVISION—CRIMINAL CASES—SENTENCES . B. L. R., Sup. Vol., 488

*See* REVISION—CRIMINAL CASES—RETRIAL . . . 24 W. R., 24
I. L. R., 1 Calc., 282
I. L. R., 2 Calc., 405

**NEXT OF KIN, CREDITOR OF—**

*See* CASES UNDER PROBATE—OPPOSITION TO AND REVOCATION OF GRANT.

**NEXT OF KIN, LIABILITY OF SHARE OF, FOR BARRED DEBT.**

*See* ADMINISTRATION.
[I. L. R., 2 Bom., 75

**NEXT OF KIN, PURCHASER FROM—**

*See* PROBATE—OPPOSITION TO AND REVOCATION OF GRANT.
[I. L. R., 4 Calc., 360

**NON-ACCEPTANCE.**

*See* CONTRACT—CONSTRUCTION OF CONTRACTS . . 2 B. L. R., O. C., 154
[3 B. L. R., O. C., 103

**NON-APPEARANCE, EFFECT OF—**

*See* CASES UNDER APPEAL—DEFAULT IN APPEARANCE.

*See* CASES UNDER APPEAL—EX PARTE CASES.

*See* CASES UNDER CIVIL PROCEDURE CODE, 1882, ss. 98, 99 (1859, s. 110).

*See* CASES UNDER CIVIL PROCEDURE CODE, 1882, s. 100 (1859, s. 111).

*See* CASES UNDER CIVIL PROCEDURE CODE, 1882, ss. 102, 103.

*See* CASES UNDER CIVIL PROCEDURE CODE, 1882, s. 108 (1859, s. 119).

**NON-APPEARANCE, EFFECT OF—*continued.***

*See* CASES UNDER CIVIL PROCEDURE CODE, 1882, s. 158 (1859, s. 148).

*See* CASES UNDER CIVIL PROCEDURE CODE, 1882, s. 177.

*See* CIVIL PROCEDURE CODE, 1882, s. 249 (1859, s. 217) . 5 B. L. R., Ap., 65

*See* COMPLAINT—DISMISSAL OF COMPLAINT—EFFECT OF DISMISSAL.
[4 Mad., Ap., 8
6 Mad., Ap., 8
I. L. R., 6 Calc., 523

*See* CASES UNDER COMPLAINT—DISMISSAL OF COMPLAINT—GROUND FOR DISMISSAL.

*See* INSOLVENT ACT, s. 86.
[8 B. L. R., Ap., 57
7 C. L. R., 378

**NON-DELIVERY.**

*See* BAILMENT . 1 B. L. R., O. C., 68

*See* CASES UNDER CONTRACT.

*See* CONTRACT ACT, s. 39.
[I. L. R., 4 Calc., 252
1 Mad., 162

*See* CONTRACT ACT, s. 51.
[I. L. R., 4 Calc., 252

**NON-JOINDER.**

*See* PARTIES—ADDITION OF PARTIES—PLAINTIFFS . I. L. R., 1 All., 453

**NON-PAYMENT OF RENT.**

*See* CASES UNDER LANDLORD AND TENANT—PAYMENT OF RENT—NON-PAYMENT.

**NORTH-WEST PROVINCES LAND REVENUE ACT (XIX OF 1873).**

*See* CASES UNDER JURISDICTION OF CIVIL COURT—RENT AND REVENUE SUITS, N.-W. P.

*See* RES JUDICATA—COMPETENT COURT—REVENUE COURTS.
[I. L. R., 7 All., 224

——— s. 3.

*See* JURISDICTION OF CIVIL COURT—RENT AND REVENUE SUITS, N.-W. P.
[I. L. R., 6 All., 578
I. L. R., 8 All., 552

*See* N.-W. P. RENT ACTS, s 94.
[I. L. R., 1 All., 512

*See* SALE FOR ARREARS OF REVENUE—SETTING ASIDE SALE—IRREGULARITY.
[I. L. R., 1 All., 400

——— ss. 43, 83, & 241.—*Vendor and purchaser.—Agreement.—Jurisdiction of Civil Court.—Cause of action.—Assessment of revenue.*—The purchaser of a certain estate paying revenue to Government agreed with the vendors, shortly after

NORTH-WEST PROVINCES LAND REVENUE ACT (XIX OF 1873)—*continued.*

——— ss. 43, 83, & 241—*continued.*

the sale, that they should retain a certain portion of such estate free of rent, and that he would pay the revenue payable in respect of such portion. In 1853, in a suit by the vendors against the purchaser to enforce this agreement, the Sudder Court held that the revenue payable in respect of such portion of the estate was payable by the purchaser. In 1875, on a fresh settlement of the estate, the representatives in title of the purchaser applied to the settlement officer to settle such portion of the estate with the representative in title of the vendors. The settlement officer refused this application, but it was subsequently allowed by the superior revenue authorities. The representative in title of the vendors then sued the representatives in title of the purchaser in the Civil Court, claiming "that he might, in accordance with the agreement between the vendors and the purchaser, be exempted from paying revenue in respect of such portion, as against the defendants, without any injury to the Government: that the defendants might be ordered to pay as heretofore such revenue: and that the defendants might be ordered never to claim or demand from him any revenue they might be compelled to pay in respect of such portion." *Held per* SPANKIE, *J.*, that, assuming that the agreement between the vendors and the purchaser was enforceable, the act of the defendants in moving the settlement officer to settle such portion of the estate with the plaintiff gave the plaintiff a cause of action. Also that, the object of the plaintiff's suit being to obtain a declaration that, as between him and the defendants, the latter were bound to pay revenue in respect of such portion, the suit was not barred by clause (*b*), section 241 of Act XIX of 1873. Also that, although the revenue authorities might regard the decision of the Sudder Court as binding on the parties then before the Court, for the currency of the then settlement, that decision, that settlement having expired, and section 83 of Act XIX of 1873 having come into force, could not control the power of the revenue authorities to settle the land in question with the plaintiff who was its proprietor. *Held per* OLDFIELD, *J.*, that, with reference to sections 43 and 83 of Act XIX of 1873, the Civil Courts could not relieve the plaintiff of his liability to pay revenue. *Held* by the Court that, in the absence of proof that the agreement by the purchaser was intended to extend beyond the period of the settlement then current, and that it was binding upon his representatives in title, the plaintiff could not obtain the declaration which he sought. HIRA LAL *v.* GANESH PRASAD . . . I. L. R., 2 All., 415

——— ss. 53, 54.

*See* JURISDICTION OF CIVIL COURT—RENT AND REVENUE SUITS, N.-W. P. [I. L. R., 6 All., 578

——— ss. 62, 91, 94, 241.

*See* JURISDICTION OF CIVIL COURT—RENT AND REVENUE SUITS, N.-W. P. [I. L. R., 1 All., 613

NORTH-WEST PROVINCES LAND REVENUE ACT (XIX OF 1873)—*continued.*

——— s. 66.

*See* JURISDICTION OF CIVIL COURT—RENT AND REVENUE SUITS, N.-W. P [I. L. R., 1 All., 373
I. L. R., 2 All., 49

——— s. 79.

*See* GRANT—POWER TO GRANT. [I. L. R., 2 All., 545, 732

*See* JURISDICTION OF CIVIL COURT—RENT AND REVENUE SUITS, N.-W. P. [I. L. R., 2 All., 545, 732

——— s. 91.

*See* CUSTOM . I. L. R., 8 All., 434

——— s. 108.

*See* PARTITION—RIGHT TO PARTITION. [I. L. R., 3 All., 400

——— ss. 112, 113.

*See* JURISDICTION OF CIVIL COURT—RENT AND REVENUE SUITS, N.-W. P. [I. L. R., 7 All., 894

——— ss. 113, 114.

*See* APPEAL—NORTH-WESTERN PROVINCES ACTS . . I. L. R., 2 All., 619

*See* RES JUDICATA—COMPETENT COURT—REVENUE COURTS. [I. L. R., 2 All., 839
I. L. R., 5 All., 260

——— *Procedure.—Inquiry into objections raising questions of title.*—When a Collector or Assistant Collector has determined to enquire into objections raising questions of title preferred under section 113 of the N.-W. P. Land Revenue Act, 1873, his proceeding thereupon must be conducted as an original suit in a Civil Court. RANJIT SINGH *v.* ILAHI BAKSH . . I. L. R., 5 All., 520

——— s. 125.

*See* CO-SHARERS—CULTIVATION OF JOINT PROPERTY . I. L. R., 3 All., 818
[I. L. R., 4 All., 515

——— s. 135.

*See* JURISDICTION OF CIVIL COURT—REVENUE COURTS—PARTITION. [7 N. W., 346

——— s. 146.

*See* SALE FOR ARREARS OF REVENUE—SALE-PROCEEDS . I. L. R., 6 All., 112

——— s. 188.

*See* PRE-EMPTION—RIGHT OF PRE-EMPTION . . I. L. R., 1 All., 277

——— s. 195.

*See* LUNATIC . I. L. R., 1 All., 476

NORTH-WEST PROVINCES LAND REVENUE ACT (XIX OF 1873)—*continued.*

——— ss. 194, 195 (Act VIII of 1879, s. 20).

*See* COURT OF WARDS.
[I. L. R., 7 All., 687

——— s. 205.

*See* GUARDIAN—DISQUALIFIED PROPRIETORS . I. L. R., 5 All., 264, 487

——— ss. 220, 231.

*See* N.-W. P. RENT ACTS, s. 1.
[I. L. R., 6 All., 170

——— s. 241.

*See* JURISDICTION OF CIVIL COURT—RENT AND REVENUE SUITS, N.-W. P.
[I. L. R., 1 All., 613
I. L. R., 2 All., 545, 732
I. L. R., 3 All., 191, 367
I. L. R., 6 All., 578
I. L. R., 7 All., 140, 447, 454
I. L. R., 8 All., 552

——— (VIII of 1879), s. 20.

*See* COURT OF WARDS.
[I. L. R., 7 All., 687

NORTH-WEST PROVINCES MUNICIPAL IMPROVEMENTS ACT (VI OF 1868), s. 12.

*See* N.-W. P. AND OUDH MUNICIPALITIES ACT, 1883, ss. 69, 71.
[I. L. R., 8 All., 677

NORTH-WESTERN PROVINCES AND OUDH MUNICIPALITIES ACT (XV OF 1873).

——— ss. 27, 32, 38.

*See* RIGHT OF SUIT—OBSTRUCTION TO PUBLIC HIGHWAY.
[I. L. R., 1 All., 557

——— ss. 28, 43.

*See* APPELLATE COURT—OBJECTION TAKEN FOR FIRST TIME ON APPEAL—SPECIAL CASES—NOTICE OF SUIT.
[I. L. R., 1 All., 269

——— *Suit against Local Government.—Notice of suit.*—Where, in a suit against a Municipal Committee, the Magistrate of the District was impleaded as representing the Local Government, the Court refused to allow the plea that the Local Government had not been made a party to the suit in accordance with the provisions of section 28 of Act XV of 1873. The notice previous to suing a Municipal Committee for a thing done by them under that Act required by section 43 of the Act is only necessary where compensation is claimed for the thing done. MUNICIPAL COMMITTEE OF MORADABAD *v.* CHATRI SINGH . I. L. R., 1 All., 269

NORTH-WESTERN PROVINCES AND OUDH MUNICIPALITIES ACT (XV OF 1873)—*continued.*

——— s. 38.

*See* PUBLIC ROAD . I. L. R., 7 All., 362

——— s. 43.

*See* LIMITATION ACT, 1877, s. 22.
[I. L. R., 2 All., 296

1. ——— *Suit against Committee for declaration of right.—Right of suit.—Semble,*—Section 43 of Act XV of 1873 contemplates suits in which relief of a pecuniary character is claimed for some act done under that Act by a Committee, or any of their officers, or any other person acting under their direction, and for which damages can be recovered from them personally, and not a suit against a Committee for a declaration of the plaintiff's right to reconstruct a building which has been demolished by the order of such Committee and for compensation for such demolishment. MANNI KASAUNDHAN *v.* CROOKE . . . . I. L. R., 2 All., 296

2. ——— *Suit against Municipal Committee.—Claim for a declaration of right.—Limitation Act (XV of 1877), art. 120.—Cause of action.*—The lessee of certain land belonging to the plaintiffs, situate within the limits of a Municipality, applied to the Municipal Committee for permission to establish a market on such land, and such permission was refused by the Committee on the 26th November 1878. Meanwhile, the plaintiffs, on behalf of the lessee and on their own behalf as proprietors of such land, applied to the Committee for such permission, sending such application by post. No orders were passed by the Committee on such application because it had come by post. On the 18th April 1879 the plaintiffs sued the Committee for a declaration of their right to establish a market on such land, and for a perpetual injunction restraining the Collector as President of the Committee from interfering with their so doing. The cause of action alleged was the refusal of the Committee of the 26th November 1878. *Held* by STUART, *C. J.*, on the question whether such suit was barred by the provisions of section 43 of Act XV of 1873, not having been brought within three months next after the date of the alleged cause of action, that it was not so barred, inasmuch as the provisions of that section were only applicable to suits brought against a Committee for something done under that Act in which compensation was claimed, and not to those in which compensation was not claimed; and that therefore the present suit was not governed by the provisions of that section, but by art. 120, schedule II of Act XV of 1877. Also, that the rejection of the lessee's application gave the plaintiffs a cause of action as there was privity between them and the lessee; and that, as there was nothing in the Municipal rules prohibiting the presentation of an application by post, the application of the plaintiffs should not have been rejected. *Held* by DUTHOIT, *J.*, that the suit of the plaintiffs was governed by the provisions of section 43 of Act XV of 1873, and was therefore beyond time. *Municipal Committee of Moradabad* v. *Cha-*

## NORTH-WESTERN PROVINCES AND OUDH MUNICIPALITIES ACT (XV OF 1873)—*continued.*

——— s. 43—*continued.*

*tri Singh, I. L. R., 1 All., 269; Manni Kasaundhan* v. *Crooke, I. L. R., 2 All., 296;* and *Chunder Sikhur Bundopadhya* v. *Obhoy Churn Bagchi, I. L. R., 6 Calc., 8,* referred to. BRIJ MOHAN SINGH *v.* COLLECTOR OF ALLAHABAD . I. L. R., 4 All., 102

*Held* by the Full Bench (reversing the decision of DUTHOIT, *J.*, and affirming that of STUART, *C. J.*) that such suit was not barred by limitation under the provisions of section 43 of Act XV of 1873, because it had not been brought within three months after the date of the alleged cause of action, inasmuch as the provisions of that section were only applicable to suits brought against a Committee for something done under the Act in which compensation was claimed, and not to those in which compensation was not claimed. *Held* also by the Full Bench (confirming the decision of STUART, *C. J.*), that the refusal of the Municipal Committee to allow the plaintiffs' lessee to establish the market gave them a cause of action. BIRJ MOHAN SINGH *v.* COLLECTOR OF ALLAHABAD . . . I. L. R., 4 All., 339

——— (XV of 1883) ss. 69, 71.—*Municipal rules.—Infringement of rules.—Prosecutions.—N.-W. P. Government Notification No. 865, dated the 3rd November 1869.—Rule VI, Legality of.*—Municipal Boards and Magistrates should see that before prosecutions are instituted under the municipal rules, care is taken that the requirements of section 69 of Act XV of 1883 (N.-W. P. and Oudh Municipalities Act) are satisfied. A District Magistrate, who was also Chairman of a Municipal Board, having information that a certain person had evaded the payment of octroi duty, directed his prosecution for breach of municipal rules. The Magistrate in thus causing proceedings to be taken, acted wholly of his own motion and authority. The accused was tried and convicted under Rule 6, Government, N.-W. P., Notification No. 865, dated the 3rd November 1869, read with section 45 of Act XV of 1873 (N.-W. P. and Oudh Municipalities Act). This rule provided that any person evading or abetting the evasion of the octroi duties specified in a schedule, should be deemed to have committed an infringement of a bye-law. It purported to have been made under section 12 of Act VI of 1868 (Municipal Improvements Act, N.-W. P.), which authorised the making of "rules as to the persons by whom, and the manner in which, any assessment of taxes under this Act shall be confirmed, and for the collection of such taxes." *Held* that, assuming the rule to have been legally made under section 12 of Act VI of 1868, which was not clear, and that it was saved by section 2 of Act XV of 1873, it would, as declared in section 71 of Act XV of 1883 (N.-W. P. and Oudh Municipalities Act), continue in force until repealed by new rules made under such last-mentioned Act, and be deemed to have been made under that Act, and its operation was therefore subject to the provisions of that Act, and among them to section 69, which made it a condition precedent to the institution of a prosecution against the petitioner, that

## NORTH-WESTERN PROVINCES AND OUDH MUNICIPALITIES ACT (XV OF 1873)—*continued.*

——— (XV of 1883), ss. 69, 71—*continued.*

there should be a complaint of the Municipal Board or of some person authorised by the Board in that behalf. *Held* that the position of the Magistrate of the district in connection with section 69 was neither better nor worse than that of any other member of the Board; and unless he had been duly authorised by the Board as a Board, he had no more *locus standi* to cause a prosecution to be instituted personally than any other individual member; and the words of section 69 being mandatory, and the petitioner having from the outset urged this objection to the legality of the proceedings, he was entitled to the benefit of it now, and the conviction was illegal and must be set aside. QUEEN-EMPRESS *v.* YUSUF KHAN [I. L. R., 8 All., 677

## NORTH-WEST PROVINCES RENT ACTS (XVIII OF 1873 AND XII OF 1881).

*See* ARBITRATION—ARBITRATION UNDER SPECIAL ACTS AND REGULATIONS—N.-W. P. RENT ACT. [I. L. R., 2 All., 119

*See* LIMITATION ACT, 1877, s. 14. [I. L. R., 1 All., 254

1. ——— s. 1.—*Application of the Civil Procedure Code to suits in the Revenue Courts.—Civil Procedure Code, 1877, ss. 43, 373.—Suit, Withdrawal of.—Relinquishment of part of claim.—Held* by the Full Bench (STUART, *C. J.*, dissenting) that the Courts of Revenue in the North-Western Provinces, in those matters of procedure upon which the Rent Act of those Provinces (Act XII of 1881) is silent, are governed by the provisions of the Civil Procedure Code. The principle of decision in *Nilmoni Singh Deo* v. *Taranath Mukerjee, I. L. R., 9 Calc., 295,* followed. *Held,* therefore, that the procedure provided by sections 43 and 373 of the Civil Procedure Code is applicable to suits tried under the N.-W. P. Rent Act, 1881. MADHO PRAKASH SINGH *v.* MURLI MANOHAR. HIRA SINGH *v.* MAKUND SINGH . . . . I. L. R., 5 All., 406

2. ——— *Application of the Civil Procedure Code to suits in the Revenue Court.—Judgment in accordance with award.—Appeal.—Act XIX of 1873 (N.-W. P. Land Revenue Act), ss. 220, 231.*—The provisions of the Civil Procedure Code relating to awards are not applicable to suits under the N.-W. P. Rent Act, 1881, the matters in dispute in which have been referred to arbitration, as section 96A of that Act specifically imports into it the procedure of the N.-W. P. Land Revenue Act with regard to arbitrations. FAHIMUNNISSA *v.* AJUDHIA PRASAD . . I. L. R., 6 All., 170

1. ——— s. 2.—*Procedure.—Case begun while Act XVIII of 1873 was in force.*—The question whether land held by a person whose proprietary rights in a mehal have been sold in execution of a decree while Act XVIII of 1873 was in force, was

**NORTH-WEST PROVINCES RENT ACTS (XVIII OF 1873 AND XII OF 1881)—*continued.***

——— s. 2—*continued.*

held by him as sír at the time of such sale, must be determined by that Act. HARI DAS *v.* GHANSHAM NARAIN . . . . I. L. R., 6 All., 286

2. ——— and s. 9.—*Procedure.—Landholder and tenant.—Sale of occupancy right in execution of decree.—Held* that a landholder who had attached the occupancy right of an occupancy tenant in certain land in execution of a decree before Act XII of 1881 came into force, was not entitled under section 2 of that Act to bring such right to sale after that Act came into force, that section not saving the right of a landholder to bring such a right to sale in execution of a decree, and section 9 of that Act expressly prohibiting the sale of such a right in execution of a decree. NAIK RAM SINGH *v.* MURLI DHAR [I. L. R., 4 All., 371

MURLI RAI *v.* LEDRI . I. L. R., 7 All., 851

——— s. 3.—*Sír land.—Settlement.*—Land recorded as sír during the progress of a settlement of the district in which it is situate is not sír land as defined in section 3 (4) of Act XVIII of 1873. Such land does not become sír land within the meaning of that definition until the settlement is closed and confirmed. HARI DAS *v.* GHANSHAM NARAIN [I. L. R., 6 All., 286

——— s. 4.

*See* JURISDICTION OF REVENUE COURT—N.-W. P. RENT AND REVENUE CASES. [I. L. R., 3 All., 81

——— ss. 5 & 6.

*See* ENHANCEMENT OF RENT—EXEMPTION FROM ENHANCEMENT BY UNIFORM PAYMENT OF RENT, &c.—VARIATION BY CHANGE IN NATURE OF RENT, &c. [I. L. R., 1 All., 301

——— s. 7.

*See* LANDLORD AND TENANT—PROPERTY IN TREES PLANTED ON LAND. [I. L. R., 8 All., 467

*See* LANDLORD AND TENANT—TRANSFER BY LANDLORD . I. L. R., 8 All., 189

*See* RIGHT OF OCCUPANCY—TRANSFER OF RIGHT . I. L. R., 1 All., 448, 459
I. L. R., 2 All., 735
I. L. R., 6 All., 54
I. L. R., 7 All., 633

1. ——— *Ex-proprietary tenant.—Possession of sír land, Right to.*—Since Act XVIII of 1873 came into force a co-sharer entitled to obtain by pre-emption the proprietary right of another co-sharer is not entitled ordinarily to a decree against the vendor for possession of the sír, but only for the possession of the proprietary right in the sír. He is, however, entitled to possession of the sír land as against the vendee. BALDEO PANDEY *v.* JHARI KUAR [7 N. W., 334

**NORTH-WEST PROVINCES RENT ACTS (XVIII OF 1873 AND XII OF 1881)—*continued.***

——— s. 7—*continued.*

2. ——— *Usufructuary mortgage.—Ex-proprietary tenant.—Sír land.—Held* by the Full Bench (OLDFIELD and BRODHURST, *JJ.*, dissenting) that a person who creates a usufructuary mortgage of zemindari property becomes an ex-proprietary or occupancy-tenant of the sír land under section 7 of the N.-W. P. Rent Act (XII of 1881). *Per* PETHERAM, *C.J.*—A usufructuary mortgagee is, for the time being, the proprietor of the property, inasmuch as a proprietor is the person entitled to exclusive possession at the time; and the intention of the Legislature, as expressed in section 7 of the Rent Act, is that when a zemindar ceases to be entitled to occupy the sír land as proprietor, he shall have the right to occupy it as an ex-proprietary tenant under section 5. *Bhagwan Singh* v. *Murli Singh, I. L. R., 1 All., 549,* dissented from. *Per* STRAIGHT, *J.*—The words "lose" and "part with" in section 7 of the Rent Act were intended to cover all cases in which a proprietor of land has either voluntarily or by operation of law deprived himself permanently or temporarily of the power to exercise full proprietary right over his property. *Per* MAHMOOD, *J.*—The meaning of the words "proprietary rights" in section 7 of the Rent Act is equivalent to that of the term "full ownership," corresponding to *dominium* in the Roman law and fee-simple estate in English law. The right of a usufructuary mortgagee cannot be called proprietorship; and, having regard to section 58 of the Transfer of Property Act, the execution of a usufructuary mortgage does not amount to a transfer of the proprietary right. The word "lose" as used in section 7 of the Rent Act means the transfer of proprietary rights otherwise than by the will of the owner in consequence of some incident of law. The term "part with" is a general expression including both absolute and temporary alienation; and a usufructuary mortgage is a "parting with" some of the incidents of ownership, and falls within the purview of section 7, inasmuch as the rights of possession and of the enjoyment of the usufruct are transferred from the mortgagor to the mortgagee, though such a transfer does not amount to a total alienation of proprietorship. *Bhagwan Singh* v. *Murli Singh, I. L. R., 1 All., 549,* dissented from. *Gopal Pandey* v. *Parsotam Das, I. L. R., 5 All., 121; Ganga Din* v. *Dhurandhar Singh, I. L. R., 5 All., 495;* and *Gulab Rai* v. *Indar Singh, I. L. R., 6 All., 54,* referred to. *Per* OLDFIELD, *J.*—The words "lose or part with his proprietary rights in any mehal" in section 7 of the Rent Act, mean a loss or parting which divests absolutely of all proprietary rights, leaving no interest of a proprietary kind in the mehal; this does not happen in a usufructuary mortgage, and therefore the latter is not a loss of or parting with proprietary rights, within the meaning of section 7. *Bhagwan Singh* v. *Murli Singh, I. L. R., 1 All., 549,* approved. *Per* BRODHURST, *J.*—The word "lose" in section 7 of the Rent Act means involuntarily lose, as, for instance, by auction sale, and "part with" means voluntarily and entirely divested of by means, *e.g.*, of gift or private sale.

NORTH-WEST PROVINCES RENT ACTS (XVIII OF 1873 AND XII OF 1881)—*continued.*

——— s. 7—*continued.*

"Proprietary rights" means the whole of the proprietary rights; and a usufructuary mortgagor of zemindari property cannot be said to have lost or parted with his proprietary right therein, and therefore does not, under the provisions of section 7 of the Rent Act, become an ex-proprietary or occupancy tenant of the sír land. INDAR SEN *v.* NAUBAT SINGH

[I. L. R., 7 All., 553

3. ——— *Ex-proprietary tenancy.*—The words "held by him as sír" in section 7 of Act XII of 1881 (N.-W. P. Rent Act) must be construed to mean land belonging to him, or to which he was entitled, as sír, and as literal an interpretation should be placed upon these words as is consistent with the canons of construction. In 1879 one of the defendants sold a one-third share of certain sír land in a village to the plaintiff, who, at that time, was in cultivatory possession thereof under a deed of mortgage executed in his favour by the same defendant in 1877. The plaintiff alleged that, after the sale, he continued in possession of the sír land till 1884, when he was dispossessed thereof by the defendants. He sued for recovery of possession of the land. *Held* that the defendants, being ex-proprietary tenants of the land in dispute, were entitled to hold possession thereof, by operation of law, with reference to the terms of section 7 of the N.-W. P. Rent Act; and the plaintiff's contention that because for four or five years the defendants failed to assert their ex-proprietary tenant rights, they were debarred from doing so, could only be well founded if there had been any provision either in the Limitation Act or the Rent Act creating such a disability. *Held* also that, notwithstanding the fact that the plaintiff was in possession of the land in dispute as mortgagee at the time of the sale, and continued in possession afterwards, his vendor must be taken to have "held" the land as his sír at the time of the sale of his proprietary interest, within the meaning of section 7 of the Rent Act. HARJAS *v.* RADHA KISHAN

[I. L. R., 8 All., 256

4. ——— *Transfer of Property Act (IV of 1882), ss. 41, 48.—Transfer by ostensible owner.—Meaning of "held."—Statute, Construction of.—Retrospective effect.—Mortgage of sír land before passing of Act XVIII of 1873.—Sale of mortgagor's rights while that Act was in force.—Right of mortgagee.*—In 1869 *A.* and *J.*, two co-sharers of a moiety of a 10 biswas share in a village (*F.* and *W.* being also co-sharers in the same moiety), joined with *H.*, the holder of the other moiety, in giving to *K.* a usufructuary mortgage of 87 bighas of land, being the whole of the sír land appertaining to the 10 biswas share. The deed of mortgage authorised the mortgagee to retain possession of the land until payment of the mortgage-money, and to receive profits in lieu of interest; and he obtained possession accordingly. In 1872 *F.*, *W.*, and *A.* gave to other persons a usufructuary mortgage of their 5 biswas share, together with a moiety of the 87 bighas of sír land; and it was stated in the deed that half the mortgage-money due to *K.* on the mortgage of 1869 was due by the executants, and that they accordingly left the same with the mortgagees in order that the latter might redeem. In November 1876 *H.'s* 5 biswas share, together with its sír land, was sold in execution of a decree. Subsequently, *K.*, alleging that the mortgagees under the deed of 1872, and the purchasers under the execution-sale of 1876 had dispossessed him, and that his mortgage debt had not been paid, sued to recover possession of the 87 bighas of sír land, by virtue of his mortgage deed of 1869. The Court of first instance held that the plaintiff was not entitled to enforce his mortgage in respect of *F.'s* and *W.'s* share in the 87 bighas, because they were not parties to the deed of 1869. The lower Appellate Court further held that from the date of the execution sale of November 1876 *H.* became an ex-proprietary tenant of his sír land, and that to give the plaintiff possession thereof would be contrary to the provisions of section 7 of Act XVIII of 1873 (N.-W. P. Rent Act). *Held* that, inasmuch as it was clear that at the time when the mortgage-deed of 1869 was executed *F.* and *W.* were aware of the transaction which made *K.* the mortgagee, under the deed, of the whole property, and that, knowing this, they allowed the possession of *A.*, *J.*, and *H.* to appear as if covering the entire zemindari rights in the 10 biswas share of the sír land, and inasmuch as the statements contained in the mortgage-deed of 1872 were an admission on the part of *F.* and *W.* that the mortgage of 1869 was executed with their consent, the equitable doctrine contained in section 41 of the Transfer of Property Act applied to the case and *F.* and *W.* had no defence, either in law or in equity, to the plaintiff's suit, with reference to their shares, and for the purpose of obviating the lien of 1869. *Ramcoomar Koondoo* v. *Mcqueen, 11 B. L. R., 46,* referred to. *Per* MAHMOOD, *J.*, with reference to the effect of the execution-sale of November 1876, in regard to the provisions of section 7 of Act XVIII of 1873; that the general rule that statutory provisions have no retrospective operation did not apply to the case; that, by reason of the sale, *H.*, who had proprietary rights in the mehal, and held the 5 biswas share of the sír as such (the word "*held*" as used in section 7 of the Rent Act not being confined to manual or physical holding), lost his proprietary rights, and so became an ex-proprietary tenant of the land belonging to him at that time; that although the mortgage of 1869 must not be so affected as to deprive the mortgagee of all his rights, yet by the terms of section 7 of Act XVIII of 1873, and by virtue of the sale his means of benefiting by the mortgage were necessarily changed; that neither the preamble nor section 1 of the Act contained any saving clause which would justify the interpretation that all the conditions included in a usufructuary mortgage are to be exempted from the operation of the Act, or of section 7 in particular, merely because the mortgage was a subsisting one; that under these circumstances possession must be given to the plaintiff of such rights as

NORTH-WEST PROVINCES RENT ACTS (XVIII OF 1873 AND XII OF 1881)—*continued.*

——— s. 7—*continued.*

*H.* had at the time of the mortgage subject only to *H.'s* rights as an ex-proprietary tenant; that the rights of the purchaser of *H.'s* share under the sale were subject to the mortgage of 1869; and that, by virtue of the rule enunciated in section 48 of the Transfer of Property Act, the rights of the mortgagees under the deed of 1872 must give way to the incidents of the prior deed of 1869, both mortgages being usufructuary. *Tulshi* v. *Radha Kishan, Weekly Notes, All., 1886, p. 74,* referred to. *Per* TYRRELL, *J.,* that in 1876, by reason of the execution sale, the sír rights and interests of *H.* mortgaged by him in 1869, as such, went out of existence, and assumed a different character; that over that tenure in its altered character the plaintiff, though he still had his mortgage charge, had not, in the existing state of the law, a right to physical possession of the actual land; and that, subject to this new right of *H.'s* the plaintiff retained his mortgage charge of 1869 over the zemindari interest in the portion of the land acquired by *H.'s* vendees. KARAMAT KHAN v. SAMI-UD-DIN . . . . I. L. R., 8 All., 409

5. ——— and s. 14.—*Suit for profits.—Ex-proprietary tenant.—Sír land held jointly.*—A certain mehal, of which the plaintiff in this suit claimed a one-third share of the profits for a certain year, belonged in equal shares to the defendant (lambardar), and *S.* and *R.,* his two brothers, who had certain sír land in partnership. The plaintiff had acquired the share of *S.* by auction-purchase, *S.* thus becoming an ex-proprietary tenant. The sír land was not included in the rent-roll of the mehal, but was admitted by the defendant to be assessable with rent at a certain rate per bigha. *Held* that, whatever might be the course proper to be taken for the purpose of assessing such sír land or *S.'s* share of it with rent, and notwithstanding that such course had not been taken, the plaintiff was entitled in this suit to claim and obtain his share in the profits of the sír land. MUHAMMAD ALI v. KALIAN SINGH [I. L. R., 1 All., 659

——— s. 8.

*See* RIGHT OF OCCUPANCY—ACQUISITION OF RIGHT—MODE OF ACQUISITION. [I. L. R., 4 All., 157

*See* RIGHT OF OCCUPANCY—ACQUISITION OF RIGHT—SUBJECTS OF ACQUISITION. [I. L. R., 7 All., 586

——— ss. 8 & 9.

*See* RIGHT OF OCCUPANCY—TRANSFER OF RIGHT . . I. L. R., 7 All., 866

——— s. 9.

*See* LANDLORD AND TENANT—PROPERTY IN TREES PLANTED ON LAND. [I. L. R., 6 All., 19

*See* LANDLORD AND TENANT—ABANDONMENT OR RELINQUISHMENT OF TENURE. [I. L. R., 7 All., 847

NORTH-WEST PROVINCES RENT ACTS (XVIII OF 1873 AND XII OF 1881)—*continued.*

——— s. 9—*continued.*

*See* CASES UNDER RIGHT OF OCCUPANCY—TRANSFER OF RIGHT.

——— s. 14.

*See* s. 7 . . I. L. R., 1 All., 659

——— *Determination of rent.—Landlord and tenant.—"May apply."*—The words "may apply" in section 14 of Act XII of 1881 mean "shall apply," if the landholder wants to procure such a determination of his tenant's rent as would give him a title to sue his tenant under that Act for arrears of rent, and if he cannot get the rent arranged between himself and his tenant by other legitimate means, such as an amicable settlement between themselves or the like. RAM PRASAD RAI v. DINA KUAR [I. L. R., 4 All., 515

——— s. 18.

*See* LANDLORD AND TENANT—ACCRETION TO TENURE . I. L. R., 5 All., 260

——— s. 21.

*See* ENHANCEMENT OF RENT—LIABILITY TO ENHANCEMENT—CONSTRUCTION OF DOCUMENTS AS TO LIABILITY, &c. [I. L. R., 3 All., 365

——— s. 29.

*See* PLAINT—RETURN OF PLAINT. [I. L. R., 3 All., 766

——— s. 30.

*See* GRANT—POWER TO GRANT. [I. L. R., 2 All., 545, 732

——— s. 31.

*See* LANDLORD AND TENANT—ABANDONMENT OR RELINQUISHMENT OF TENURE. [I. L. R., 7 All., 487

*See* LANDLORD AND TENANT—ACCRETION TO TENURE . I. L. R., 5 All., 260

——— s. 34.

*See* LANDLORD AND TENANT—ACCRETION TO TENURE . I. L. R., 5 All., 260

——— ss. 36-39.

*See* JURISDICTION OF CIVIL COURT—RENT AND REVENUE SUITS, N.-W. P. [I. L. R., 3 All., 521

*See* RES JUDICATA—COMPETENT COURT—REVENUE COURTS . I. L. R., 4 All., 11

——— s. 39.

*See* RES JUDICATA—COMPETENT COURT—REVENUE COURTS. [I. L. R., 2 All., 428 I. L. R., 3 All., 81, 521

NORTH-WEST PROVINCES RENT ACTS (XVIII OF 1873 AND XII OF 1881)—*continued.*

——— s. 44.

*See* JURISDICTION OF CIVIL COURT—RENT AND REVENUE SUITS, N.-W. P. [I. L. R., 3 All., 85

——— s. 56.

*See* VENDOR AND PURCHASER—LIEN. [I. L. R., 3 All., 433

——— s. 93.

*See* s. 171 . . I. L. R., 6 All., 503

*See* INTEREST—MISCELLANEOUS CASES—MESNE PROFITS. [I. L. R., 1 All., 261

*See* JURISDICTION OF CIVIL COURT—RENT AND REVENUE SUITS, N.-W. P. [I. L. R., 2 All., 429
I. L. R., 3 All., 66
I. L. R., 6 All., 81
I. L. R., 7 All., 256
I. L. R., 8 All., 446

*See* JURISDICTION OF REVENUE COURT—N.-W. P. RENT AND REVENUE CASES. [I. L. R., 1 All., 217, 512
I. L. R., 4 All., 412
I. L. R., 3 All., 144
I. L. R., 5 All., 438

1. ——— s. 93 (h).—"*Recorded co-sharer.*"—*Held* that a co-sharer of a mehal whose share was recorded in "shamilat" with all the other pattidars, but was not specifically defined in the khewat in a fractional or separate form, was a "recorded co-sharer," within the meaning of section 93 (*h*) of the N.-W. P. Rent Act (XII of 1881). SHIB SHANKAR LAL *v.* BANARSI DAS . I. L. R., 7 All., 891

2. ——— *Village expenses.—Expenses of cultivating sír land held in partnership by plaintiff and defendant.*—A recorded co-sharer of a mehal sued the lumberdar for his share of the profits of the mehal for the year 1286 Fasli. At the time of the institution of the suit, the profits for 1287 and 1288 also were due, but no claim was then made in respect of them. The suit was struck off on account of the non-appearance of the parties under section 140 of Act XII of 1881 (N.-W. P. Rent Act), with leave to the plaintiff to bring a fresh suit. Subsequently the plaintiff brought a suit against the same defendant for his share of the profits of the mehal for 1287 and 1288 Fasli. *Held* that the Courts below had properly refused to deduct from the plaintiff's claim as "village expenses" within the meaning of section 93 (*h*) of the Rent Act certain charges on account of the expenses of cultivation of sír land held in partnership by the plaintiff and the defendant. MULCHAND *v.* BHIKARI DAS . I. L. R., 7 All., 624

——— s. 94.—*Act XIX of 1873, s. 3, cl. 8.—Limitation.—Expiration of agricultural year.—Suit by co-sharer for profits.—Date of taking account and dividing profits.*—*Held* by the majority of the Full Bench that the share of a co-sharer in an undivided mahal of the profits of the mehal for any agricultural year are due to him from the lumberdar as soon as, after the payment of Government revenue and village expenses, there is a divisible surplus in the hands of the lumberdar, unless by agreement or custom a date is fixed for taking the accounts and dividing the profits, in which case any divisible surplus which may have accrued prior to that date is due on that date, and the divisible profits in respect of any arrears which may be collected after that date are due when they reach the hands of the lumberdar or his agent. *Held per* STUART, *C. J.*, and SPANKIE, *J.*—That where by agreement or custom there is no date fixed for dividing such profits, the share of a co-sharer becomes due on the last day of the agricultural year as fixed by Acts XVIII and XIX of 1873. BHIKHAN KHAN *v.* RATAN KUAR [I. L. R., 1 All., 512

——— s. 95.

*See* CASES UNDER JURISDICTION OF CIVIL COURT—RENT AND REVENUE SUITS, N.-W. P.

*See* JURISDICTION OF REVENUE COURT—N.-W. P. RENT AND REVENUE CASES. [I. L. R., 8 All., 62

*See* LANDLORD AND TENANT—TRANSFER BY LANDLORD . I. L. R., 8 All., 189

——— s. 96A.

*See* s. 1 . . I. L. R., 6 All., 170

——— s. 106.

*See* CO-SHARERS—SUITS BY CO-SHARERS WITH RESPECT TO THE JOINT PROPERTY. [I. L. R., 2 All., 264
I. L. R., 6 All., 576

——— ss. 128 (a), 140.—*Judgment by default.—Appeal.*—Section 128 (*a*), Act XII of 1881 (N.-W. P. Rent Act), refers to the procedure described in sections 124, 125, 126, when no appearance has been put in on the day fixed by the summons or proclamation for the appearance of the defendant, or on any subsequent day to which the hearing of the case may be adjourned prior to the recording of an issue for trial, and not to subsequent non-appearance of parties on a day fixed for trial of issues, to which section 140 relates. MUHAMMAD ABDUL RAHMAN KHAN *v.* MUHAMMAD QUTAB-UD-DIN [I. L. R., 6 All., 446

——— s. 140.

*See* s. 128 . . I. L. R., 6 All., 446

——— s. 148.

*See* APPEAL—NORTH-WESTERN PROVINCES ACTS . . I. L. R., 3 All., 63
[I. L. R., 4 All., 237

NORTH-WEST PROVINCES RENT ACTS (XVIII OF 1873 AND XII OF 1881)—*continued.*

——— s. 148—*continued.*

*See* JURISDICTION OF CIVIL COURT—RENT AND REVENUE SUITS, N.-W. P. [I. L. R., 5 All., 503 I. L. R., 6 All., 81

——— s. 149.

*See* RIGHT OF OCCUPANCY—TRANSFER OF RIGHT . I. L. R., 7 All., 691

——— ss. 171, 177, and s. 93 (i).—*Government revenue, Assignee of.—Mehal not charged where the revenue is assigned.—Act XIX of 1873, s. 167.*—Muafidars or assignees of Government revenue are not in precisely the same position as Government itself would have been, and possessed of identical rights and powers, in respect of the recovery of arrears of revenue due to them. An arrear of assigned revenue is not a prior charge on the property in respect of which it is payable, against all the world. The effect of the provisions of sections 93 (*i*), 171, and 177 of the N.-W. P. Rent Act (XII of 1881) is to show that what the Legislature contemplated was to place the revenue assigned to a muafidar upon the same footing as rent; that, therefore, in order to recover an arrear of revenue, a muafidar must bring a suit in the Revenue Court; that, upon obtaining a decree, he may apply for execution against the immoveable property of the judgment-debtor; that, where such property is a mehal, the Collector may make certain arrangements for discharge of the debt; and that, failing such arrangements, such immoveable property may be sold, subject to any incumbrances there may be upon it. BITHAL DASS *v.* HARPHUL . I. L. R., 6 All., 503

——— s. 177.

*See* s. 171 . . I. L. R., 6 All., 503

*See* PRE-EMPTION—RIGHT OF PRE-EMPTION . . I. L. R., 1 All., 277

——— s. 183.

*See* APPEAL—NORTH-WESTERN PROVINCES ACTS . . I. L. R., 4 All., 237

——— s. 189.

*See* APPEAL—NORTH-WESTERN PROVINCES ACTS . . I. L. R., 6 All., 398 [I. L. R., 1 All., 366

——— s. 191.

*See* APPEAL—NORTH-WESTERN PROVINCES ACTS . . I. L. R., 5 All., 309

——— ss. 206, 207.

*See* JURISDICTION OF REVENUE COURT—N.-W. P. RENT AND REVENUE CASES. [I. L. R., 1 All., 512 I. L. R., 4 All., 379 I. L. R., 5 All., 191

NORTH-WEST PROVINCES RENT ACTS (XVIII OF 1873 AND XII OF 1881)—*continued.*

——— ss. 206, 208.

*See* SUBORDINATE JUDGE. [I. L. R., 6 All., 36, 295

——— s. 207.

*See* APPELLATE COURT—EVIDENCE AND ADDITIONAL EVIDENCE ON APPEAL. [I. L. R., 6 All., 440

——— s. 208.

*See* JURISDICTION OF REVENUE COURT—N.-W. P. RENT AND REVENUE CASES. [I. L. R., 5 All., 438

*See* REMAND—GROUND FOR REMAND. [I. L. R., 5 All., 438 I. L. R., 6 All., 378, 440

1. ——— s. 209.—*Land in mehal held by the lumberdar as "khud-kasht" at a nominal rental.—Liability of lumberdar to co-sharer for profits.*—The land in a certain mehal was recorded as held by *M.*, the lumberdar, as "khud-kasht" at a certain nominal rental. For two years in succession *M.* sublet such land in part or in whole for a less amount than such nominal rental; the third year such land lay fallow. Certain persons sued as co-sharers in the mehal to recover from *M.* their share of the profits on account of such years. *M.* set up as a defence to the suit that there were no profits—on the contrary, a small loss. The lower Courts held *M.* answerable for the rental recorded. *Held* that it was doubtful whether the provisions of section 209 of Act XVIII of 1873 were applicable in the present case, and that, even if such provisions were applicable, the lower Courts having neither found that more was realised from the land than had been accounted for by *M.*, nor that the failure to realise more was owing to gross negligence or misconduct on his part, the decree of the lower Courts could not be sustained. MANGAL KHAN *v.* MUMTAZ ALI [I. L. R., 2 All., 239

2. ——— *Suit by co-sharer for profits.—Burden of proof.*—When a co-sharer claims a dividend on the full rental of the mehal, and the lumberdar pleads in reply that the actual collection fell short of that rental, the burden of proof lies on the co-sharer to show that the deficient collection was attributable to the conduct of the lumberdar, in the sense of section 209 of the N.-W. Provinces Rent Act (XII of 1881), before he can succeed in getting a decree for a sum in excess of the actual collections. DHANAK SINGH *v.* CHAIN SUKH [I. L. R., 3 All., 61

NOTE OF JUDGMENT TO EXPLAIN DECREE.

*See* DECREE—CONSTRUCTION OF DECREE—GENERAL CASES. [I. L. R., 1 Bom., 158

NOTES OF EVIDENCE.

*See* TRANSFER OF CRIMINAL CASE—GENERAL CASES . 15 B. L. R., Ap., 14 [I. L. R., 1 Calc., 356

NOTICE.

*See* HINDU LAW—MAINTENANCE—RIGHT TO MAINTENANCE—WIDOW.
[I. L. R., 2 Bom., 494
8 B. L. R., 225
20 W. R., 126
9 B. L. R., 11
I. L. R., 1 Calc., 365

*See* SERVICE OF SUMMONS.
[15 W. R., 270
12 W. R., 365

*See* CASES UNDER VENDOR AND PURCHASER—NOTICE.

——— by Municipality.

*See* BOMBAY DISTRICT MUNICIPALITIES ACT, s. 74 . I. L. R., 2 Bom., 527

——— of abandonment.

*See* INSURANCE—MARINE INSURANCE.
[6 B. L. R., 218: S. C. on appeal
7 B. L. R., 347
Bourke, O. C., 391

——— of action.

*See* BENGAL MUNICIPAL ACT, 1864, ss. 77, 81, 87 . . . 7 W. R., 213
[9 W. R., 279, 562

*See* BOMBAY DISTRICT MUNICIPALITIES ACT, s. 86 . I. L. R., 7 Bom., 399
I. L. R., 8 Bom., 142

*See* CALCUTTA MUNICIPAL ACT, 1863, s. 226 . . . 8 B. L. R., 265

——— of appeal.

*See* COMPANY—WINDING UP—GENERAL CASES . . I. L. R., 4 Calc., 704

——— of deposit or payment into Court.

*See* BENGAL RENT ACT, 1869, s. 31.
[I. L. R., 4 Calc., 714

——— of dishonour.

*See* BILL OF EXCHANGE . 1 W. R., 75
[2 W. R., 214
3 B. L. R., A. C., 198
7 B. L. R., 431, 434, note

*See* CASES UNDER HINDU LAW, CONTRACT—BILLS OF EXCHANGE.

*See* CASES UNDER HUNDI—NOTICE OF DISHONOUR.

*See* MAHOMEDAN LAW—BILL OF EXCHANGE . 7 B. L. R., 434, note

——— of enhancement.

*See* CASES UNDER ENHANCEMENT OF RENT—NOTICE OF ENHANCEMENT.

*See* KABULIAT—REQUISITE PRELIMINARIES TO SUIT.
[B. L. R., Sup. Vol., 25, 202
W. R., 1864, Act X, 2, 37, 60
4 W. R., Act X, 5
5 W. R., Act X, 88

NOTICE—*continued.*

——— of execution.

*See* CASES UNDER EXECUTION OF DECREE—NOTICE OF EXECUTION.

*See* LIMITATION ACT, 1877, ART. 164 (1871, ART. 157).
[I. L. R., 2 Calc., 123

*See* CASES UNDER LIMITATION ACT, 1877, ART. 179 (1871, ART. 167; 1859, s. 20)—NOTICE OF EXECUTION.

——— of foreclosure.

*See* CASES UNDER MORTGAGE—FORECLOSURE—DEMAND AND NOTICE OF FORECLOSURE.

——— of meeting.

*See* BOMBAY DISTRICT MUNICIPALITIES ACT, s. 11 . I. L. R., 7 Bom., 399

——— of proceedings.

*See* COMPANY—WINDING UP—GENERAL CASES . . I. L. R., 5 Bom., 223

*See* CASES UNDER POSSESSION, ORDER OF CRIMINAL COURT AS TO—NOTICE TO PARTIES.

*See* SURVEY AWARD . 3 W. R., 7

——— of relinquishment.

*See* RELINQUISHMENT OF TENURE.
[7 B. L. R., Ap., 11
W. R., 1864, Act X, 9
8 W. R., 220
11 W. R., 456

——— of sale.

*See* CASES UNDER SALE FOR ARREARS OF RENT—SETTING ASIDE SALE—IRREGULARITY.

——— Service of—

*See* CASES UNDER SALE FOR ARREARS OF RENT—SETTING ASIDE SALE—IRREGULARITY.

——— of suit.

*See* COMPANY—WINDING UP—GENERAL CASES . . I. L. R., 5 Bom., 223

*See* MADRAS TOWNS IMPROVEMENT ACT, 1871, s. 168 . I. L. R., 2 Mad., 124

*See* N.-W. P. AND OUDH MUNICIPALITIES ACT, ss. 28, 43 . I. L. R., 1 All., 269

*See* OFFICIAL TRUSTEE.
[I. L. R., 7 Calc., 499

——— of title.

*See* CASES UNDER VENDOR AND PURCHASER—NOTICE.

——— of trust.

*See* LIMITATION ACT, 1877, ART. 134 (1871, ART. 134) . I. L. R., 1 Bom., 26

**NOTICE**—*continued.*

——— **Service of—**

*See* CASES UNDER ENHANCEMENT OF RENT —NOTICE OF ENHANCEMENT—SERVICE OF NOTICE.

——— **to prosecutor of transfer of case.**

*See* TRANSFER OF CRIMINAL CASE—GENERAL CASES.
[I. L. R., 1 Calc., 356

——— **to quit.**

*See* CASES UNDER LANDLORD AND TENANT —EJECTMENT—NOTICE TO QUIT.

**NOTIFICATIONS (GOVERNMENT).**

*See* EMBANKMENTS.
[I. L. R., 11 Calc., 570

*See* GAMBLING . . 21 W. R. Cr., 23

*See* STAMP ACT, 1879, s. 12.
[I. L. R., 5 Bom., 188

**NOVATION.**

*See* BOND . . 9 B. L. R., 364
[13 B. L. R., 509
2 N. W., 37
2 C. L. R., 565

*See* LIMITATION ACT, 1877, ART. 73 (1871, ART. 72) . I. L. R., 1 Bom., 503

**"NOW ON HER PASSAGE," MEANING OF—**

*See* CHARTER PARTY . 8 B. L. R., 544

**NUISANCE.**

Col.
1. MISCELLANEOUS CASES . . . 4094
2. UNDER CRIMINAL PROCEDURE CODES 4094
3. PUBLIC NUISANCE UNDER PENAL CODE 4112

*See* GAMBLING . 7 Bom., Cr., 74

*See* INJUNCTION—SPECIAL CASES—NUISANCE . . I. L. R., 8 Bom., 35

*See* JURISDICTION OF CIVIL COURT—MAGISTRATE'S ORDERS, INTERFERENCE WITH— . . 4 B. L. R., F. B., 24

——— **Abatement of—**

*See* JURISDICTION OF CIVIL COURT—PUBLIC WAYS, OBSTRUCTION OF—
[I. L. R., 3 Calc., 20

*See* UNLAWFUL ASSEMBLY.
[2 Mad., Ap., 6
I. L. R., 3 Calc., 573

——— **Liability for—**

*See* RAILWAY COMPANY.
[10 B. L. R., 241

——— **Suit for injunction to restrain—**

*See* RAILWAY COMPANY.
[10 B. L. R., 241

**NUISANCE**—*continued.*

1. MISCELLANEOUS CASES.

1. ——— **Order forbidding nuisance.**—*Power of Magistrate.—Towns Improvement Act (XXVI of 1850).—Held* that a Magistrate, as President of a Municipal Committee, had no power to issue an order forbidding as a nuisance an act not included in the rules passed under Act XXVI of 1850. GOVERNMENT *v.* SHAM SOONDER . 1 Agra, Cr., 34

2. ——— **Order prohibiting traffic.**—*Bom. Reg. XII of 1827, s. 19.*—A notice prohibiting-general traffic over certain level-crossings on a railway, provided for particular villages, forbidden, as not falling within the scope of Regulation XII of 1827, section 19, clauses 1 and 6. IN THE MATTER OF A PROHIBITORY NOTICE UNDER BOMBAY REGULATION XII OF 1827 . 8 Bom., Cr., 23

2. UNDER CRIMINAL PROCEDURE CODES.

1. ——— **Order to close drain.**—*Criminal Procedure Code, 1861, ss. 62, 308.—Power of Magistrate.—Order not in writing.*—The accused was fined by the Magistrate for not having closed a drain in pursuance of the verbal order of the Magistrate. *Held* that the Magistrate should have proceeded under Chapter XX, Act XXV of 1861, inasmuch as the nuisance was not one from which immediate danger was apprehended, and not under section 62, which empowered the Magistrate to put an immediate determination to the continuance thereof. A written order not having been given the procedure was faulty, and therefore quashed. Only Magistrates of a district or division can act under Chapter XX, section 308. GOVERNMENT *v.* CHOONEELALL
[2 Agra, Cr., 1

2. ——— **Assistant Magistrate, Power of.**—*Criminal Procedure Code, 1861, ss. 62, 308.—Penal Code, s. 188.*—An Assistant Magistrate, as he came within the definition of the term of "any Magistrate," was competent to pass an order under section 62 of the Criminal Procedure Code, 1861, which contemplated circumstances under which an immediate order is urgently required, and in this respect differed from section 308 of that enactment, and that it should be read along with section 188 of the Penal Code. GOVERNMENT *v.* MAHOMED BUKSH
[1 Agra, Cr., 23

3. ——— **Order to prevent breach of the peace.**—*Criminal Procedure Code, 1861, ss. 62, 318.*—It was not necessary that an order issued by a Magistrate under section 62 of the Code of Criminal Procedure, whereby a breach of the peace was prevented, should be supplemented by a proceeding under section 318 of the same Code. QUEEN *v.* LUTEEF HOSSEIN . . 10 W. R., Cr., 1

4. ——— **Order made on dismissal of complaint**—*Criminal Procedure Code, 1861, ss. 62, 308.*—Where a Magistrate dismissed a complaint under section 308 of the Code of Criminal Procedure, it was held that it was competent for him to pass an order under section 62 of that Code in the same

NUISANCE—*continued.*

2. UNDER CRIMINAL PROCEDURE CODES —*continued.*

**Order made on dismissal of complaint—** *continued.*

case, provided he called on the defendant to show cause why section 62 should not be applied. KALIDAS BHUTTACHARJEE *v.* MOHENDRO NATH CHATTERJEE . . . . . **12 W. R., Cr., 40**

S. C. IN THE MATTER OF THE PETITION OF KALIDAS BHUTTACHARJEE **[5 B. L. R., Ap., 82, note**

5. ——— **Requisites of order.**—*Criminal Procedure Code, 1861, s. 62.—General and continuous order.*—Under Act XXV of 1861, section 62, it was necessary that the direction should be addressed to a particular person or particular persons, and not to the public generally, and with reference to a particular occasion only, and not for a continuance. ANONYMOUS . **8 Mad., Ap., 9**

6. ——— *Notice and inquiry.—Criminal Procedure Code, 1861, s. 62.—Order without notice or inquiry.*—An order issued by a Magistrate under section 62 of the Code of Criminal Procedure in consequence of a mahizanama signed by certain persons but without any notice to the defendant or inquiry by the Magistrate is illegal. ANONYMOUS . . . . . **4 Mad., Ap., 67**

7. ——— **Prohibitory order.**—*Procedure.—Rule to show cause.*—Under section 62 of the Code of Criminal Procedure, a Magistrate cannot pass a prohibitory order without having previously issued a rule to show cause why the order should not be passed. QUEEN *v.* LACHMIPAT SINGH **[5 B. L. R., Ap., 81**

S. C. IN THE MATTER OF THE PETITION OF LUCHMEEPUT SINGH . **14 W. R., Cr., 17**

IN RE KALIDAS BHATTACHARJEE **[5 B. L. R., Ap., 82, note**

S. C. KALIDAS BHUTTACHARJEE *v.* MOHENDRO NATH CHATTERJEE . **12 W. R., Cr., 40**

COLLECTOR OF HOOGHLY *v.* TARAKNATH MUKHOPADHYA . **7 B. L. R., 449: 16 W. R., 63**

8. ——— *Ground necessary for order.—Power of Magistrate to make prohibitory order as to nuisance.*—When a Magistrate makes an order under section 518, Criminal Procedure Code, 1872, on the ground that he has received information, and is satisfied with it, no interference is possible; but when he states the nature of the information, the High Court can see whether such information justifies the order made. Before a prohibitory order under section 518 can be made, there ought to be information or evidence before the Magistrate, that the act prohibited was likely to cause a riot or affray, and that the stoppage of that act would prevent such riot or affray. GOSHAIN LUCHMUN PERSHAD POOREE *v.* POHOOP NARAIN POOREE **[24 W. R., Cr., 30**

NUISANCE—*continued.*

2. UNDER CRIMINAL PROCEDURE CODES —*continued.*

9. ——— **Condition precedent to making of order.**—*Criminal Procedure Code, 1872, s. 518, expl. I.*—The existence of the circumstances mentioned in explanation I is a condition precedent to the action of a Magistrate, under section 518, Code of Criminal Procedure. IN THE MATTER OF KRISHNA MOHUN BYSACK . **1 C. L. R., 58**

10. ——— **Ground for making order.**—*Criminal Procedure Code (XXV of 1861), s. 62.—Act X of 1872, s. 518.—Power of Magistrate.—Procedure.—Report of police.*—There is nothing in section 62, Criminal Procedure Code, 1861, to justify a Magistrate in making an order under that section on the mere report of a police officer. QUEEN *v.* BHYRO DAYAL SINGH **[3 B. L. R., A. Cr., 4: 11 W. R., Cr., 46**

11. ——— **Limit of order.**—*Criminal Procedure Code, 1872, s. 518.—Inquiry into act necessitating order.—Order made without jurisdiction.—Per* AINSLIE, *J.*—In dealing with the civil rights of a subject under section 518 of the Criminal Procedure Code, it is incumbent on the Magistrate to limit the operation of his order to such reasonable time as may be necessary to enable him to hold a full and sufficient inquiry as to whether the act prohibited as likely to cause a breach of the peace is within, or is in excess of, the legal right of the person forbidden to do it; and, if necessary, to deal with the case under the other provisions of the Criminal Procedure Code, which enable him to meet cases of probable breach of the peace. *Per* BROUGHTON, *J.*—Where an order on the face of it appears to have been made without jurisdiction, no subsequent explanation can make it good. IN THE MATTER OF ABDOOL *v.* LUCKY NARAIN MUNDUL . **I. L. R., 5 Calc., 132**

12. ——— **Nature of order.**—*Perpetual injunction.—Criminal Procedure Code, 1872, s. 518.—Powers of Magistrate.—Rival hâts.*—A Magistrate is not empowered to pass an order under section 518 of Act X of 1872 which has more than a temporary operation: the grant of what is in effect an order for a perpetual injunction is entirely beyond his powers. GOPI MOHUN MULLICK *v.* TARAMONI CHOWDHRANI **[I. L. R., 5 Calc., 7: 4 C. L. R., 309**

13. ——— *Perpetual injunction.—Magistrate, Power of.*—A Magistrate has no power to pass a perpetual injunction under section 518 of the Code of Criminal Procedure, 1872. *Gopi Mohun Mullick* v. *Taramoni Chowdhrani, I. L. R., 5 Calc., 7,* followed. BRADLEY *v.* JAMESON **[I. L. R., 8 Calc., 580: 11 C. L. R., 414**

14. ——— **Order for protection of property.**—*Criminal Procedure Code (Act X of 1872), s. 518.*—A Magistrate has no jurisdiction to make an order under section 518 of the Code of Criminal Procedure merely for the protection of property. IN THE MATTER OF THE PETITION OF PRAYAG SINGH. EMPRESS *v.* PRAYAG SINGH **[I. L. R., 9 Calc., 103**

NUISANCE—*continued.*

2. UNDER CRIMINAL PROCEDURE CODES —*continued.*

15. ——— **Recall of order.**—*Order made without jurisdiction.*—Where a Deputy Magistrate, without taking evidence, made an order under section 62 of the Code of Criminal Procedure, 1861, changing a day on which a hât used to be held, and subsequently, on taking evidence, found that his first order was wrong and passed without jurisdiction, he was held to have acted properly in recalling his first order. MOHUN SIRDAR *v.* OBHOY CHURN MOOKOPADHYA [13 W. R., Cr., 72

16. ——— **Order in disputes as to land.**—*Criminal Procedure Code, 1861, s. 62.*—Section 62 of the Code of Criminal Procedure does not apply to disputes connected with lands, but refers specially to nuisances and other similar matters in which immediate action is necessary, in order to avoid a risk of illegal consequences. RAJ BULLUB ADDHYA *v.* GOBINDO CHUNDER MOITRO . 12 W. R., Cr., 66

17. ——— **Order as to moveable property.**—*Criminal Procedure Code, 1861, s. 62.*—*Likelihood of breach of the peace.*—The power of issuing orders to prevent breaches of the peace, &c., conferred on a Magistrate by section 62 of the Code of Criminal Procedure, extends only to immoveable property of the description set forth in Chapter XXII of that Code. QUEEN *v.* GOLUCK CHUNDER GOOHO [12 W. R., Cr., 38

18. ——— **Private dispute as to pathway.**—*Criminal Procedure Code, 1861, s. 62.*—Section 62 of the Code of Criminal Procedure does not apply to a private dispute between two parties relative to a path. NILKOMUL MOOKHOPADHYA *v.* ANUND CHUNDER LUSHKUR . . 19 W. R., Cr., 6

19. ——— **Dispute as to interest in land.**—*Question for Civil Court.*—*Criminal Procedure Code, 1861, s. 62.*—The purchaser of an interest in land at a sale in execution of decree obtained an order for possession under section 263 or 264, Act VIII of 1859, and a dispute arose between him and another person who had some interest in the land, as to what passed under the sale certificate. Without ascertaining the rights of the parties the Magistrate made certain orders, the effect of which was to exclude the auction-purchaser for some time from exercising the right alleged to have passed to him under the purchase. *Held* that the Magistrate ought to have made no order at all with reference to the property, leaving it to the parties to determine their rights in the Civil Court, and that he had ample power under the section to do what was necessary to prevent a breach of the peace. LALOO *v.* ADAM SIRCAR. GOVERNMENT *v.* SUBJAKANT ACHARJIA. DENGOO SHAIKH *v.* ADAM SIRCAR . 17 W. R., Cr., 37

20. ——— **Order for removal of wall.**—*Criminal Procedure Code, 1861, s. 62.*—Section 62 of the Code of Criminal Procedure does not authorise a Magistrate summarily to direct a person to remove a wall erected on land alleged to belong to another person in the absence of evidence showing that a riot or affray was likely to occur. RADHAKISHORE *v.* GIRIDHAREE SAHEE . . 13 W. R., Cr., 19

NUISANCE—*continued.*

2. UNDER CRIMINAL PROCEDURE CODES —*continued.*

**Order for removal of wall**—*continued.*

21. ——— **Order for removal of buildings.**—*Criminal Procedure Code, 1861, s. 62.*—Orders by Subordinate Magistrates in one case directing the removal of a house on the ground that it was in a dangerous and dilapidated condition, and in the other directing the removal of a granary on the ground that it had been improperly erected upon land required to be kept unoccupied for common purposes, were set aside by the High Court because the Subordinate Magistrate acted without jurisdiction. ANONYMOUS [4 Mad., Ap., 34

22. ——— **Order for removal of obstruction.**—*Criminal Procedure Code, 1872, ss. 518, 521.*—A Magistrate of the second class having passed an order under the Criminal Procedure Code, 1872, section 518, for the removal of an obstruction, the Magistrate on appeal held that, though the proceedings of the Subordinate Magistrate were without jurisdiction, he (the Magistrate) was competent under section 518 to direct the removal of the obstruction, and he passed an order accordingly. *Held* that the order of the Magistrate under section 518 was illegal, and that he should have proceeded under section 521 and the following sections of the Code. IN THE MATTER OF THE PETITION OF BRINDABUN DUTT [21 W. R., Cr., 24

23. ——— **Dispute as to right of possession.**—*Criminal Procedure Code, 1872, s. 518.*—*Breach of peace imminent.*—*Order not to interfere with a temple.*—Where a dispute arises as to the right of the possession of lands and buildings, a Magistrate, if he considers a collision between the parties and a serious breach of the peace imminent, may properly proceed under Chapter 39, instead of Chapter 40, of the Criminal Procedure Code. If the Magistrate had jurisdiction, the proceedings, not being judicial, cannot be revised by the High Court. An order to abstain from interference with a temple and its property is an order to abstain from a "certain act" within the meaning of section 518 of the Criminal Procedure Code. ELAVARISU VANAMAMALOI RAMANUJA JEEYARSVAMI *v.* VANAMAMALAI RAMANUJA JEEYAR . . I. L. R., 3 Mad., 354

24. ——— **Order to alter doorway of temple.**—*Criminal Procedure Code, 1861, s. 62.*—The temple of Pandharpur, a public temple, is visited at certain periods of the year by a large concourse of pilgrims. With a view to prevent the dangers arising from overcrowding, and to improve the ventilation, the Magistrate, by a written order, under section 62 of the Criminal Procedure Code, directed the hereditary priests of the temple to widen and heighten the doorway. *Held* that such order was legal under the above section. *Semble,*—That the case would have been the same had the temple been private property; and also that the power of Magistrates to issue orders under the section in question is

**NUISANCE**—*continued.*

2. UNDER CRIMINAL PROCEDURE CODES —*continued.*

**Order to alter doorway of temple**—*continued.*

entirely discretionary. REG. *v.* RAM CHANDRA EKNATH . . . . . **6 Bom., Cr., 36**

25. ——— **Order as to procession in public streets.**—*Criminal Procedure Code, 1872, s. 518.—Public worship.—Conflict of rights.—Duty of Magistrate when public peace threatened.*—In affording special protection to persons assembled for religious worship or religious ceremonies, the law points to congregational rather than private worship, and it may fairly be required of congregations that they should inform the Magistrate or police at what hours they customarily assemble for worship, in order that the rights of other persons may not be unduly curtailed. No sect is entitled to deprive others for ever of the right to use the public streets for processions, on the plea of the sanctity of their place of worship, or on the plea that worship is carried on therein day and night. The duties of a Magistrate in cases where the public peace is likely to be disturbed by one sect attempting to prevent another from using the public streets for processions, discussed. The principles laid down in *Muthealu Chetti* v. *Bapun Saib, I. L. R., 2 Mad., 140,* examined, explained, and approved. SUNDRAM *v.* QUEEN. PONNUSAMI *v.* QUEEN . . **I. L. R., 6 Mad., 203**

26. ——— **Order to remove embankment.**—*Criminal Procedure Code, 1861, s. 62.*—The Subordinate Magistrate issued an order to two persons directing them to remove a certain embankment, whereby the adjacent lands of the complainant were in danger of being flooded. *Held* that the act of the defendant was not an act which could be prohibited by the Subordinate Magistrate under section 62 of the Code of Criminal Procedure ANONYMOUS **[5 Mad., Ap., 19**

27. ——— **Order to destroy tank.**—*Obstruction to enjoyment of public rights.*—The defendant had made a tank in the bed of a khal by throwing two bunds across it, and on complaint to the Magistrate, he, finding that the tank had been in existence only for about six years, passed an order under section 62, Act XXV of 1861, directing the defendant to destroy the bunds, on the ground that they were an obstruction to the enjoyment of the river by the public in the rainy season; and that the bunds interfered with the drainage of the country and tended to the injury of the crops and of the inhabitants. The High Court held that section 62 did not authorise the passing of such an order. QUEEN *v.* GOLAM DARBESH **[1 B. L. R., S. N., 27 : 10 W. R., Cr., 36**

28. ——— **Trespass by cattle.**—*Penal Code, s. 188.*—A Magistrate issued an order warning owners of cattle to take proper care of them; and that in case of disobedience or neglect they would be punished according to law; and did punish them for disobedience under section 188, of the Penal Code. *Held* that the Magistrate was not competent, under

**NUISANCE**—*continued.*

2. UNDER CRIMINAL PROCEDURE CODES —*continued.*

**Trespass by cattle**—*continued.*

section 62 of the Code of Criminal Procedure, 1861, to pass such an order. The order contemplated under that section is in the nature of an injunction, and such an order passed by a Magistrate would not be legal. The conviction under section 188 of the Penal Code was therefore illegal. IN THE MATTER OF AMIRADDI **[2 B. L. R., A. Cr., 45**

S. C. QUEEN *v.* AMEERUDDEEN **[12 W. R., Cr., 36**

29. ——— *Penal Code, s. 289.*—An order by a Magistrate prohibiting the straying of cattle within certain local limits is not an order within the meaning of section 62 of the Code of Criminal Procedure. There can be no conviction for disobedience of such order under section 289 of the Penal Code. QUEEN *v.* MOZAFAR KHALIFA . . . . **9 B. L. R., Ap., 36**

S. C. GOVERNMENT *v.* MOZUFFER KHALIFA **[18 W. R., Cr., 21**

30. ——— **Order to cut down trees as being a nuisance.**—*Removal of nuisance.—Power of Magistrate.*—Under section 62 of the Code of Criminal Procedure, 1861, a Magistrate has no power to issue an order *ex parte* to cut down trees on the representation of a party supported by the report of the police that the existence of the trees was a nuisance. QUEEN *v.* RAM CHANDRA MOOKERJEE **[5 B. L. R., 131**

S. C. UTTAM CHUNDER CHATTERJEE *v.* RAM CHUNDER CHATTERJEE . . **13 W. R., Cr., 72**

31. ——— **Order to remove stacked timber.**—*Criminal Procedure Code, 1861, s. 62.—Illegal order.*—Where a complaint was made by *A.* that timber belonging to his master, which had been cut and stacked in a certain place, had been removed by *B.*, who said that the timber was cut not by *A.'s* master but by himself, and that he had stacked it in a place where he always put his timber, it was held that the Magistrate could not proceed under section 62 of the Code of Criminal Procedure, but was bound to try the charge brought against *B.*, and either restore the timber to *A.* or leave it where it was, according to the result of the investigation. KARTICK CHUNDER BAL *v.* CHUNDER NATH CHUCKERBUTTY **[15 W. R., Cr., 56**

32. ——— **Order as to holding of hât or market.**—*Rival hâts.—Act XXV of 1861, s. 404.—Judicial order.—Power of revision by High Court.*—An order of a Magistrate under section 62, Criminal Procedure Code, 1861,—*e.g.*, prohibiting one of two rival proprietors of two different hâts from holding his hât on certain days of the week in order to prevent obstruction, annoyance, and injury,—was not a judicial order; and was, therefore, not open to revision by the High Court under section 404, Criminal Procedure Code. PHEAR, *J.* (dissenting). QUEEN *v.* ABBAS ALI CHOWDHRY . . **6 B L. R., F. B., 74**

NUISANCE—*continued.*

2. UNDER CRIMINAL PROCEDURE CODES —*continued.*

**Order as to holding of hât or market—** *continued.*

S. C. ABBAS ALI CHOWDHRY *v.* ILLIM MEAH [14 W. R., Cr., 46

LALLA MITTERJEET SINGH *v.* RAJCOOMAR SIRCAR [18 W. R., Cr., 22

*See* as to section 518 the corresponding section of Act X of 1872, IN THE MATTER OF THE PETITION OF MOKUT SINGH . . . . 6 N. W., 16

**33.** ——— *Rival hâts.—Criminal Procedure Code, 1861, s. 62.*—When two hâts or markets were held on the same day on adjacent pieces of land, and it was shown to lead to riots and affray, and annoyance to persons lawfully employed in their usual avocations that they should be so held, an order by the Magistrate, under section 62 prohibiting the parties from holding the hâts on the same day, was held to be a proper order under section 62, Act XXV of 1861. QUEEN *v.* KALIKAPRASAD [5 B. L. R., Ap., 82, note : 11 W. R., Cr., 5

**34.** ——— *Criminal Procedure Code (Act XXV of 1861), s. 62.—Act X of 1872, s. 518.—Rival hâts.—Power of Magistrate.*—A Magistrate has power, under section 62 of Act XXV of 1861, to prohibit a particular landholder from holding a hât on a particular spot on a particular day, at least for a temporary period, if he is satisfied upon reasonable grounds that the order is likely to prevent, or tends to prevent, a riot or an affray. IN THE MATTER OF THE PETITION OF BYKUNTRAM SHAHA ROY . . . 10 B. L. R., F. B., 434

S. C. BYKUNTRAM SHAHA ROY *v.* MEAJAN [18 W. R., Cr., 47

Overruling SHEEB CHUNDER BHUTTACHARJEE *v.* SAADUT ALLY KHAN . . 4 W. R., Cr., 12

**35.** ——— *Order under s. 518, Criminal Procedure Code, 1872.—Order to close a hât.*—In a case in which the Magistrate passed an order under section 518, Criminal Procedure Code, for closing a hât on the ground that it was only a mile apart from another hat, and a breach of the peace was not unlikely, the Sessions Judge recommended that the order should be set aside, section 518 applying only when a breach of the peace was imminent. *Held* that under explanation 2, section 518, the order could be made in all cases upon such information as satisfied the Magistrate, and the order was one which he had power to make. BHOLANATH BOSE *v.* KOMURUDDIN . . 20 W. R., Cr., 53

**36.** ——— *Criminal Procedure Code, 1872, s. 518.*—The operation of section 518, Criminal Procedure Code, was confined to cases where, in the opinion of the Magistrate, the delay which would be caused by adopting a different procedure from that specified in the explanation to that section would "occasion a greater evil than that suffered by the person on whom the order is made or would defeat the intention of this (39th) Chapter."

NUISANCE—*continued.*

2. UNDER CRIMINAL PROCEDURE CODES —*continued.*

**Order as to holding of hât or market—** *continued.*

Where a Magistrate, without hearing the petitioner or giving him an opportunity of being heard, and simply on the foundation of a police officer's report, directed the petitioner to abstain from holding a hât upon his land on a certain day, because another party had long been accustomed to hold a hât on his land adjacent to the petitioner's hât on the day following that on which the petitioner held his hât, it was held that his order passed under section 518 was *ulta vires,* the police officer's report being vague and insufficient, and a private interest of this kind not affording a ground for making an order under section 518 or any other order under the Criminal Procedure Code. BANEE MADHUB GHOSE *v.* WOOMA NATH ROY CHOWDHRY . . . . 21 W. R., Cr., 26

*See* KALI NARAIN ROY CHOWDHRY *v.* ABDOOL GUFFOOR KHAN . . 22 W. R., Cr., 24

**37.** ——— *Criminal Procedure Code, 1872, s. 518.—Hât, Removal of, Order of Magistrate as to.*—Where a Magistrate made an order under section 518 of the Code of Criminal Procedure (Act X of 1872), directing one of two rival hât proprietors to remove his hât to such a distance as to render it useless for the purposes for which it was established, it was held that the order came within the purview of the Full Bench decision of *Gopi Mohun Mullick* v. *Taramoni Chowdhrani, I. L. R., 5 Calc., 7 : 4 C. L. R., 309,* and might be set aside as in excess of jurisdiction. SHURUT CHUNDER BANNERJEE *v.* BAMA CHURN MOOKERJEE [4 C. L. R., 410

**38.** ——— **Order prohibiting use of musical instrument.**—*Criminal Procedure Code, 1861, s. 62.*—A Magistrate cannot, under section 62, Code of Criminal Procedure, in general terms forbid two parties to use any musical instrument in the neighbourhood of each other's house, though he may forbid their doing so for the purpose of mutual annoyance. IN RE RAM CHUNDER GEER GOSSAIN [6 W. R., Cr., 40

**39.** ——— **Order stopping music while passing place of worship.**—*Illegal order.*—An order of the Magistrate directing that all music should cease when any procession is passing a certain place of worship,—*Held ultra vires.* MUTHIALU CHETTI *v.* BAUPUN SAIB . . I. L. R., 2 Mad., 140

**40.** ——— **Order prohibiting collection of rents.**—*Dispute as to right to rent by rival proprietors.—Criminal Procedure Code, 1872, s 518.*—In case of a dispute between rival parties as to the payment of rents by tenants a Magistrate has no power, under section 518 of Act X of 1872, to make an order that no rents should be collected until such time as the right and title of one party should have been established by a competent Court. PROSUNNO COOMAR CHATTERJEE *v.* EMPRESS [8 C. L. R., 231

NUISANCE—*continued.*

2. UNDER CRIMINAL PROCEDURE CODES —*continued.*

41. ——— **Order not to collect cesses.** —*Criminal Procedure Code, 1861, s. 62.*—A Magistrate cannot pass an order, under section 62 of the Code of Criminal Procedure, directing a certain person to abstain from a certain act, or to take order with certain property, unless he is satisfied that such direction on his part is likely to prevent or tends to prevent a riot or affray; nor can he pass an order under that section, calling upon a person to enter into recognizances not to collect certain cesses. IN THE MATTER OF LUCHMIPUT SINGH . **14 W. R., Cr., 3**

42. ——— **Order to prevent obstruction.**—*Criminal Procedure Code (Act XXV of 1861), ss. 62 and 308.—Act X of 1872, ss. 518 and 521.* —When a case falls both under section 62 and under section 308 of the Criminal Procedure Code, the order of the Magistrate ought not to be absolute in the first instance. He should give the defendant an opportunity to show cause against the order. *Semble,*—Whether a case comes under either of these two sections or under both, the order of the Magistrate ought to contain a clear statement of the facts upon the basis of which the Magistrate has made the order. IN THE MATTER OF HARIMOHAN MALO. IN THE MATTER OF JOYKRISTO MOOKERJEE

**[1 B. L. R., A. Cr., 20 : 10 W. R., Cr., 5**

43. ——— **Procedure.**—*Case falling within scope both of s. 62 and s. 308, Criminal Procedure Code, 1861.*—In a case within section 62 of the Code of Criminal Procedure which also falls within the scope of section 308 of the same Code, a Magistrate must conform to the more particular directions of the latter section, not to those of the former. KHAN CHAND *v.* COLLECTOR OF BOOLUNDSHAHUR

**[1 N. W., Pt. 7, p. 110 : Ed. 1873, 197**

44. ——— **Removal of obstruction.**—*Criminal Procedure Code, 1861, s. 308.—Joint Magistrate in charge of division.*—Proceedings under section 308 of the Code of Criminal Procedure for the removal of obstructions may be originated by a Joint Magistrate in charge of a division of a district. IN THE MATTER OF THE PETITION OF PUNCHANUN BOSE

**[15 W. R., Cr., 41**

45. ——— *Jurisdiction of Joint Magistrate.—Criminal Procedure Code, s. 308.* —The Magistrate of a district can alone hold proceedings in a case (such as the removal of a thatched house) under section 308 of the Code of Criminal Procedure. The Joint Magistrate while in charge of the Magistrate's office has no such jurisdiction. IN THE MATTER OF GREESH CHUNDER CHUCKERBUTTY

**[15 W. R., Cr., 36**

46. ——— **Order as to future obstruction.**—*Criminal Procedure Code, 1872, ss. 521, 526.* —Section 526, Criminal Procedure Code, 1872, does not enable a Magistrate to make any orders except such as are mentioned in section 521, under which he can only deal with existing obstructions; the Magistrate has no power to direct what is to be done in the

NUISANCE—*continued.*

2. UNDER CRIMINAL PROCEDURE CODES —*continued.*

**Order as to future obstruction**—*continued.*

case of any future obstruction. KASHI CHUNDER CHUCKERBUTTY *v.* YAR MAHOMED

**[21 W. R., Cr., 10**

47. ——— **Removal of public nuisance,** —*Criminal Procedure Code, 1861, s. 308.—Summary order to police.*—In order to remove a public nuisance a Magistrate is bound to proceed under section 308 and following sections of Chapter XX of the Criminal Procedure Code, and is not competent to pass a summary order to the police to do so. QUEEN *v.* DAMODUR DASS . . . . . **2 N. W., 452**

48. ——— **Nuisance in public place, Necessity for proof of.**—*Criminal Procedure Code, 1872, s. 521.*—In a prosecution under section 521, Criminal Procedure Code, it is necessary to show that the act complained of is a nuisance, and that it was committed in a thoroughfare or public place. MUZHUR ALI *v.* GUNDOWREE SAHOO

**[25 W. R., Cr., 72**

49. ——— **Order for removal of prostitute.**—*Criminal Procedure Code, 1872, s. 521.*— The Code of Criminal Procedure (Act X of 1872), section 521, does not warrant a Magistrate's interference with a prostitute for the purpose of removing her from her dwelling-house simply on the ground of her profession, so long as she behaves herself orderly and quietly and creates no open scandal by riotous living. NUNDO KUMAREE PESHAGUR *v.* ANUND MOHUN GOOHO . . . . . **24 W. R., Cr., 68**

50. ——— **Order prohibiting cremation in certain place.**—*Criminal Procedure Code, 1872, s. 521.*—An application to have it declared that a certain place could not be used for cremation purposes, would not come under Act X of 1872, section 521. GUDADHUR KAMILA *v.* BAIDANATH JANA

**[24 W. R., Cr., 6**

51. ——— **Private road with right of way over it.**—*Criminal Procedure Code, 1861, s. 311 et seq.*—Section 311 of the Code of Criminal Procedure and the other sections of Chapter XX of that Code referred to public thoroughfares and not to private roads over which a right of way has been established. GOOROO CHURN GOON *v.* GUNGA GOBIND CHATTERJEE . . . . . **8 W. R., 269**

52. ——— **Dispute as to right to water.** —In a case of a dispute as to the right to the use of water the Magistrate should not proceed as for a nuisance under Chapter XX, Criminal Procedure Code, 1861. QUEEN *v* MADHOO CHURN

**[13 W. R., Cr., 51**

53. ——— **Obstruction of drain.**—*Criminal Procedure Code, 1861, s. 308.*—The obstruction of a drain into which the sewage of complainant's premises fell does not fall either under section 308 or 320 of the Code of Criminal Procedure, but is matter for a civil suit and injunction. IN RE TROYLAKNATH BOSE . . . . . **5 W. R., Cr., 58**

**NUISANCE**—*continued.*

2. UNDER CRIMINAL PROCEDURE CODES —*continued.*

**54. ——— Prevention of nuisance by public.**—*Criminal Procedure Code, 1861, s. 308.*—Section 308 of the Criminal Procedure Code, 1861, does not apply where a private individual charges the public with committing a nuisance in the exercise of an admitted right. BECHARAM GHOROOEE *v.* BOISTUBNATH BHOOYAN . . . . **14 W. R., 177**

**55. ——— Order for protection of public health.**—*Power of Magistrate.—Criminal Procedure Code, 1872, s. 521.*—A Magistrate's powers, under section 521 Code of Criminal Procedure, are confined to the instances specifically mentioned in that section, which does not confer general powers upon a Magistrate to pass any order he may consider necessary for the protection of the public health. It is only from a thoroughfare or public place that under that section a Magistrate is at liberty to direct a nuisance to be removed. IN THE MATTER OF THE PETITION OF SOOJAUT HOSSEIN . . . **22 W. R., Cr., 19**

PETAMBUR JUGI *v.* NASARUDDY **[25 W. R., Cr., 4**

**56. ——— Obstruction of thoroughfare.**—*Criminal Procedure Code, 1861, s. 308.*—In the case of a complaint under section 308 of the Code of Criminal Procedure, for the removal of an obstruction from a thoroughfare, a Magistrate should first inquire if the road is a public one or not. If he finds in the affirmative, he has jurisdiction to proceed; if in the negative, he should withhold his hand and abstain from carrying out the order for the removal of the obstruction. IN THE MATTER OF THE PETITION OF BECHARAM BHUTTACHARJEE . . **15 W. R., Cr., 67**

**57. ——— *Private road.***—*Criminal Procedure Code, 1861, s. 308.*—Although a road may be a private one, a Deputy Magistrate has jurisdiction to make an order under section 308, Code of Criminal Procedure, 1861, if it appears that section 320 applies to it,—that is, if it is open to the use of a certain class of persons who use it a few days before the occurrence of the dispute. TARINEE CHURN SHAH *v.* BONOMALI NAG **[19 W. R., Cr., 33**

**58. ——— Order not to frequent public places.**—*Criminal Procedure Code (Act X of 1882), s. 133.*—A general order of the Magistrate directing the public not to frequent the roads and public places in a village between certain hours is one made without jurisdiction under section 133, Act X of 1882. IN THE MATTER OF KOMUL KRISTO BONICK **[12 C. L. R., 231**

**59. ——— Obstruction of public ways.**—*Dispute as to public right.*—The powers embodied in sections 133, 134, 135, 136, 137, of the Criminal Procedure Code, 1882, with regard to the obstruction of public ways, are not intended to be exercised where there is a *bonâ fide* dispute as to the existence of the public right. Where there is such a dispute, the Court should pass no order under those sections until the public right has been established by proper legal proceedings, civil or criminal. BASARUDDIN BHUIAH *v.* BAHAR ALI . . . **I. L. R., 11 Calc., 8**

**NUISANCE**—*continued.*

2. UNDER CRIMINAL PROCEDURE CODES —*continued.*

**Obstruction of public ways**—*continued.*

LALL MIAH *v.* NAZIR KHALASHI **[I. L. R., 12 Calc., 696**

**60. ——— *Criminal Procedure Code, ss. 133, 135.—Application for order to remove obstruction.—Disputed title.—Jurisdiction of Criminal Court.***—Where an application is made under section 133 of the Criminal Procedure Code, 1882, calling on a person to remove an obstruction, and such person *bonâ fide* raises a question of title,—*Held* that the case then becomes one for a Civil Court. The section contemplates only an inquiry as to the existence or non-existence of the obstruction complained of, not an inquiry into disputed questions of title. ASKAR MEA *v.* SABDAR MEA **[I. L. R., 12 Calc., 137**

LALL MIAH *v.* NAZIR KHALASHI **[I. L. R., 12 Calc., 696**

**61. ——— Order requiring abatement of nuisance in certain time.**—*Criminal Procedure Code, ss. 133, 137, 140.*—A Subdivisional Magistrate having made a conditional order, under section 133 of the Code of Criminal Procedure, against a person to abate a nuisance or appear and show cause before a Second Class Magistrate why the order should not be enforced, the said person appeared as directed and the order was made absolute under section 137. The Second Class Magistrate then issued a notice and order under section 140, requiring the nuisance to be abated within a certain date. The District Magistrate having referred the case on the ground that the Second Class Magistrate had no jurisdiction to pass final orders in such cases,—*Held* that the order was not illegal. IN RE NARASIMHA **[I. L. R., 9 Mad., 201**

**62. ——— Judicial proceeding.**—*Criminal Procedure Code, 1861, ss. 308, 404.*—An order made by a Magistrate under section 308 of Act XXV of 1861 was not a judicial proceeding within the meaning of section 404 of that Act. ASHBURNER *v.* KESHAV VALAD TAKU PATIL . **4 Bom., A. C., 150**

*Contra,* COLLECTOR OF HOOGHLY *v.* TARAKNATH MUKHOPADHYA **[7 B. L. R., 449: 16 W. R., 63**

Such an order is now by special enactment made a judicial order.

**63. ——— Procedure.**—*Rules in Criminal Code.—Criminal Procedure Code, 1861, s. 308.*—Where a Magistrate has commenced proceedings under section 308 of the Code of Criminal Procedure, he is not at liberty to proceed otherwise than in conformity with the rules laid down in Chapter XX of the Code. QUEEN *v.* PITTI SINGH . . **8 W. R., Cr., 37**

**64. ——— *Opportunity to show cause.***—*Criminal Procedure Code (Act XXV of 1861), Ch. XX, ss. 308-315.—Order of Magistrate.***—A Magistrate does not act legally under that chapter, if he does not first call on the person with

NUISANCE—*continued.*

2. UNDER CRIMINAL PROCEDURE CODES —*continued.*

Procedure—*continued.*

whose property he proposes to interfere to appear and show cause. COLLECTOR OF HOOGHLY *v.* TARAK NATH MUKHOPADHYA

[7 B. L. R., 449 : 16 W. R., 63

*See* QUEEN *v.* RAI LACHMIPAT SINGH

[5 B. L. R., Ap., 81 : 14 W. R., Cr., 17

and IN RE KALIDAS BHATTACHARJEE

[5 B. L.R., Ap., 82, note

65. ——————— *Opportunity to show cause.—Criminal Procedure Code (Act X of 1852), s. 133.—Erection of buildings.—Unconditional order.*—Every order made under section 133 of the Code of Criminal Procedure, Act X of 1882, must appoint a time within which, and a place where, the person to whom it is directed may appear before the Magistrate, and move to have the order set aside or modified. No unconditional order can be made under that section. EMPRESS *v.* BROJOKANT ROY CHOWDHRY . . . I. L. R., 9 Calc., 637

66. ——————— *Opportunity to show cause.—Criminal Procedure Code, 1872, ss. 521, 525, 528.*—An order by a Magistrate under section 521, Act X of 1872, for the removal of a nuisance, does not become absolute until an opportunity is given to the person affected by it to show cause why the order should not be carried into effect. No order can be made under section 528 of the Code unless there is imminent danger or fear of injury of a serious kind to the public involved in the case: and where a Magistrate who had made an order under section 521 subsequently directed further inquiry to be made, it was held that he must be considered to have abandoned his proceedings under section 528, and that he should have proceeded under section 528 instead of fining the party charged under section 188 of the Penal Code. QUEEN *v.* BROJENDRO LAL

[21 W. R., Cr., 86

67. ——————— *Obstruction in public way.—Inquiry under s. 133, Criminal Procedure Code (Act X of 1882).—Previous orders when no bar to such inquiry.*—An application was made under section 133 of the Criminal Procedure Code (Act X of 1882) for the removal of an obstruction in a public thoroughfare, but after a personal local inspection by the Magistrate and without any evidence being taken, the parties were referred to a civil suit, and the order was refused, the Magistrate holding that the way was not a public way. A civil suit was then filed, and during its pendency a second application was made under section 133 of Act X of 1882, with a like object, which was refused on the ground that the civil suit was pending, and that there was no likelihood of a breach of the peace. The civil suit resulted in the way being held to be a public thoroughfare. A third application was then made under section 133 to have the obstruction removed, but the Magistrate held that in face of the two previous orders he could not interfere. *Held* that the order of the Magistrate was wrong, upon the ground that he was bound to make such inquiry, and as there never had been any inquiry into the matter, the first decision being no decision at all, but a mere *dictum* of the Magistrate upon a personal local investigation without hearing evidence, and thus not on judicial inquiry, and the second decision being based merely upon the pendency of the civil suit and the previous improper order, and that neither of these orders operated therefore as a bar to the Magistrate inquiring into the matter of the present complaint. MAKHAN LALL SAHA *v.* MAKHAN CHORA SAHA

[I. L. R., 11 Calc., 271

68. ——————— *Order calling on party to appear and show cause.—Criminal Procedure Code, 1861, s. 308.—Removal of nuisance.—Filling up tank.—Held* that a Magistrate cannot proceed to pass an order for the removal of a nuisance, under section 308 of the Code of Criminal Procedure, without calling on the party to show cause why the order should not be passed against him, and without hearing the objections, even if they are filed after the time fixed for their presentation, but before he takes up the case. A Magistrate's power to fill up a tank is by section 308 limited to having it fenced in; but where the tank is proved to be injurious to the community he may under that section treat it as a public nuisance, and cause it to be filled up. QUEEN *v.* BISTOO CHURN CHUCKERBUTTY

[10 W. R., Cr., 27

69. ——————— *Appearance of party to show cause.*—Where a person to whom an order has been issued under section 521 of the Code of Criminal Procedure, appears to show cause against such order, the Magistrate is bound to take evidence under section 525 of the Code. IN THE MATTER OF MOHUR MANDAR . . . 8 C. L. R., 431

70. ——————— *Appearance of party to show cause.—Criminal Procedure Code, 1861, ss. 308, 404.—Thoroughfare.—Obstruction, Removal of.—Powers of Magistrate.*—Where, in a proceeding before a Magistrate under section 308 of the Code of Criminal Procedure, for the removal of an obstruction from a thoroughfare, or public place, the accused appears and shows cause, it is the duty of the Magistrate to inquire whether there is a thoroughfare or public place, and whether there is an obstruction. If the Magistrate makes the inquiry upon evidence before him, he does not act without jurisdiction, or in excess of jurisdiction. The High Court cannot set aside his order except for an error in law, or an excess of jurisdiction. It is not a ground for interference that the Magistrate has come to an erroneous decision upon the evidence. ANGELO *v.* CARGILL

[9 B. L. R., 417: 18 W. R., Cr., 41

71. ——————— *Appearance of party to show cause.—Criminal Procedure Code (Act XXV of 1861), s. 308.—Order made without record-*

NUISANCE—*continued.*

2. UNDER CRIMINAL PROCEDURE CODES —*continued.*

Procedure—*continued.*

*ing evidence.*—Where the Magistrate, on the report of the Civil Surgeon of the district, passed an order under section 308, Act XXV of 1861, that the defendants should appear and show cause why certain tanneries should not be removed as being a nuisance and injurious to health, and after the defendants had shown cause, the Magistrate went himself to the place and thereupon made his former order absolute, the High Court, on an objection that the order was not legal, it having been made without recording legal evidence, refused to interfere. QUEEN *v.* ALA BUKSH

[7 B. L. R., 482, note: 12 W. R., Cr., 24

72. ——— Slaughter-house, Order prohibiting.—*Criminal Procedure Code, 1861, s. 308.—Power of High Court to interfere with order.*—When a Magistrate, under section 308, Criminal Procedure Code, has ordered the suppression of a trade or occupation as a nuisance and injurious to the health of the community, the High Court will not interfere, unless they find either that there was no reasonable evidence before the Magistrate of the trade being injurious to the health and comfort of the community, or that the cause shown was such as ought to have satisfied the Magistrate that his order for suppressing the trade was not reasonable and proper. The Court take the findings of fact by the Magistrate to be correct, unless they see that there is not on the record any evidence to warrant such findings. MUNICIPAL COMMISSIONERS FOR THE SUBURBS OF CALCUTTA *v.* AMANAT ALI

[7 B. L. R., 516

73. ——— *Criminal Procedure Code, 1861, s. 308.*—The condition and the conduct of an old-established slaughter-house were proved to be, in fact, an offensive nuisance and dangerous to the health of the neighbours; but the evidence did not show it was in a worse condition than at any time since its establishment; the occupiers, when summoned, refused to ask for a jury under section 310, Criminal Procedure Code. *Held*, the Magistrate was justified in suppressing the "trade or occupation" under section 308. MUNICIPAL COMMISSIONERS OF THE SUBURBS OF CALCUTTA *v.* MAHOMED ALI

[7 B. L. R., 499: 16 W. R., Cr., 6

74. ——— *Private slaughter-house.—Criminal Procedure Code, 1872, s. 521.*—Where a Deputy Magistrate had treated the slaughtering of cattle as a "nuisance" under section 521 of the Criminal Procedure Code, and ordered its discontinuance within a private enclosure belonging to some Mahomedans,—*Held* that, though the act complained of might be shocking to the prejudices of Hindus, it could not properly be regarded as a nuisance, and that, at any rate, the act being done in a private place and not on a thoroughfare, it could not be dealt with under section 521. MUZHUR ALI *v.* GUNDOWREE SAHOO . . . . 25 W. R., Cr., 72

NUISANCE—*continued.*

2. UNDER CRIMINAL PROCEDURE CODES —*continued.*

75. ——— Order to pull down house.—*Criminal Procedure Code, 1861, s. 308.—Report of jurors.—Illegal order.—Obstruction to public way.*—The Magistrate of a district issued an order, under section 308 of the Code of Criminal Procedure, calling upon the petitioner to remove a building, on the ground that it was unlawful obstruction upon a high road. A jury of five persons was appointed by the Magistrate's successor, under section 310, to report within fifteen days whether the order was reasonable and proper. The jurors, being without instruction, took different views as to the performance of their duties; but four of them visited the premises, and were unanimous in finding that the building complained of was not on the high road at all. Five days after receiving reports to this effect the Magistrate issued another order to the petitioner, requiring him to pull down his house within fifteen days, as the jurors had made no report within the time prescribed. The petitioner showed cause under section 313, but without effect, and the order was repeated. The proceedings were ultimately forwarded to the Sessions Judge, whose successor in office returned them with the remark that nothing appeared to have been done contrary to the law for the removal of nuisances. *Held* that the petitioner had shown sufficient cause to satisfy the Magistrate, under section 313, that the order to pull down the house was not reasonable and proper. REG. *v.* DALSUKRAM HARIBHAI . . . 2 Bom., 407: 2nd Ed., 384

76. ——— Nuisance caused by tank.—*Criminal Procedure Code, 1861, s. 308.—Removal of tank.*—The order of a Magistrate under section 308, Code of Criminal Procedure, should be confined to a direction to remove the nuisance complained of. In the case of a tank, the Magistrate cannot order the proprietor to excavate it. The proprietor ought to have the discretion allowed him as to the mode in which he will remove the nuisance caused by the tank. If a Magistrate is compelled to direct the excavation of the tank, the actual cost of excavation can alone be charged against the proprietor, at whose disposition the soil taken out in the course of excavation must be placed. IN THE MATTER OF PAUL DOSS

[10 W. R., Cr., 51

77. ——— Presumption as to place being public thoroughfare.—*Finding of jury.—Interference of High Court.*—The fact of a Magistrate taking action under section 521 of the Code of Criminal Procedure is *primâ facie* sufficient to show that he considers the *locus in quo* to be a thoroughfare or public place, and if no objection is taken that it is not such, and the jury find that the order made under that section is reasonable and proper, the High Court will not interfere. IN THE MATTER OF IMANDI KHAN

[8 C. L. R., 399

78. ——— Functions of jury.—*Obstruction.—Public thoroughfare.—Procedure.*—Before a Magistrate can make an order under section 521 of the Code of Criminal Procedure to remove an obstruction from a path alleged to be a

NUISANCE—*continued.*

2. UNDER CRIMINAL PROCEDURE CODES —*continued.*

**Functions of jury**—*continued.*

public thoroughfare, he must first, in a proceeding held under section 532, have come to the conclusion that the path is open to the use of the public. The only functions which a jury appointed under section 523 can exercise, are to consider whether the order made by the Magistrate under section 521 is reasonable and proper, it being no part of their duty to determine the rights of parties in property. *Held*, therefore, that where a Magistrate, through a mistaken view of the law, ordered the removal of an obstruction on a pathway under section 521, and had further submitted this order to the consideration of a jury appointed under section 523, before he had himself come to a conclusion whether such pathway was a public thoroughfare, the only course left open to him under such circumstances was to stay all proceedings initiated under section 521, and take action under section 532. IN THE MATTER OF THE PETITION OF CHUNDERNATH SEN

[I. L. R., 5 Calc., 875 : 6 C. L. R., 379

**79. ——— Application for jury.**—*Obligation of Magistrate to appoint jury.—Criminal Procedure Code, 1872, s. 521.*—When the person, on whom a notice has been issued under section 521, Code of Criminal Procedure, applies for a jury, the Magistrate is bound to appoint one, and cannot decide the matter by a local inquiry. IN THE MATTER OF MOTHOOR CHUNDER DOSS . 2 C. L. R., 509

**80. ——— Question referred to jury.**—*Effect of referring a question not for jury to decide.—Held* that the agreement of the accused to refer the matter to a jury, which had given the case against them, in no way deprived them of their legal rights, or affected the fact that the question of the expediency of discontinuing the alleged nuisance, which had been referred to the jury, ought not to have been so referred. MUZHUR ALI *v.* GUNDOWREE SAHOO . . . . . 25 W. R., Cr., 72

**81. ——— Discontinuance of proceedings.**—*Criminal Procedure Code, 1872, s. 521.—Absence after enquiry of ground for proceeding further.*—When after inquiry a Magistrate finds that there is no sufficient cause for proceeding under section 521 of the Code of Criminal Procedure, he is competent to let the matter drop. IN RE SHONAI PORAMANICK. SHONAI PORAMANICK *v.* JOGENDRO SHAHA . . . . . 1 C. L. R., 486

**82. ——— Withdrawal of case.**—*Code of Criminal Procedure (Act X of 1872), s. 521.*—Where a Magistrate, in a proceeding under section 521 of the Code of Criminal Procedure, satisfies himself that there is no necessity for proceeding further under that section, he is competent to let the matter drop. *In re Shonai Paramanick, 1 C. L. R., 486,* followed. IN THE MATTER OF THE PETITION OF ISSUR CHUNDER NATH. ISSUR CHUNDER NATH *v.* KALI CHURN NATH

[I. L. R., 8 Calc., 883 : 11 C. L. R., 235

NUISANCE—*continued.*

2. UNDER CRIMINAL PROCEDURE CODES —*continued.*

**83. ——— Procedure after decision by jury.**—*Criminal Procedure Code, 1872, ss. 523, 526.—Order of Magistrate after decision of jury.*—A Magistrate who on the application of the party called on refers a matter as to whether a pathway is a thoroughfare or not for the consideration of a jury under section 523 of the Criminal Procedure Code, 1872, is bound to make an order upon the report of the jury and in accordance with their decision as required by section 526 of the Code. NYAN *v.* SHER ALI . . . . . 22 W. R., Cr., 86

3. PUBLIC NUISANCE UNDER PENAL CODE.

**84. ——— Prescriptive right.**—No length of enjoyment can legalise a public nuisance. MUNICIPAL COMMISSIONERS OF SUBURBS OF CALCUTTA *v.* MAHOMED ALI

[7 B. L. R., 499 : 16 W. R., Cr., 6

**85. ——— Unfenced well.**—*Penal Code, ss. 290, 43.*—Omission to fence a well on private ground within eight yards of a highway and open to it, is not punishable as a public nuisance. QUEEN *v.* ANTHONY . . . I. L. R., 6 Mad., 280

**86. ——— Omission to keep ponies from straying.**—*Penal Code, s. 290.*—The omission of a person to keep his ponies from straying is not a public nuisance punishable under section 290 of the Penal Code. JOYNATH MUNDUL *v.* JAMUL SHEIKH

[6 W. R., Cr., 71

**87. ——— Prostitute visiting dak-bungalow.**—*Penal Code, s. 290.*—A prostitute by visiting a dak-bungalow at the request of a person staying there, but against whom there is no evidence of any impropriety of speech or gesture or act, or that she had occasioned annoyance to the public generally or to any persons who, in the exercise of their public right, were lodging in the bungalow, is not liable to be convicted under section 290 of the Penal Code as having committed a public nuisance. QUEEN *v.* BEGUM . . . . 2 N. W., 349

**88. ——— Requisite proof.**—*Penal Code, s. 290.—Offence under special law.*—In a case of public nuisance, under section 290 of the Penal Code, it must be proved that injury, danger, or annoyance has been caused, either in regard to the enjoyment of property or the exercise of a public right on the part of a portion of the community or of any particular class of people. The fact that there is a special law to meet a particular offence (in this case, cattle trespass) does not prevent the punishment of the offenders under the Penal Code, if an offence which could have been rightly punished under the Penal Code was established. ONOORAM *v.* LAMESSOR. WEBSTER *v.* KEENA . . 9 W. R., Cr., 70

**89. ——— *Penal Code, s. 291.—Previous conviction and order to desist.***—Before a conviction can be had of committing a public

NUISANCE—*continued.*

3. PUBLIC NUISANCE UNDER PENAL CODE —*continued.*

**Requisite proof**—*continued.*

nuisance under section 291 of the Penal Code there must be proof that there was a previous conviction of an offence and an injunction by a public servant to desist from continuing such nuisance. IN THE MATTER OF MOHESH CHUNDER . **20 W. R., Cr., 55**

**90. ——— Erection of shed for religious ceremonies.**—*Penal Code, ss. 268, 290.—Annoyance to persons of other religion.*—Certain Mahomedan inhabitants of a village erected, during the Muharram, a temporary shed on land forming part of the village site and placed in the shed a religious symbol. They were convicted by a Magistrate under section 290 of the Penal Code of committing a public nuisance, on the ground that their act was certain to cause annoyance to the Hindu inhabitants of the village whose temples were in the vicinity, and was, therefore, calculated to lead to a breach of the public peace. *Held* that the conviction was illegal. MUTTUMIRA *v.* QUEEN-EMPRESS **[I. L. R., 7 Mad., 590**

**91. ——— Repeating or continuing public nuisance.**—*Penal Code, s. 291.—Injunction by public servant not to repeat or continue.—Criminal Procedure Code, 1882, ss. 134, 143, 144, sch. V, form 20.*—To support a conviction under section 291 of the Penal Code, there must be proof of an injunction to the accused individually against repeating or continuing the same particular public nuisance. It must be shown that the person convicted had on some previous occasion committed the particular nuisance, had been enjoined not to repeat or continue it, and had repeated or continued it. The authority under which a Magistrate can order or enjoin a person against repeating or continuing a public nuisance is section 143 of the Criminal Procedure Code. It is the infringement of this order that is punishable under section 291 of the Penal Code. What is contemplated is an order addressed to a particular person. A Magistrate's powers to deal with public nuisances are contained in Chapters X and XI of the Criminal Procedure Code. Chapter XI is only properly applicable to temporary orders in urgent cases. It is only in such cases that an order may be made *ex parte*, and any exception is allowed to the general rule that it shall be directed to a particular individual. In such emergent cases an order may, under section 144 of the Code, be directed to the public generally, when frequenting or visiting a particular place, to abstain from a certain act; but this provision does not apply to a proclamation directed not to the public generally frequenting or visiting a particular place, but to a portion of the community. QUEEN-EMPRESS *v.* JOKHU **[I. L. R., 8 All., 99**

NUNCUPATIVE WILL.

*See* DECLARATORY DECREE, SUIT FOR—REVERSIONERS . **I. L. R., 7 All., 163**

*See* DECLARATORY DECREE, SUIT FOR—SUITS CONCERNING DOCUMENTS. **[I. L. R., 1 All., 688**

NUNCUPATIVE WILL—*continued.*

*See* CASES UNDER HINDU LAW—WILL—NUNCUPATIVE WILL.

*See* WILL—NUNCUPATIVE WILLS. **[3 W. R., 63**

O

OATH.

*See* WITNESS—CIVIL CASES—SWEARING, &C., OF WITNESSES. **[1 Mad., 99, note 2 Mad., 246**

*See* WITNESS—CRIMINAL CASES—SWEARING, &C., OF WITNESSES. **[13 W. R., Cr., 17**

**——— Administration of, by arbitrators.**

*See* APPELLATE COURT—OBJECTION TAKEN FOR FIRST TIME ON APPEAL—SPECIAL CASES—AWARD. **I. L. R., 1 All., 535**

*See* ARBITRATION—AWARDS—VALIDITY OF AWARDS AND GROUND FOR SETTING THEM ASIDE . **I. L. R., 1 All., 535**

**——— Agreement to take—**

*See* COMPROMISE—COMPROMISE OF SUITS UNDER CIVIL PROCEDUE CODE. **[4 Mad., 422 4 Mad., Ap., 3**

**1. ——— Power to administer oath.**—*Act X of 1861.—Mad. Regs. III of 1802, s. 6, and VI of 1816, s. 27.*—Since the repeal of section 27 of Madras Regulation VI of 1816, and section 6 of Madras Regulation III of 1802 by Act X of 1861, the Court has no longer the power of settling cases by "oath." ANONYMOUS . . **4 Mad., Ap., 3**

**2. ——— *Non-judicial proceeding.—Charge of giving false evidence on.***—In a non-judicial proceeding, the object of which is to discover the writer of a scandalous petition, it is not competent for the Magistrate conducting the proceeding to administer an oath. The High Court reversed a conviction for giving false evidence where an oath was administered under the above circumstances. REG. *v.* JIBHAI VAJA . **11 Bom., 11**

OATHS ACT (IV OF 1872).

——— *Omission to take oath or taking it irregularly.*—Under Act VI of 1872, section 5, the omission to take any oath, or any irregularity in the form in which it is administered does not invalidate the proceedings. QUEEN *v.* TARINEE CHURN BOSE **[21 W. R., Cr., 31**

**——— (X OF 1873), ss. 8-12.**

*See* APPEAL—ARBITRATION. **[I. L. R., 4 All., 283**

*See* ARBITRATION—REVOCATION OF, OR WITHDRAWAL FROM, ARBITRATION. **[I. L. R., 4 All., 302**

**OATHS ACT (X OF 1873)**—*continued.*

——— **s. 9.**

*See* RES JUDICATA—ADJUDICATIONS.
**[I. L. R., 5 Mad., 259**

——— **s. 11.**

*See* RES JUDICATA—ADJUDICATIONS.
**[I. L. R., 5 Mad., 259**

1. ——— *Agreement to be bound by oath.—Judgment on such agreement.—Mad. Reg. III of 1806, s. 6.*—The mere agreement of one of the parties to a judicial proceeding to be bound by the oath of the other is in itself no adjustment of the suit. If the matter stated in the agreement is sufficient as the grounds of a decision, a judgment may be passed, for then it would be conclusive evidence under the Oaths Act. The difference between Regulation III of 1802, section 6, and the Indian Oaths Act, 1873, section 11, discussed. VASUDEVA SHANBOG *v.* NARAINA PAI
**[I. L. R., 2 Mad., 356**

2. ——— **and s. 8.**—*Defendant examined in usual form.*—Section 11 of the Oaths Act (X of 1873) is not applicable to the evidence of a defendant who has been examined under the usual form of oath, and not under any oath or form of affirmation under section 8. SREEMUNT RAM TOTADAR *v.* RAM KISHEN SEN . **22 W. R., 387**

——— **s. 12.**—*Refusal to take the oath.—Presumption.*—Where the lower Appellate Court, at the instance of the defendant, called upon the plaintiff to swear on the Koran that the defendant's case was false, which the plaintiff refused to do,—*Held* that the lower Appellate Court was justified in raising a presumption from the plaintiff's refusal, that his case was false, the Court having power to act as it did under the provisions of Act X of 1873. ISSEN MEAH *v.* KALARAM CHUNDER NAW
**[2 C. L. R., 476**

——— **s. 13.**

*See* ARBITRATION—AWARDS—VALIDITY OF AWARDS AND GROUNDS FOR SETTING THEM ASIDE . **I. L. R., 1 All., 535**

1. ——— *Omission to take evidence on oath or affirmation.*—The word "omission" in section 13 of Act X of 1873 includes any omission, and is not limited to accidental or negligent omissions. JACKSON, *J.*, dissented. QUEEN *v.* SEWA BHOGTA
**[14 B. L. R., F. B., 294: 23 W. R., Cr., 12**

2. ——— *Omission to take evidence on oath or affirmation.*—Section 13 of Act X of 1873 does not render the evidence of a child of nine years of age inadmissible, if the evidence has been advisedly, and not by an omission, recorded without any oath ora ffirmation. QUEEN *v.* ANUNTO CHUCKERBUTTY
**[14 B. L. R., 295, note: 22 W. R., Cr., 1**

3. ——— *Competent witness.*—The accused was charged with throwing *B.* and *C.* down

**OATHS ACT (X OF 1873)**—*continued.*

a well. She was charged with the murder of *B.* under section 302 of the Penal Code, and on that charge she was tried and acquitted. Thereupon the Joint Magistrate, without holding any further preliminary inquiry, committed her on a charge under section 307, of attempting to murder *C.* The only eyewitness of the offence, according to the Sessions Judge, was a child, and as she did not understand the nature of an oath or solemn affirmation, her evidence was taken on simple affirmation. The jury found the prisoner guilty and she was sentenced to ten years' transportation. *Held* that the omission to administer either an oath or solemn affirmation, although knowingly made, did not render the child's evidence inadmissible. QUEEN *v.* ITWARYA
**[14 B. L. R., 54: 22 W. R., Cr., 14**

4. ——— *Omission to swear jury in sessions case.—Quære,*—If the jury in a sessions case are not sworn, whether the omission is one which would be covered by section 13 of the Oaths Act, 1873. QUEEN *v.* RAMSODOY CHUCKERBUTTY
**[20 W. R., Cr., 19**

**OBJECTION TAKEN FOR FIRST TIME ON APPEAL.**

*See* CASES UNDER APPELLATE COURT—OBJECTION TAKEN FOR FIRST TIME ON APPEAL.

*See* CASES UNDER JURISDICTION—QUESTION OF JURISDICTION.

*See* CASES UNDER PRIVY COUNCIL, PRACTICE OF—PRACTICE AS TO OBJECTIONS.

**OBJECTIONS—**

*See* CASES UNDER APPEAL—OBJECTIONS BY RESPONDENTS.

*See* CASES UNDER REMAND—OBJECTIONS TO FINDINGS ON REMAND.

**OBJECTIONS TO REPORT OF COMMISSIONERS FOR TAKING ACCOUNTS, MEMO. OF—**

*See* PRACTICE—CIVIL CASES—COMMISSIONER FOR TAKING ACCOUNTS.
**[I. L. R., 1 Bom., 158**

**OBSCENE PUBLICATION.**

——— *Penal Code, s. 293.—Destruction of book by order of Criminal Court.—Act X of 1872 (Criminal Procedure Code), s. 418.*—A book may be obscene, within the meaning of the Penal Code, although it contains but a single obscene passage. The defence to a charge of selling and distributing certain obscene books was that they were sold and distributed in good faith in prosecution of a religious controversy. *Held* that the excessive obscenity of such books took away the protection which their controversial nature might otherwise have afforded them. Also that the intention of the seller and distributor must be gathered from the character of the matter contained in such books As he had chosen to sell and distribute what was obscene, it must be

**OBSCENE PUBLICATION**—*continued.*

presumed that he intended the natural consequences of his act, namely, corruption of the minds and prejudice of the morals of the public. It was not sufficient for him to say that his intentions were good. It was his public act that must be the test of his intentions; and having done an unlawful act, it was no answer to say that he thought it lawful. *Queen* v. *Hicklin, L. R., 3 Q. B, 360;* and *Steele* v. *Brannan, L. R., 7 C. P., 261,* followed. At the conclusion of the trial of a person for the sale and distribution of obscene books, the Court trying him ordered the destruction of certain copies of such books, voluntarily surrendered by him, under section 418 of the Criminal Procedure Code. *Held* that such Court was not empowered by that section to make such an order. EMPRESS OF INDIA *v.* INDARMAN

[I. L. R., 3 All., 837

**OBSTRUCTING NAVIGATION.**

——— *Beng. Act V of 1864.*—To render a person liable to punishment under section 16, Bengal Act V of 1864, for obstructing the line of navigation of a Government canal, it must be shown that he wilfully obstructed the navigation. QUEEN *v.* KABIL MANJI . . . 2 B. L. R., A. C., 23

S. C. QUEEN *v.* KALIL . 11 W. R., Cr., 18

**OBSTRUCTING PUBLIC WAY.**

*See* CASES UNDER JURISDICTION OF CIVIL COURT—PUBLIC WAYS, OBSTRUCTION OF—

*See* MADRAS POLICE ACT, 1859, s. 48.

[I. L. R., 4 Mad., 235

*See* PENAL CODE, s. 283.

[I. L. R., 4 Mad., 235

*See* CASES UNDER RIGHT OF SUIT—OBSTRUCTION TO PUBLIC HIGHWAY.

**OBSTRUCTING ROAD.**

*See* CASES UNDER JURISDICTION OF CIVIL COURT—PUBLIC WAYS, OBSTRUCTION OF—

*See* POSSESSION, ORDER OF CRIMINAL COURT AS TO— . 2 B. L. R., Ap., 9

[5 B. L. R., Ap., 68

*See* CASES UNDER RIGHT OF SUIT—OBSTRUCTION TO PUBLIC HIGHWAY.

**OBSTRUCTION, REMOVAL OF—**

*See* CASES UNDER NUISANCE.

**OBSTRUCTION TO FLOW OF WATER.**

*See* INJUNCTION—SPECIAL CASES—OBSTRUCTION TO RIGHTS OF PROPERTY.

[9 B. L. R., 328

I. L. R., 10 Bom., 390

*See* LIMITATION ACT, 1877, s. 26 (1871, s. 27) . I. L. R., 1 Mad., 335

*See* CASES UNDER PRESCRIPTION—EASEMENTS—RIGHTS OF WATER.

*See* CASES UNDER RIGHT TO USE OF WATER.

**OCCUPANCY.**

*See* RIGHT OF OCCUPANCY.

**OCCUPANT.**

*See* LAND REVENUE.

[I. L. R., 1 Bom., 70

**OCCUPIERS AND OWNERS, FINE IMPOSED ON—**

*See* BENGAL MUNICIPAL ACT, 1864, s. 67.

[8 B. L. R., Ap., 9

8 W. R., Cr., 33, 57

8 W. R., Cr., 45

**OFFENCE AGAINST PUBLIC JUSTICE.**

*See* CASES UNDER CONTEMPT OF COURT.

*See* CASES UNDER CRIMINAL PROCEDURE CODE, 1882, s. 476 (1872, s. 471).

*See* CASES UNDER CRIMINAL PROCEDURE CODE, 1882, s. 487 (1872, s. 478).

**OFFENCE COMMITTED BEFORE PENAL CODE CAME INTO OPERATION.**

1. ——— **Murder.**—*Beng. Reg. IV of 1797.—Act XVII of 1862.—General Clauses Consolidation Act (1 of 1868), s. 6.—Repeal of statute, Effect of.—Right of defence to High Court.*—Up to the 1st January 1862, a person committing the offence of murder was liable to trial and punishment under the Regulations. By Act XVII of 1862 the Regulations prescribing punishments for offences were repealed "except as to any offence committed before the 1st January 1862." By the same Act it was declared that no person who should claim the same should be deprived of any right of appeal or reference which he would have enjoyed under such Regulations. By section 6 of Act I of 1868, the repeal of an Act does not affect anything done, or any offence committed, or any fine or penalty incurred before the repealing Act shall have come into operation. Under the provisions of this section the repeal of Act XVII of 1862 by Act VIII of 1868 and Act X of 1872 did not, in respect of offences committed before the 1st January 1862, affect the penalties prescribed by such Regulations, nor were any of the Regulations prescribing punishments for offences, which were in force before the passing of Act XVII of 1862, repealed in respect of offences committed before the 1st January 1862, prior to the passing of Act I of 1868. *Held* accordingly, where a person committed murder in the year 1855, that such person was punishable under the Regulations. *Held*, also, that inasmuch as such right as the right of reference given by section 3 of Regulation IV of 1797 accrues on conviction, and therefore in the present case had not accrued before Act XVII of 1862 was repealed, it is doubtful whether a person convicted of murder committed before the 1st January 1862 has such right. EMPRESS OF INDIA *v.* MULUA

[I. L. R., 1 All., 599

2. ——— *Beng. Reg. IV of 1797.—Act XVII of 1862.—General Clauses Consolidation Act (1 of 1868), s. 6.—Repeal of statute,*

**OFFENCE COMMITTED BEFORE PENAL CODE CAME INTO OPERATION—*continued.***

*Effect of.*—The prisoner was found guilty and sentenced under Regulation IV of 1797 to transportation for life, for a murder committed in 1861, before the Penal Code came into operation, and the case was sent up to the High Court to confirm the sentence. Regulation IV of 1797 was repealed by Act XVII of 1862, and that Act was wholly repealed by Acts VIII of 1868 and X of 1872. *Held*, on reference to a Full Bench, that the conviction was illegal, section 6 of Act I of 1868, which provides that the repeal of any Act or Regulation shall not affect any offence committed before the repealing Act shall have come into operation, not being applicable. EMPRESS *v.* DILJOUR MISSER . . . **I. L. R., 2 Calc., 225**

3. ——— **Perjury or forgery.**—*Act I of 1848.—Sanction in case of perjury or forgery.*—A case of perjury or forgery alleged to have been committed in a case before a Civil Court before January 1st, 1862, can be dealt with only under the old Procedure Law (Act I of 1848), according to which the sanction of the Court before which the offence was alleged to have been committed was necessary before criminal proceedings can be instituted. IN RE RADHAJEEBUN MOOSTAFFEE . **[5 W. R., Cr., 8 : 1 Ind. Jur., N. S., 97**

4. ——— **Forgery.**—*Procedure in case of forgery.*—In a case of filing a forged vakalutnamah in a Civil Court before January 1st, 1862, the prosecution can only proceed in the ordinary way, *i.e.*, by way of commitment by a Magistrate on the complaint of the party aggrieved. QUEEN *v.* ENAYET HOSSEIN . . . . **5 W. R., Cr., 43**

5. ——— **Mortgage of property previously mortgaged.**—*Bom. Reg. XIV of 1827.—Religious Law of Hindus.*—Regulation XIV of 1827 (Bombay), section 1, clause 1, article 7, and the Religious Law of the Hindus, are not applicable to the case of a party charged with mortgaging his house a second time previously to redeeming the same from a prior mortgagee. REG. *v.* ANNAJI VALAD GOVINDRAM . . . **1 Bom., 93**

**OFFENCE COMMITTED DURING JUDICIAL PROCEEDING.**

*See* CRIMINAL PROCEDURE CODE, 1882, SS. 480-482 (1872, SS. 435 AND 436). **[13 B. L. R., Ap., 40 : 22 W. R., Cr., 10**

**OFFENCE COMMITTED IN CONTEMPT OF COURT.**

*See* CASES UNDER CONTEMPT OF COURT.

*See* CASES UNDER CRIMINAL PROCEDURE CODE, 1882, S. 476 (1872, S. 471).

*See* CASES UNDER CRIMINAL PROCEDURE CODE, 1882, S. 467 (1872, S. 473).

**OFFENCE COMMITTED ON THE HIGH SEAS—**

*See* JURISDICTION OF CRIMINAL COURT—GENERAL JURISDICTION. **[8 Bom., Cr., 63 I. L. R., 5 Mad., 23**

1. ——— **Punishment.**—*Procedure.—European British subject.—7 Will. IV., and 1 Vict., c. 85, s. 2.—14 and 15 Vict., c. 19, s. 5.—Jurisdiction.—Act XIII of 1835.*—In prosecuting a British subject for an offence committed on board a British ship upon the high seas,—*Held* (1) (*dubitante* PHEAR, *J.*) that he must be charged with an offence under English law; (2) that the punishment must be according to English law; (3) that the trial must be according to the procedure of the local Court. Therefore, where a British subject was charged before the High Court with having committed an offence under 7 William IV., and 1 Victoria, Cap. 85, section 2, on board a British ship, upon the high seas, within the admiralty jurisdiction of the Court, and found guilty of an offence under 14 and 15 Victoria, Cap. 19, section 5,—*Held* that the conviction was good, and that the prisoner would be rightly punished with rigorous imprisonment, which is defined by section 53 of the Penal Code to be equivalent to imprisonment with hard labour, and that the trial had been rightly proceeded with under Act XIII of 1865. QUEEN *v.* THOMPSON . . . **1 B. L. R., O. Cr., 1**

2. ——— **Law applicable.**—*Statute 30 and 31 Vict., c. 124, s. 11.—Procedure.—Power of Legislature.*—The substantive law applicable to a British-born subject tried in the High Court of Judicature at Bombay for destroying a British ship on the high seas, at a distance of more than three miles from the shores of British India, is the English law, and not the Penal Code, notwithstanding the provisions of Statute 30 and 31 Victoria, Cap. 124, section 11. The same substantive law is applicable to prisoners who conspire together in Bombay to destroy such ship on the high seas, and such ship is so destroyed in consequence. The procedure applicable in such cases is the ordinary criminal procedure of the High Court. The question whether the Indian Legislature has power to legislate with reference to offences committed on the high seas considered. There is not any Act of the Indian Legislature now in force which provides for the offence of destroying a ship, when committed at a greater distance than three miles from the coast, or for the abetment in British India of such an offence so committed. REG. *v.* ELMSTONE . . . . . **7 Bom., Cr., 89**

3. ——— *Jurisdiction of Criminal Courts.—Power to legislate for high seas.—Statutes 12 and 13 Vict., c. 96, and 23 and 24 Vict., c. 88.*—An offence committed on the high seas, but within three miles from the coast of British India, as being committed within the territorial limits of British India, is punishable under the provisions of the Penal Code. The ordinary Criminal Courts of the country have jurisdiction over such offences by virtue of the Statute 12 and 13 Victoria, Cap. 96, sections 2 and 3, extended to India by Statute 23 and 24 Victoria, Cap. 88. *Semble*,—The Governor General of India in

**OFFENCE COMMITTED ON THE HIGH SEAS.—Law applicable—*continued.***

Council has no power to legislate for offences committed on the high seas outside the territorial limits of British India, though he has power to legislate in respect of offences committed on the high seas within three miles of its coasts. Meaning and effect of Statute 12 and 13 Victoria, Cap. 69, sections 2 and 3, considered. *Queen* v. *Thompson, 1 B. L. R., O. Cr., 1,* commented on. REG. *v.* KASTYA RAMA
[8 Bom., Cr., 63

**OFFENCE COMMITTED UNDER THREAT.**

——— *Penal Code, s. 94.—Proof requisite.*—To obtain the benefit of the exception allowed by section 94 of the Penal Code, it must be shown that the prisoners were compelled to set as they did from apprehension that instant death would be the consequence of a refusal. QUEEN *v.* SONOO
[10 W. R., Cr., 48

**OFFENCE RELATING TO DOCUMENTS.**

*See* CASSES UNDER FALSE EVIDENCE—FABRICATING FALSE EVIDENCE.

*See* CASES UNDER FORGERY.

1. ——— **Penal Code, s. 477.**—*Destruction of pottah.*—The tearing up of a pottah is destruction of valuable security within the meaning of section 477 of the Penal Code. QUEEN *v.* NITTAR MUNDLE . . . . . 3 W. R., Cr., 38

2. ——— *Valuable security.—Unstamped and inadmissible document.*—The fact that a document has not been stamped, and is not therefore receivable in evidence, does not prevent its being a "valuable security" within the meaning of section 477 of the Penal Code. ANONYMOUS . . . . . 7 Mad., Ap., 26

**OFFENCE, SPECIFICATION OF—**

*See* WARRANT OF ARREST—CRIMINAL CASES . . 6 B. L. R., Ap., 129

**OFFER MADE WITHOUT PREJUDICE.**

*See* WRITTEN STATEMENT.
[12 B. L. R., Ap., 19

**OFFICE, SUIT TO ESTABLISH RIGHT TO—**

*See* CASES UNDER JURISDICTION OF CIVIL COURT—OFFICES, RIGHT TO—

*See* CASES UNDER RIGHT OF SUIT—OFFICE OR EMOLUMENT.

**OFFICER ACTING IN TWO CAPACITIES.**

*See* COLLECTOR . . W. R., Cr., 13

*See* MAGISTRATE, DUTY OF—
[5 B. L. R., Ap., 89
8 B. L. R., 422
24 W. R., Cr., 1

**OFFICER APPOINTED TO CONDUCT APPEAL.**

*See* APPEAL IN CRIMINAL CASES—ACQUITTALS, APPEALS FROM—
[I. L. R., 2 Calc., 273

**OFFICER OF COURT HAVING PERSONAL INTEREST IN SUIT ON BEHALF OF INFANTS.**

*See* SUPREME COURT, MADRAS.
[3 Moore's I. A., 229

**OFFICER OF GOVERNMENT.**

*See* COLLECTOR . I. L. R., 1 Bom., 318

**OFFICER OF SEA CUSTOMS, LIABILITY OF, FOR ACT DONE WITHOUT JURISDICTION.**

*See* JURISDICTION OF CIVIL COURT—REVENUE . I. L. R., 1 Mad., 89

**OFFICER, LIABILITY OF—**

——— *Protection of officers acting bonâ fide.—Illegal collection of revenue.—Action of trespass.*—If a party *bonâ fide,* and not absurdly, believes that he is acting in pursuance of a statute, he is entitled to the special protection which the Legislature intended for him, although he has done an illegal act. SPOONER *v.* JUDDOW
[4 Moore's I. A., 353

**OFFICIAL ASSIGNEE.**

——— **Commission to—**

*See* INSOLVENT ACT, s. 19.
[I. L. R., 8 Mad., 79
I. L. R., 13 Calc., 66

——— **Election by—**

*See* INSOLVENCY—SALES FOR ARREARS OF RENT. . I. L. R., 1 Mad., 59

——— **Liability of—**

*See* COSTS—SPECIAL CASES—OFFICIAL ASSIGNEE . I. L. R., 7 Bom., 484

——— **Priority of—**

*See* CASES UNDER INSOLVENCY—CLAIMS OF ATTACHING CREDITORS AND OFFICIAL ASSIGNEE.

*See* INSOLVENT ACT, s. 7.
[5 B. L. R., 309

——— **Validity of sale as against—**

*See* INSOLVENCY—SALES FOR ARREARS OF RENT . . I. L. R., 1 Mad., 59

**OFFICIAL LETTERS.**

*See* EVIDENCE—CRIMINAL CASES—LETTERS . . . 7 B. L. R., 63

**OFFICIAL TRUSTEE.**

——— *Public officer.—Civil Procedure Code, 1877, s. 2, and s. 424.—Notice of suit.*—The

**OFFICIAL TRUSTEE—*continued.***

Official Trustee is a "public officer" within the definition given in section 2 of the Civil Procedure Code. The cases in which a public officer is entitled to notice of suit under section 424 of the Code, are those in which he is sued for damages for some wrong inadvertently committed by him in the discharge of his official duties, and the object of giving notice is, that if a public body or officer entrusted with powers happens to commit an inadvertence, irregularity, or wrong, before any one has a right to require payment in respect of that wrong, he shall have an opportunity of setting himself right, making amends, restoring what he has taken, or paying for the damages he has done. The Official Trustee, therefore, is not entitled to notice of suit, when the question to be decided relates to the rights of the *cestuis que trustent* in respect of the trust-fund, and not to a wrong committed by him. SHAHUNSHAH BEGUM *v.* FERGUSSON . I. L. R., 7 Calc., 499

**OFFICIAL TRUSTEE'S ACT, XIX OF 1841.**

*See* LIMITATION ACT, 1877, ART. 13 (1859, s. 1, CL. 5) . . . Marsh., 573
[11 Moore's I. A., 405
B. L. R., Sup. Vol., 633

**OMISSION TO CONSIDER EFFECT OF DOCUMENTARY EVIDENCE.**

*See* REMAND—GROUND FOR REMAND.
[1 Ind. Jur., N. S., 35

*See* REVIEW—GROUND FOR REVIEW.
[I. L. R., 1 Mad., 396

**OMISSION TO DECIDE ISSUE.**

*See* CASES UNDER REMAND—GROUND FOR REMAND.

*See* REVIEW—GROUND FOR REVIEW.
[3 B. L. R., A. C., 346
16 W. R., 134, 150
I. L. R., 5 All., 14
I. L. R., 2 Mad., 58

**OMISSION TO EXAMINE WITNESS.**

*See* REVIEW—GROUND FOR REVIEW.
9 W. R., 129

**OMISSION TO GIVE INFORMATION OF OFFENCE.**

*See* CASES UNDER CRIMINAL PROCEDURE CODE, 1882, s. 45 (1872, s. 90).

*See* CASES UNDER INFORMATION OF COMMISSION OF OFFENCE.

**ONUS PROBANDI.**


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*See* BILL OF LADING . 13 B. L. R., 394
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*See* CHAMPERTY . 13 B. L. R., 516, note

*See* DEKKAN AGRICULTURISTS' RELIEF ACT, 1879, ss. 12 & 15.
[I. L. R., 9 Bom., 520

*See* ESCHEAT . 1 B. L. R., P. C., 44

*See* EVIDENCE—CIVIL CASES—SECONDARY EVIDENCE—LOST OR DESTROYED DOCUMENTS . . I. L. R., 7 All., 738
[I. L. R., 2 All., 876

**ONUS PROBANDI**—*continued.*

*See* EVIDENCE—CIVIL CASES—MISCELLANEOUS DOCUMENTS—WAJIB-UL-URZ. [I. L. R., 2 All., 876

*See* EVIDENCE ACT, S. 105. [I. L. R., 4 Calc., 124

*See* CASES UNDER HINDU LAW—JOINT FAMILY—PRESUMPTION AND ONUS OF PROOF AS TO JOINT FAMILY.

*See* INSOLVENCY—INSOLVENT DEBTORS UNDER CIVIL PROCEDURE CODE. [I. L. R., 4 Calc., 888

*See* INSOLVENCY—VOLUNTARY CONVEYANCES . . . 10 Bom., 327

*See* LANDLORD AND TENANT—DAMAGE TO PREMISES LET . 5 B. L. R., 401

*See* LANDLORD AND TENANT—PAYMENT OF RENT—NON-PAYMENT.
[I. L. R., 4 Calc., 314
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5 Bom., A. C., 85

*See* LIMITATION ACT, 1877, ART. 127 (1859, S. 1, CL. 13) . 12 B. L. R., 219
[4 Mad., 354
3 Agra, 133
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23 W. R., 381

*See* LIMITATION ACT, 1877, ART. 136. [I. L. R., 11 Calc., 680

*See* LIMITATION ACT, 1877, ART. 144 (1859, S. 1, CL. 12)—ADVERSE POSSESSION . . 2 B. L. R., P. C., 111
[6 B. L. R., Ap., 151

*See* CASES UNDER MALICIOUS PROSECUTION.

*See* CASES UNDER PARDANASHIN WOMEN.

*See* PENAL CODE, S. 498. [8 B. L. R., Ap., 63

*See* VENDOR AND PURCHASER—NOTICE. [I. L. R., 4 Calc., 897

1. ACCOUNT.

1. ——— **Balance of account.**—*Suit for sum due on balance of account.*—Where a plaintiff sues for a specific sum of money due on a balance of account, it is for him to start his case and show what sum is due on the account; and until he has done so the defendant need not be called upon to rebut him. RUTTUN CHAND BYSACK *v.* BOCHA BIBEE [12 W. R., 529

2. ——— *Suit founded on statement of account.*—Where a claim was founded upon a distinct statement of an account signed by the defendant, in which he acknowledged a particular sum to be due to the plaintiff,—*Held* that it was for defendant to produce evidence to rebut the *primâ facie* case made against him. ELIAS *v.* JORAWAR MULL . . . . . 24 W. R., 202

**ONUS PROBANDI**—*continued.*

1. ACCOUNT—*continued.*

**Balance of account**—*continued.*

2. ACCOUNT BOOKS, ENTRIES IN—

3. ——— **Suit for possession.**—*Dispute as to whether transaction was a mortgage or sale.—Entries in account books showing debts.*—The plaintiffs sued for possession of certain lands, alleging that they had been mortgaged to the defendant by their father under two documents. The defendant produced them and relied upon them as deeds of sale which conveyed to him absolutely the lands mentioned in them. The form of the instruments was not conclusive, but it appeared *aliunde* by the conduct of the defendant himself that the deeds were intended as mere securities for money, and that he had treated them as such. Certain entries in the defendant's accounts also treated the respective considerations named in the deeds as continuing debts due to the defendant from the plaintiffs' father. *Held* that the entries, when put in evidence, were sufficient to shift the burden of proof from the plaintiffs to the defendant, and that it was incumbent on the latter to give either oral or documentary evidence which in some way neutralised or explained away their effect, or showed that they related to other transactions than those mentioned in the two documents. GOVINDA *v.* JESHA PREMAJI . I. L. R., 7 Bom., 73

3. AGENT.

4. ——— **Gomastah, Suit against.**—*Suit to recover advances due from discharged gomastah.*—In a suit to recover advances alleged to be due from a discharged gomastah, who pleaded acquittance at the time of his discharge,—*Held* that plaintiff was bound to prove the payments to, and the receipts from, the gomastah, and to put in original documents, and not mere transcripts, even if the defendant had remained silent. WATSON & CO. *v.* SREEDHUR MUNDLE . . 10 W. R., 421

5. ——— **Agents of official assignee, Suit against.**—*Proof of items of account.*—Agents who have collected money on account of an insolvent estate are severally bound to prove to the assignee or his representative that the expenditure of the several amounts charged in their accounts has been actually and properly made, and the *onus probandi* rests on such agents. It is incumbent on such agents to offer proof in support of all the items in their accounts which are impugned, and the propriety, or the actual expenditure of such items should form the subject-matter of issues properly framed. NUJUF ALI *v.* PATTERSON .2 N. W., 104

6. ——— **Principal, Suit against, for acts of agent.**—*Authority of agent, Proof of.*—In a suit against a principal as liable for the acts of an accredited agent of the latter the onus lies on the plaintiff to prove that the alleged agent was the duly accredited agent of the defendants in reference to the transaction, the subject of the claim. HATHE RAM *v.* GOBIND RAM . . 13 Agra, 131

**ONUS PROBANDI**—*continued.*

4. ARBITRATION.

7. ——— **Reference to arbitration.**—*Consent obtained by threats and undue influence.*—When it is averred that the consent of one of the parties to an arbitration was obtained by threats and through undue influence exerted by persons in authority, the *onus probandi* is on the person making the avermnt. PURVATHA VURDHAY NAUCHIAR *v.* JAYAVERA RAMAKOMARA ETTYAPA NAICKER [4 W. R., P. C., 31

S. C. ZEMINDAR OF RAMNAD *v.* ZEMINDAR OF YETTIAPOORAM . 7 Moore's I. A., 441

5. ATTACHMENT IN EXECUTION.

8. ——— **Attachment of person of debtor.**—*Execution of decree.*—In an application for an order for execution of a decree by attachment of the person of the debtor, the onus is on the judgment-debtor to show that he has no means of satisfying the debt, and that he has not been guilty of any misconduct; and not on the creditor to show that, by sending the debtor to prison, some satisfaction of the debt would be obtained. SETON *v.* BIJOHN . . 8 B. L. R., 255 : 17 W. R., 165

6. BOUNDARY.

9. ——— **Disputed boundary.**—*Removal of boundary.*—Where a dispute arises regarding the direction of a boundary which one of the parties to a suit has demolished, and the other party proves its general direction, the onus of proof that the direction is wrongly stated, if it be so, lies on the former, who removed the boundary. JUDOONATH MULLICK *v.* KALEE KISTO TAGORE [25 W. R., 524

10. ——— *Failure of proof.*—Suit concerning the boundary line between contiguous mehals. The land in dispute (which, with the mehals adjacent, originally formed part of a permanently-settled zemindari, consisted of revenue-paying mehals, and of mehals alleged to be lakhiraj, all belonging to one proprietor) was so situated that it necessarily belonged either to Havelee, one of the latter, or to the contiguous rent-paying mehals. The Permanent Settlement did not define the boundary, nor was it fixed in subsequent resumption proceedings against Havelee, which ended in a temporary settlement of that mehal for twenty years. The ownership of Havelee having become severed from the ownership of the other mehals, the question of boundary arose, not as a question of revenue between the Government and a zemindar, but as one of title to land between the zemindars and proprietors of two contiguous and separate estates. The appellant having failed to prove that no part of the disputed land was included in the respondent's settlement (some portion at least being shown to belong to Havelee), and also having failed to prove by independent evidence his own right to recover the land specified in the plaint,—*Held* that the suit should not have been determined upon that mere failure on his part to support the burden of proof cast upon him, because the judgment would be as final and conclusive between the parties as an adjudication on the merits would be, and its effect would be to give something to the respondent which on the evidence belonged to the appellant's mehals. LEELANUND SINGH *v.* MOHESHUR SINGH [3 W. R., P. C., 19 : 10 Moore's I. A., 81

*See* LELANUND SINGH *v.* LUCHMUNUR SINGH [10 C. L. R., 169

where the Privy Council explain this case.

11. ——— *Lakhiraj tenure and mâl land of zemindar.*—In a question of boundary between a lakhiraj tenure and a zemindar's mâl land, there is no presumption in favour of one or the other, but the onus is on the plaintiff to prove his case. BEER CHUNDER JOOBRAJ *v.* RAM GUTTY DUTT . . . . . 8 W. R., 209

12. ——— *Failure to prove alleged boundary.*—Where the plaintiff sued to recover a quantity of land by rectification of certain survey awards, which he averred demarcated erroneously the boundary between his zemindari and the zemindaris of the defendants, it was held, on a consideration of the evidence, that his suit was rightly dismissed because he failed to prove the position or existence of a stream which he stated was the true boundary between the zemindaris. LEELANUND SINGH *v.* MOHENDRO NARAIN SINGH [13 W. R., P. C., 7 : 13 Moore's I. A., 57

13. ——— *Suit for possession where defendant alleges land to be within zemindari, but in protected tenure.*—In a suit by a talookdar to obtain khas possession of certain land as being an encroachment by the defendants, who admittedly held land within a howla appertaining to the talook, the defendants alleged that the land in dispute was situate within a nim-howla which they held within the howla. *Held* that the onus was on the plaintiff to show that the land was not within the howla and that he was entitled to khas possession. RHIDOY KRISTO MISTRI *v.* NOBIN CHUNDER SEN [12 C. L. R., 457

14. ——— *Lands in zemindari.—Settlement of shikmi talook.*—Lands situate within a zemindari must *primâ facie* be considered as part of the zemindari; and it is for those who insist on the separation of lands from the general lands of the zemindari and on their settlement as a shikmi talook to establish their title. WISH *v.* BHOOBUN MOYEE DEBIA [3 W. R., P. C., 5 : 10 Moore's I. A., 165

15. ——— *Suit for confirmation of possession of lands alleged to be within certain talook.*—In a suit for confirmation of right and possession in respect of lands alleged to be within plaintiff's permanently-settled talook, where plaintiff incidentally remarked that defendant (as inter-

**ONUS PROBANDI**—*continued.*

6. BOUNDARY—*continued.*

**Disputed boundary**—*continued.*

venor in a previous rent suit) had claimed the lands as appertaining to another talook which plaintiff alleged had no existence,—*Held* that it was an error of law in the lower Appellate Court to place on the defendant the onus of proving the existence of that other talook, instead of following the usual and recognised course of requiring the plaintiff to prove that the lands in suit belonged to his talook. GUNGAMALA CHOWDHRAIN *v.* MADHUB CHUNDER ROY [10 W. R., 413

16. ——— *Mouzah which may belong to one of two zemindaris.—Possession.*—If a particular mouzah has been held for many years as part of a particular mehal or zemindari, the fact of such holding affords a strong presumption that it is part of that mehal, even as against a purchaser at a sale for arrears of revenue of another mehal who claims that part of the mehal purchased by him. It is not conclusive evidence against such auction-purchaser, nor could any length of adverse holding prior to his purchase preclude the auction-purchaser from recovering it, if he could show clearly that it belonged to the mehal which he had purchased. PRAN KISHEN BANERJEE *v.* JUGGOBUNDOO DUTT . . . . . 7 W. R., 207

17. ——— *Suit for possession of land once bed of a nullah.*—In a suit for possession of land which had once formed the bed of a nullah of which defendants held a julkur settlement, but which was situated within plaintiff's settled estate,—*Held* that as defendants had failed to show that their settlement extended beyond the fishery rights, plaintiff was entitled to recover possession. MONOHUR CHOWDHRY *v.* NURSINGH CHOWDHRY [11 W. R., 272

18. ——— *Suit for possession.—Disputed plots of land.*—In a suit to recover possession of two parcels of land alleged to have been comprehended in one plot on the ground that they had been held by the plaintiff and defendant jointly until by certain proceedings the former was virtually deprived by the latter of the usufruct, the defendant's case being that the parcels were divisible into two distinct plots, one held by the plaintiff and himself jointly and the other by himself exclusively,—*Held* that it was on the plaintiff to prove that the disputed parcel was a part of the land held jointly by him and the defendant. GUNGA PERSHAD DUTT *v.* LOKENATH NUNDEE . 12 W. R., 179

19. ——— *Suit by purchaser of share of co-sharer in land jointly settled.*—Where the settlement proceedings showed that the question of extent of the shares of several persons on settlement was in dispute, and that the settlement was made jointly without prejudice to title, the onus, in a suit by a purchaser of one of the shares, was held to be on the plaintiff to show the extent of his vendor's share. GOOROO CHURN PODDAR *v.* HAFEEZA BIBEE . . . . . 7 W. R., 366

**ONUS PROBANDI**—*continued.*

7. CLAIM TO ATTACHED PROPERTY.

20. ——— **Allegation of alienation by debtor during attachment.**—Plaintiff alleging that an attachment subsisted, and that therefore the mortgage under which defendant claimed was invalid is bound to prove his allegation, and the onus is not discharged by showing that the attachment was made some years previous to the alienation. TOOLSEE DUTT MISSER *v.* BROJO MOHUN THAKOOR [9 W. R., 332

21. ——— **Proof of attachment.**—*Civil Procedure Code, 1859, ss. 235, 239, 270.—Priority.*—Plaintiff claimed priority under section 270, Act VIII of 1859, asserting that the property attached and sold by defendant was an identical property which he had attached prior to defendant's attachment. *Held* that he was bound to prove the due attachment of the property, *viz.*, by proof of having obtained a written order, under section 235, prohibiting defendant from alienating the property by sale, gift, &c., and by the publication of the said order in the manner prescribed by section 239. KANHYA LALL PUNDIT *v.* DINONATH SIRCAR . . . 17 W. R., 23

22. ——— **Suit by unsuccessful claimant for confirmation of alleged possession and adjudication of title.**—*Civil Procedure Code, 1859, s. 246.*—Where an unsuccessful claimant, under section 246, Code of Civil Procedure, sues for confirmation of alleged possession and adjudication of title, the onus in the first instance is on plaintiff, and an important question in the case is, who was in possession at the time of the attachment. TOOFANEE DOSS *v.* MUN RAKHUN ROY [15 W. R., 202

23. ——— **Right to begin.**—*Civil Procedure Code, 1859, s. 246.*—Where a claim was made under section 246 of Act VIII of 1859, by a third party, to some timber, which had been attached by a prohibitory order under section 234,—*Held per* PEACOCK, *C. J.*, L. S. JACKSON, PHEAR, and MACPHERSON, *JJ.* (MITTER, *J.*, dissenting), the claimant must begin. The onus is on him to prove that the goods attached were his property, or in his possession, and therefore not in the possession of the judgment-debtor. His evidence must be confined to proving his own claim, and he cannot be allowed to show a title in a third person with whom he has no connection. *Held* (*per* MITTER, *J.*) that, on the proper construction of the words "proceed to investigate the same with like powers as if the claimant had been originally made a defendant," the onus of proof as against the claimant is on the decree-holder. *Nito Kali Debi* v. *Kripanath Roy, 8 W. R., 358*; and *Misree Begum* v. *Punnoo Singh, 8 W. R., 362*, overruled. NGA THA YAH *v.* BURN . 2 B. L. R., F. B., 91 : 11 W. R., F. B., 8

24. ——— **Suit for confirmation of possession.**—*Civil Procedure Code, 1859, s. 246.—Claim.—Deed of sale.*—A decree-holder caused the right, title, and interest of his debtor in certain land to be attached in execution. A claim was preferred under section 246, Act VIII of 1859, by a previous

ONUS PROBANDI—*continued.*

7. CLAIM TO ATTACHED PROPERTY —*continued.*

**Suit for confirmation of possession**—*continued.*

purchaser, but was rejected. In a suit thereupon instituted for confirmation of possession on reversal of the order, the defence was that the purchase was benami. *Held* the onus was on the plaintiff to make out his case. MAHIMA CHANDRA KUNDU *v.* NURUDDIN [3 B. L. R., A. C., 70: 11 W. R., 422

TULSEE MONEE DOSSEE *v.* PEARY MOHUN BABOO [25 W. R., 79

**25. ——— Suit to establish right after rejection of claim.**—*Civil Procedure Code, 1859, s. 246.*—In a suit brought to establish the plaintiff's right to certain property after an order against him under section 246, Act VIII of 1859, the defendant admitted that the property had been in the possession of the person against whom the plaintiff had obtained his decree, but stated that it had passed to him by conveyance executed by that judgment-debtor in his favour: the plaintiff alleged that this deed of sale was fraudulent and void. *Held,* the onus was on the plaintiff to show that the deed was not *bonâ fide,* and not on the defendant to prove the actual execution of the deed. LALA RUDRA PRASAD *v.* BINODE RAM SEN. 3 B. L. R., A. C., 71, note: 10 W. R., 321

**26. ——— *Civil Procedure Code, 1859, s. 246.—Claim.***—The plaintiff sued to establish his right to a decree, of which he stated he was the assignee, and which he alleged the defendant had seized and sought to sell as the property of the plaintiff's assignee. The defendant admitted the assignment, but alleged that it was a fraudulent transaction. *Held,* the onus was on him to prove that the transaction was not a *bonâ fide* one. LALBEHARI DUTT *v.* SRINATH MOOKERJEE [3 B. L. R., A. C., 73, note

**27. ——— Suit for declaration of title.** —*Civil Procedure Code, 1859, s. 246.—Equitable right.*—Certain property belonging to one *S.* was mortgaged by him in 1810 and 1813 to *O.,* under form of conditional sale. *S.* had three sons, *H.,* *A.,* and *N.,* and in 1819 he sold the property included in the mortgages of 1810 and 1813 to his sons, *H.* and *A.* In 1820 *H.* and *A.* entered into a fresh arrangement with *O.,* who accepted from them a fresh mortgage of the property in lieu of those of 1810 and 1813, and of this mortgage in 1831 he obtained a decree for foreclosure. Subsequently, the Government resumed the property and settled it with *O.'s* widow as representing the proprietor, and the plaintiff afterwards purchased a one-third share of the estate. The defendant was the holder of a decree obtained in 1836 against the heirs of *S.* on a money-debt of *S.,* and in execution of that decree he, in 1866, caused the rights of *N.* in the property to be attached and sold, and himself became the purchaser. On attachment, the plaintiff preferred a claim to it under section 246, Act VIII of 1859, but it was disallowed. In a suit by the plaintiff praying for his right of

ONUS PROBANDI—*continued.*

7. CLAIM TO ATTACHED PROPERTY —*continued.*

**Suit for declaration of title**—*continued.*

ownership and possession, which was menaced by the defendant's decree and sale,—*Held,* the onus was on the defendant to show that he had an equitable right which he could assert against the plaintiff. SHURFUN BIBEE *v.* COLLECTOR OF SARUN [12 B. L. R., 66, note: 10 W. R., 199

**28. ——— Allegation of assignment by deed of sale.**—*Civil Procedure Code, 1859, s. 246.*—If a plaintiff coming into Court, under section 246 of the Code of Civil Procedure, to set aside an attachment and sale shows, in proof of his title, that a deed of sale has been executed in his favour by the judgment-debtors, and that consideration-money has passed and possession has been given him, he starts his case sufficiently. If the defendant alleges, notwithstanding, that the sale was collusive and fictitious, it is for him to show that it was so. DIGUMBUREE DOSSEE *v.* BANEEMADHUB GHOSE [15 W. R., 155

**29. ——— Suit by unsuccessful claimant to set aside sale of land.**—*Civil Procedure Code, 1859, s 246.*—Where the plaintiff filed a suit to set aside a sale of land after he had been unsuccessful in an application made under section 246 of the Civil Procedure Code, 1859, to raise an attachment that had been laid on such land,—*Held* that the onus lay on the plaintiff to prove his title and not on the purchaser to prove that of the judgment-debtor. NATHU SADASHIV *v.* RAMCHANDRA ANNAJI [5 Bom., A. C., 76

**30. ——— Suit to establish title under deeds of gift.**—*Proof of bona fides.*—In a suit to establish title, unsuccessfully asserted in an execution case, to property sold in satisfaction of a decree, where plaintiff claims under a gift and other titles originating with the judgment-debtor, it is not sufficient for plaintiff to make out a *primâ facie* case, leaving it to defendant to demonstrate fraud; plaintiff is bound to satisfy the Court of the genuine *bonâ fide* nature of the transfer. RAM KISHORE SINGH *v.* RAMSURBO CHATTERJEE [1 W. R., 454

**31. ——— Suit for value of goods taken in execution where a claim to them is allowed under s. 246, Act VIII of 1859.**—*Evidence of title.*—*M.,* to whom *C.,* his judgment-debtor, had made over certain goods, attached the same in execution of his decree as the property of his judgment-debtor, but, on a claim being preferred to the goods by *D.* and *B.* under section 246 of Act VIII of 1859, they were ordered to be released from attachment; they remained, however, in the possession of *M.* *D.* and *B* having sued *M.* to recover the value of the goods, the lower Court held that, inasmuch as *M.* failed to sue within a year to set aside the order of the miscellaneous department, and to establish his right to take the property in satisfaction of his decree as belonging to his judgment-debtor

**ONUS PROBANDI**—*continued.*

7. CLAIM TO ATTACHED PROPERTY —*continued.*

**Suit for value of goods taken in execution where a claim to them is allowed under s. 246, Act VIII of 1859**—*continued.*

the plaintiff's right to it must be admitted without further enquiry or proof, and decreed the claim on the basis of that order alone. It was held in special appeal that the defendant was not debarred by that order or by the law of limitation from disputing the plaintiff's right to the goods, and that the plaintiffs were bound to prove their right to entitle themselves to a decree, and that the miscellaneous order was not conclusive proof of their right, and still less such an adjudication on the question as precluded a readjudication of it. MADHO PARSHAD *v.* DURGA PARSHAD **[7 N. W., 85**

8. CONTRACT.

**32. ——— Construction of contracts.**—*Allegation of special law.*—The onus is on the party who contends that a contract is governed by special and not by general rules of law. TEJ CHUND *v.* SREEKANTH GHOSE **[6 W. R., P. C., 48: 3 Moore's I. A., 261**

9. CONTRIBUTION.

**33. ——— Suit for contribution for Government revenue.**—In a suit to recover the amount of excess payments of Government revenue made by the plaintiffs on account of their co-sharers to save the estate from sale (each proprietor holding a well-defined although not actually separated share),—*Held* that the onus was on the plaintiffs to prove their shares and amount of revenue payable on them. AGHOREE RAM SAHOY *v.* RAMOLEE SAHOO **[W. R., 1864, 309**

**34. ——— *Money paid to Government treasury.***—In a suit for contribution for money admittedly paid by plaintiff into the Government treasury, on account of defendants' share of the revenue, where defendants plead previous payment to the plaintiff,—*Held* that the burden of proving such payment was upon the defendants. MOHADEO MISSER *v.* LAHOREE MISSER **[24 W. R., 250**

10. CUSTOM.

**35. ——— Custom at variance with law of inheritance.**—*Proof of custom.*—*Khojas.*—Where a defendant alleged a special custom of the Khoja community at variance with the Hindu law of inheritance,—*Held* that the burden of proving the alleged custom rested upon her. RAHIMATBAI *v.* HIRBAI . . . . **I. L. R., 3 Bom., 34**

**36. ——— Impartibility.**—*Suit for partition.*—*Presumption as to partibility.*—In a suit for the partition of part of a deshgat vatan, brought by the younger brothers of a joint Hindu family against their eldest brother the desai, the defence was that

**ONUS PROBANDI**—*continued.*

10. CUSTOM—*continued.*

**Impartibility**—*continued.*

the vatan was held by him as an impartible inheritance, subject to a right, by custom, that a brother should receive maintenance out of the income derived from it. *Held* that there was no such general presumption in favour of the impartibility of estates of this kind as to shift the burden of proof, which was upon the desai, to show that the vatan had, contrary to the general Hindu law, been inherited by him alone. It was for the desai to show, by evidence of the nature of the tenure of the vatan, that it was impartible, or to show, by evidence of family custom or of district, *i.e.* local, custom, that impartibility attached to it, such evidence being strong enough to rebut the presumption of the prevalence of the general Hindu law. ADRISHAPPA *v.* GURUSHIDAPPA **[I. L. R., 4 Bom., 494**

**37. ——— Adoption.**—*Custom, Proof of.*—It is a general rule and fundamental principle amongst Brahmans, Kshatryas, and Vaishyas, that they are absolutely prohibited from, and incapable of, adopting a daughter's or sister's son or son of any other woman whom they could not marry by reason of propinquity. The burden of proving a special custom to the contrary amongst any members of these three regenerate classes, prevalent either in their caste or in a particular locality, lies upon him who avers the existence of that custom. GOPAL SAFRAY *v.* HANMANT SAFRAY . . **I. L. R., 3 Bom., 273**

**38. ——— Forfeiture of rights of mohuntship by marriage.**—*Right of succession.*—Where the plaintiff proved his right of succession to a math on the death of its mohunt, the burden of proving that his subsequent marriage worked a forfeiture of his office and its appendant property and rights, lay upon the defendant who impugned the plaintiff's right on account of the marriage. GOSAIN RAMBHARTI JAGRUPBHARTI *v.* SURAJBHARTI HARIBHARTI . . **I. L. R., 5 Bom., 682**

**39. ——— Maintenance.**—*Custom to reduce maintenance.*—Suit by a late Rajah's brother for maintenance allowance, which the present Rajah opposed on the ground that, as the plaintiff was no longer the ruling Rajah's brother, his allowance must be diminished. *Held* that the onus was on the defendant to prove a custom of entitling him to diminish the allowance heretofore enjoyed in right of plaintiff's position in the family. MOOKOOND NARAIN DEB *v.* MOORALEE MOHUN . **6 W. R., 91**

**40. ——— Right to take fees.**—*Vatandar joshi, Right of, to take fees.*—The burden of proving that the vatandar joshi of a village is not entitled to officiate and take fees in the family of any particular caste, lies upon the person or persons asserting exemption. RAJA VALAD SHIVAPA *v.* KRISHNABHAT **[I. L. R., 3 Bom., 232**

11. DAMAGES.

**41. ——— Suit for damages against defaulting witness.**—*Proof of liability.*—In a

ONUS PROBANDI—*continued.*

11. DAMAGES—*continued.*

**Suit for damages against defaulting witness**—*continued.*

suit for damages against a defaulting witness the onus is on the plaintiff to prove that he was damaged by the non-attendance of the witness. The mere failure of the defendant to appear as a witness is not *per se* a sufficient proof of his liability to damages. DWARKANATH KOOREE *v.* ANUNDO CHUNDER SANNEL . . . **5 W. R., S. C. C. Ref., 18**

42. ——— **Suit for damages for wrongful occupation.**—*Refusal to give up possession.*—A party holding a decree for a share of a mouzah brought a suit for possession and damages on the allegation that he found the defendant in occupation of a part of the land on which indigo plants were standing, and permitted him to continue for a time till the plants should be removed, defendant promising then to give over possession, but that when the time came defendant refused to give over possession and was still occupying the land. *Held* that it lay upon the plaintiff to show wrongful occupancy on the part of the defendant. GOUR SURUN DASS *v.* SORONDEY . . . . **15 W. R., 144**

12. DEBTOR AND CREDITOR.

43. ——— **Release of debtors.**—*Debt owing by partnership.*—The burden of proof that a creditor by agreeing to an arrangement whereby a firm indebted to him conveyed to two of the partners thereof certain property in trust to pay off his and certain other debts, thereby released the remaining members of the partnership, lies upon the parties who were originally liable to such creditor. KALAI KHAN *v.* MADHO PERSHAD . . **3 N. W., 129**

44. ——— **Debts contracted by persons in wrongful possession.**—*Suits to charge zemindari.*—Where it was sought to charge a zemindari with debts contracted by persons who were at the time usurpers in wrongful possession of the zemindari, solely on the ground that the documents evidencing the loans recited that they were for the purpose of discharging the kists due to Government,—*Held* that, as between the lawful owner and the creditor, the onus was on the creditor who was seeking to set up a charge in his favour made by one who was in possession but without title; and therefore, in absence of any evidence on behalf of the creditor as to the circumstances in which the transactions were had with the usurping zemindar in possession, and the failure to connect the loans with the debts contracted by the former and lawful zemindars, the suit was rightly dismissed. The case of *Hunooman Pershad Panday* v. *Munraj Kooeeree, 6 Moore's I. A., 393,* distinguished. CHIDAMBARA SETTI *v.* MUTTUVIJEYA . . . . . **3 Mad., 260**

13. DECLARATION OF TITLE.

45. ——— **Suit for declaration of title.**—*Proof of title.*—Where a plaintiff brings a suit for a declaration of his title as owner, he is bound to establish his title affirmatively. He is in the same position as any other plaintiff and must make out his case, and the *onus probandi* that he is in possession as owner is upon him. RASSONADA RAYAR *v.* SITHARAMA PILLAI . . . . **2 Mad., 171**

46. ——— *Production of title-deeds.*—The plaintiff sued for declaration of her title to property, of which the defendant was in possession, but of which she produced the title-deeds in favour of herself. *Held,* the onus was on the defendant to disprove the plaintiff's title. SWARNAMAYI RAUR *v.* SRINIBASH KOYAL . **6 B. L. R., 144**

47. ——— *Reversioner.*—*Setting aside deed of sale.*—In a suit for a declaration of plaintiff's reversionary title as heir to his late uncle's property, and for reversal of a deed of sale from that uncle set up by the defendant, the widow not having been made a party to the suit and her consent to or dissent from the alleged conveyance not having been ascertained, the issue tried was whether the deed was genuine, and whether defendant has possession under it. *Held* that the onus was rightly placed on the defendant. BYKUNT NATH ROY *v.* GREESH CHUNDER MOOKERJEE **[15 W. R., 96**

48. ——— *Suit for confirmation of possession.*—*Intervenor.*—In a suit for confirmation of possession and declaration of title (the principal defendants admitting plaintiff's possession and title), in which a vendee from such defendants intervenes and claims the property on the allegation of being in possession,—*Held* that such vendee must prove possession before he could question the plaintiff's title. LALLA RAM SUHAE SINGH *v.* LALLA OOJOODHYA PERSHAD . **5 W. R., 233**

14. DECREES AND DEEDS, SUITS TO SET ASIDE—

49. ——— **Decree, Suit to set aside.**—*Decree alleged to be fraudulent.*—Where a decree in execution of which formal possession has been obtained, is impugned by the party in actual possession as fraudulent and collusive, the onus lies on the impugners to prove their allegation. RABIA KHANUM *v.* WISE . . . . . **23 W. R., 329**

50. ——— **Deed, Suit to set aside.**—*Allegation that document is false.*—In a suit for a declaration that a document propounded by the defendant is false, it lies upon the plaintiff to prove that allegation. RAM NIDHEE KOONDOO *v.* GOLUCK CHUNDER MOSHANTO . . **11 W. R., 280**

51. ——— *Relationship between parties as showing bona fides of transaction.* The relationship between parties to a conveyance of property may be immaterial if the purchase is found true, but is not immaterial where the question to be decided is whether the purchase was true or fraudulent. The mere handing over of the purchase-money

ONUS PROBANDI—*continued.*

14. DECREES AND DEEDS, SUITS TO SET ASIDE—*continued.*

**Deed, Suit to set aside**—*continued.*

from one party to the other in the presence of strangers, and the registration of the deed, are not sufficient to prove the transaction to be *bonâ fide.* PRAN KISHEN DEB *v.* LOKENATH SINGH MOJOOMDAR . . . . . **10 W. R., 445**

52. ———— *Suit for possession and to have deeds declared fraudulent.—Purchaser.*—The plaintiff executed a deed of sale of a moiety and a lease of the other moiety of certain property to *B.* *B.* instituted a suit under section 15, Act XIV of 1859, which was dismissed. *B.* then returned the deed of sale and lease to *A.*, with the following endorsement under his signature: "Returned; no claim." *A.* instituted the present suit for recovery or possession of the said property, and the defendant set up in his defence that he had no right to sue for a moiety of the property as the same had been conveyed to *B.*, and that the endorsement on the deed of sale was not admissible in evidence as it had not been registered. *Held* that the onus was upon the defendant to prove his purchase. GIRISH CHANDRA ROY CHOWDHRY *v.* AMINA KHATUN **[3 B. L. R., Ap., 125**

53. ———— *Suit to have deed cancelled as a forgery.*—Under the special procedure provided in the Registration Act (III of 1877), the defendant, in whose favour a document was said to have been executed, succeeded in obtaining an order from the District Registrar for the registration of the same, although the plaintiff, who was alleged to have executed it, appeared before the Sub-Registrar, and subsequently before the Registrar, and denied executing it, and alleged it to be a forgery. In a suit brought under the above circumstances to have the document declared void, and to have it cancelled,—*Held* that, under the circumstances, the onus of proof was properly placed on the defendant. MOHIMA CHUNDER DHUR *v.* JUGUL KISHORE BHUTTACHARJI . **I. L. R., 7 Calc., 736: 9 C. L. R., 471**

54. ———— *Suit to set aside agreement on ground of fraud.—Want of opportunity of giving evidence in lower Court.*—Where an appellant alleges that a razinamah was obtained from him by duress or fraud, the onus is on him to prove his allegation. Where also an appellant complains that he had not an opportunity of giving his evidence to the Court below, the onus is on him to show that he tendered evidence which the Court rejected. MOTER LALL OPADHIYA *v.* JUGGURNATH GURG . **5 W. R., P. C., 25: I Moore's I. A., 1**

55. ———— **Suit to set aside order finding deed not genuine.**—*Proof of bona fides.*—In a suit brought to set aside an order of the Small Cause Court in which that Court had held that a certain deed was *malâ fide,—Held* that the onus was on the plaintiff to show that it was executed *bonâ fide.* ISHAN CHANDRA DAS *v.* RUKIMUDDIN SOWDAGAR . **2 B. L. R., A. C., 326, note**

ONUS PROBANDI—*continued.*

14. DECREES AND DEEDS, SUITS TO SET ASIDE—*continued.*

**Suit to set aside order finding deed not genuine**—*continued.*

S. C. ESHAN CHUNDER DOSS *v.* RUKHEMOODDEEN SOUDAGUR . . . **10 W. R., 412**

56. ———— **Suit for declaration of right to property.**—*Possession under deed of gift.—Allegation of fraud.—Presumption.*—In a suit for a declaration that certain property, which plaintiff as decree-holder attempted to sell, belongs to his judgment-debtor, where the opposite party claims to have been in possession of the same under an alleged hibba, and plaintiff gives sufficient evidence to raise a reasonable presumption that there has been fraud and collusion in the case, it becomes the duty of the Court to go on to the evidence on the other side, and ascertain whether the transactions which are the subject of enquiry are fraudulent or valid. KADUMBINEE DOSSIA *v.* UNNOPOORNA DAYE . . . . . **14 W. R., 289**

57. ———— **Proof of bona fides of deed made under suspicious circumstances.**—Where the authenticity and *bona fides* of a hibba were called into question, on the ground that, at the time the instrument was executed, the executants were in a state of indebtedness, and the registration was delayed until the making of certain decrees against them,—*Held* that it lay on the parties whose intention was impugned to give evidence of a satisfactory kind of the *bona fides* of the suspicious transaction. CHUNDER NARAIN SEN *v.* AMIRTO LALL SEN **[24 W. R., 292**

58. ———— **Allegation of want of bona fides of trust-deed.**—Where it is found on the face of a deed creating a trust that the transaction is *bonâ fide,* it is for the creditors who impugn the *bonâ fide* nature of the trust to prove their plea. KASHESHURRE DASSEE *v.* KRISHNA KAMMER DEBEA **[2 Hay, 557**

59. ———— **Proof of mooktearnama alleged to be forged.**—Where a mooktearnama on the authority of which a suit was brought was impugned by the defendant as a forgery, and as not executed by the party alleged to have granted it, the Court held that, notwithstanding its attestation in due form by the Munsif of Muttra, the onus was on the parties charged to prove its genuineness. BIKRAM SINGH *alias* BISHEN SINGH *v.* INDURJEET KOONWAR **[6 W. R., 2**

60. ———— **Execution of deed by purdanashin lady.**—*Suit to set aside deed.*—In a suit by the heirs of a Mahomedan purdanashin lady to set aside a deed of sale executed by her whilst living apart from her relations in the house of the purchaser, who had occasionally acted as her mooktear,—*Held* that some evidence to impeach the deed should be given by the plaintiffs before the onus

ONUS PROBANDI—*continued.*

14. DECREES AND DEEDS, SUITS TO SET ASIDE—*continued.*

**Execution of deed by purdanashin lady** —*continued.*

of supporting it is thrown on the purchaser. THAKOOR DEEN TEWARRY *v.* ALI HOSSEIN HHAN [13 B. L. R., 427 : 21 W. R., 340 L. R., 1 I. A., 192

S. C. in lower Court . . 8 W. R., 341

61. ——— **Execution of document by purda ladies.**—*Evidence.—Agency.*—The plaintiff sought to make two purda ladies liable on a document which he alleged had been executed by a third person as their agent. *Held* by the Privy Council (reversing the decision of the High Court) that strict proof of the agency must be given. AZEEZOONISSA *v.* BAQUR KHAN . . 10 B. L. R., 205 : 17 W. R., 393

62. ——— **Suit to set aside deed on ground of fraud.**—*Existence of motive.*—In a suit by a judgment-creditor to recover the amount of certain decrees by attachment and sale, and to have a certain deed of bye-moksa, which was set up by the judgment-debtor's wife, set aside as executed in fraud of creditors; where plaintiff showed the existence in the mind of the judgment-debtor of a sufficient motive for the fraud, and also that the said debtor was in the management of the estate claimed and in the receipt of its rents, it was held that plaintiff had started a *primâ facie* case, which shifted the onus on the defendant to prove the *bona fides* of the deed. GOWHUR ALI KHAN *v.* SAKHEENA KHANUM [15 W. R., 507

63. ——— **Suit to recover possession.** —*Fraudulent deed.*—In a suit to recover immoveable property alleged to have belonged to the plaintiff's husband which she inherited from him, and from which, after seven years' possession, she was ousted by the defendant, whose possession was conferred by the Magistrate under section 318 of the Code of Criminal Procedure, 1861, the defendants claimed under a deed of sale which the lower Courts found to have been executed in fraud of creditors,—*Held* that if plaintiff was in possession for seven years since her husband's death, she should not be allowed to be dispossessed on the ground of a fraudulent deed to which defendant was a party years previously, to which plaintiff was no party. ECHAMOYEE *v.* HURRO SOONDUREE DASSEE . . . 12 W. R., 155

64. ——— **Suit to set aside compromise of claim.**—*Consideration.—Disputed adoption.*—The defendant, the divided brother of a deceased Hindu, disputed the title of he plaintiff, a minor adopted by his deceased brother, to succeed to the estate of the deceased. To induce the defendant to acknowledge the validity of the adoption, the adoptive mother of the plaintiff, as his guardian, executed a conveyance of one moiety of the family house to the defendant. *Held,* in a suit to cancel the conveyance, that the burden of proving that the defendant's objection to the validity of the adoption was groundless, and the conveyance therefore without

ONUS PROBANDI—*continued.*

14. DECREES AND DEEDS, SUITS TO SET ASIDE—*continued.*

**Suit to set aside compromise of claim**— *continued.*

consideration, was upon the plaintiff. SUBRAMANIA AYYAN *v.* VENKATA RAYAR [I. L. R., 6 Mad., 254

65. ——— **Suit to set aside sale.**—*Allegation of fraud.*—*N.*, as reversionary heir of the former proprietor, and as now entitled to possession on the death of that proprietor's mother, sued for land in the possession of *C.*, who obtained it by purchase at a sale in execution of a decree passed on a bond granted by *O.*, which bond and decree were alleged by *N.* to be fraudulent and collusive transactions. *Held* that the burden was on the plaintiff to prove that the decree was fraudulently obtained. GREESH CHUNDER CHATTERJEE *v.* MOHESH CHUNDER NYALUNKAR [10 W. R., 173

66. ——— **Transfer of interest in joint family by one member to the other members.**—Where one brother of a joint undivided family transferred his interest in the joint property to the other brothers after a decree had been passed against him, although before attachment,—*Held* that, when a question arose in such a case, the onus was on the brothers to whom the transfer was made to prove the *bonâ fide* character of the transaction. BROJO LALL SANDYAL *v.* BHOBO SOONDUREE DEBIA CHOWDRAIN . . . . 17 W. R., 499

67. ——— **Suit to set aside collusive decree.**—*Suit by judgment-debtor on allegation of decree being fraudulent and collusive.*—*A.* having obtained a decree in a suit instituted on a bond, purporting to have been executed by plaintiff's father and one *D.*, proceeded to execute it by putting up for sale certain rights and interests of plaintiff as the legal representative of her father. Plaintiff sued on the allegation that the decree was fraudulent and collusive, and that she had not been served with notice of proceedings taken in execution. *Held* that it was for the plaintiff to make out her case of fraud, and that it was not for defendant to show that the decree obtained from a competent Court was not collusive, or that notice had been actually served. MOHIMA CHUNDER MULLICK *v.* BURODA SOONDUREE DOSSEE [12 W. R., 147

68. ——— **Suit to have deed declared a forgery.**—*Setting up forged lease.*—*D.* sued *T.* for arrears of rent on the allegation that he held a khursa jumma. *T.* admitted only a lower rent, alleging that he held a jumma under a miras howladari pottah. *D.* failing in that suit, brought another suit for a declaration that the deed put forward by *T.* was a false document. *Held* that the plaintiff was bound to make out a *primâ facie* case before the onus could be thrown upon the defendant of proving the genuineness of his pottah. JOY CHUNDER TUPPADAR *v.* RAM CHUEN DOSS [15 W. R., 117

ONUS PROBANDI—*continued.*

14. DECREES AND DEEDS, SUITS TO SET ASIDE—*continued.*

69. ——— **Deed conveying property to other than legal heir.**—*Suit by Mahomedan widow for share of property.*—In a suit by a Mahomedan widow against the brother of her deceased husband for her share of the property of her husband, the defendant set up a tumliknamah by which the deceased conveyed the property away to the son of the defendant. *Held* that the burden of proof was on the defendant, and that he was bound to adduce the very strictest proof of the conveyance, as it cut away property from the natural heir. The tumliknamah was rejected, having regard to its terms and to the probabilities and facts of the case. SADUK ALI KHAN *v.* PEAREE . **9 W. R., 142**

15. DOCUMENTS RELATING TO LOANS, EXECUTION OF AND CONSIDERATION FOR, AND CASES OF MONEY LENT.

70. ——— **Execution, Admission of.**—*Suit on document.*—Where a defendant admits the execution of a document upon which he is sued, the onus lies on him to get rid of the effect of such admission. YEKNATH BABAJI *v.* GULABCHAND KAHANJI . . . . . **1 Bom., 85**

MOKOOND NARAIN DEO *v.* JONARDUN DEY BURNICK . . . . . **15 W. R., 208**

71. ——— *Mortgage-deed, Possession under.*—Where the execution of a mortgage-deed was admitted and long possession of the mortgagee under that decree was established,—*Held* that the onus of proving that the transaction was impeachable lies on the person who impugns it and denies that the money which was consideration for its execution was paid. HURPAUL SINGH *v.* ZAHOORUN . . . . . **2 Agra, 202**

72. ——— **Consideration, Payment of.**—*Recital in deed.—Presumption.*—When it has been found that a deed has been duly executed, and that a certain sum of money has passed in consideration of that deed, and where there is a recital in the deed of the fact that the balance of the consideration-money was paid previously to the execution of the deed, then there is something more than a presumption that the whole consideration has passed upon the deed. DOMUN SINGH *v.* BHUGGOBUTTY DEBEA **[8 W. R., 215**

73. ——— *Presumption as to bona fides.*—Where a mortgage is found to be genuine, and the receipt of consideration admitted, the Court is bound to assume, unless it be shown to the contrary, that the transaction was a real one, and that the consideration-money was paid. RADHANATH BANERJEE *v.* JODOONATH SINGH **[7 W. R., 441**

74. ——— *Deed of sale—Acknowledgment of payment in deed.—Delivery of deed.*—In a suit to recover the balance of purchase-money alleged to have been due upon the sale of a

ONUS PROBANDI—*continued.*

15. DOCUMENTS RELATING TO LOANS, EXECUTION OF AND CONSIDERATION FOR, AND CASES OF MONEY LENT—*continued.*

**Consideration, Payment of**—*continued.*

decree where the plaintiff's case was that the consideration-money was not paid, but a rooqua given for it, payable when the mutation of names took place,—*Held* that the onus of proving non-payment was thrown upon the plaintiff in consequence of the acknowledgments she had made of the receipt of the whole purchase-money,—*viz.*, an admission which was made and recorded under Act XX of 1866, at the time when the deed was registered, and again an acknowledgment made in the petition presented to the Court which made the decree for mutation of names. Although when a deed of sale containing an acknowledgment of payment is written, payment is not made, it may become an acknowlgment afterwards,—*i.e.*, when the deed is handed over. ALLEE SHAH *v.* AMANEE BEGUM . . **19 W. R., 149**

75. ——— **Proof of execution and bona fides of transaction.**—*Suit on mortgage-bond.*—Where a claim is made under an alleged mortgage against a *bonâ fide* purchaser for value, and the defendant puts in issue the genuineness of the transaction, the onus is upon the plaintiff of proving *primâ facie* the *bona fides* as well as the actual execution of the mortgage; and if the Court discredits the plaintiff's witnesses as regards the *bona fides* of the transaction, it is at liberty to dismiss the suit, although the defendant gives no substantial evidence of fraud. BRAJESHWARA PESHKAR *v.* BUDHANUDDI **[I. L. R., 6 Calc., 268: 7 C. L. R., 6**

76. ——— **Proof of execution and consideration.**—*Suit on bond.*—In a suit on a bond, the plaintiff is entitled to recover upon showing that it was executed by the defendant. The onus lies on the defendant of showing the want of consideration. JUGGUT CHUNDER CHOWDHRY *v.* BHUGWAN CHUNDER FUTTEHDUR . **Marsh., 27: 1 Hay, 57 [1 Ind. Jur., O. S., 67**

KUBUFOOL KOOER *v.* RAJKALEE KOOER **[17 W. R., 439**

77. ——— **Receipt of consideration.**—*Suit on bond.*—Though a bond may be genuine and duly executed, the receipt of consideration must nevertheless be proved. GHANSAM SINGH *v.* CHUKOWREE SINGH . . . **W. R., 1864, 197**

78. ——— *Payment under letter of assignment.*—When a defendant admits execution of a bond, but denies receipt of consideration, the onus of proving receipt is on the plaintiff. When a defendant admits having written a letter of assignment directing the plaintiff to pay certain sums of money due by the defendant to the third parties named in the letter, the plaintiff is bound to prove such payment. ROOP MUNGUL SINGH *v.* ANUND ROY . . . . **3 W. R., 111**

JHALOO *v.* FURZUND ALI . . **5 W. R., 20**

ONUS PROBANDI—*continued.*

15. DOCUMENTS RELATING TO LOANS, EXECUTION OF AND CONSIDERATION FOR, AND CASES OF MONEY LENT—*continued.*

79. ——— **Proof of amount due.**—*Suit on bond.*—In a suit on a bond, it is for the plaintiff to prove the amount of the debt, and this will be done sufficiently in the first instance by proof of the execution of the bond. It is for the defendant to prove in answer, if he can, that such amount is less than the sum sued for. SIVARAMAIYAR *v.* SAMU AIYAR . . . . . **1 Mad., 447**

80. ——— **Recital in bond.**—*Consideration.*—The plaintiff sued on a bond, which recited that the defendant had received the consideration mentioned in the bond. *Held* that the onus was on the defendant to show that the recital in the bond was not correct. FULLI BIBI *v.* BASSIRUDI MIDHA **[4 B. L. R., F. B., 54**

S. C. FOOLEE BIBEE *v.* BASSIRUDDY MIRDHA. BAMA NATH CHUCKERBUTTY *v.* ROMANATH ROY **[12 W. R., F. B., 25**

RUGHOONATH DOSS *v.* LUCHMEE NARAIN SINGH **[10 W. R., 407**

81. ——— *Admission.*—*Consideration.*—*A.* sued *B.* on a bond, in which it was recited that *B.* had received the amount. *B.*, in his written statement, admitted execution, but stated that he had received the amount mentioned therein, not under the bond, but on the pledge of certain jewellery. *Held* that, on the admission of the execution of the bond, which contained the recital of payment, the onus was upon *B.* to prove that payment had not been made under the bond. MANIKLAL BABOO *v.* RAMDAS MAZUMDAR **[1 B. L. R., A. C., 92: 10 W. R., 132**

82. ——— **Proof of want of consideration.**—*Suit for money due on bond.*—When in a suit for money due on a bond, both the execution and the receipt of the consideration are denied, the defendant must prove the latter plea, if the execution be established by the plaintiff. KISHENDYAL SINGH *v.* MONOHUR LALL . . . **2 Hay, 381**

83. ——— *Suit on bond.*—*Onus thrown on wrong party, Effect of.*—The defendants in a suit on a bond admitted the execution of the bond, but denied that they had received, as the bond recited they had at the time of its execution, the consideration for it. The Court of first instance, instead of calling on the defendants to establish the fact that they had not received the consideration for the bond as it ought to have done under the circumstances, irregularly allowed the plaintiff to produce witnesses to prove that the consideration for the bond had been paid at the time of its execution. The evidence of these witnesses proved that the consideration of the bond had not been paid at the time of execution, and that, if it had been paid at all, it had been paid at some subsequent time. *Held* that, although the plaintiff ought not to have begun, yet, as he had done so, and his witnesses had proved that the consideration for the bond had not been paid as admitted in the bond, a new case was opened up in which the onus was shifted back to the plaintiff to establish that he had, not at the time alleged in the bond, but at such some subsequent time, paid to the defendants the consideration for the bond. MAKUD *v.* BAHORI LAL . . **I. L. R., 3 All., 824**

ONUS PROBANDI—*continued.*

15. DOCUMENTS RELATING TO LOANS, EXECUTION OF AND CONSIDERATION FOR, AND CASES OF MONEY LENT—*continued.*

**Proof of want of consideration**—*continued.*

84. ——— **Allegation of payment.**—*Allegation of loss of document.*—The plaintiff in a suit on a bond for money accounted for not producing it by alleging that the defendant had stolen it. The defendant admitted the execution of the bond, but alleged that he had paid it. *Held* that the defendant was bound to begin and prove payment either by the production of the bond or other evidence, or by both. CHUNI KUAR *v.* UDAI RAM **[I. L. R., 6 All., 73**

85. ——— **Plea of payment.**—*Suit on bond.*—*Alleged theft of bond by obligors.*—The plaintiff sued on a bond made in his favour by the defendants which he alleged had been stolen by the defendants. The defendants, while admitting the execution of the bond, pleaded payment, and that the bond had been returned by the plaintiff to them. They did not produce the bond, nor did they offer any evidence of the alleged payment. *Held* that, as the defendants admitted the bond and pleaded payment, the burden of proof of such payment lay on them. SAVJI BIN SATU *v.* PATLU . **8 Bom., A. C., 139**

MEHEROONNISSA *v.* ABDOOL GUNEE **[17 W. R., 509**

86. ——— **Suit for money lent on acknowledgment.**—*Proof of consideration.*—Where the plaintiff sued to recover money lent, relying upon a samadaskat or acknowledgment of debt given by the defendant,—*Held* that section 9 of Bombay Regulation V of 1827 contained the rule of law applicable to the case, and that the onus lay on the defendant to prove that he had not received full consideration for the acknowledgment of indebtedness he had subscribed. MOTI KAHANJI *v.* DIPCHAND VIRCHAND **[5 Bom., A. C., 81**

87. ——— **Suit for money lent.**—*Admission of receipt of note.*—Where a plaintiff suing for repayment of a loan fails to prove to the satisfaction of the Court that a pledge alleged to have been made as security was made, he is nevertheless entitled to a decree, unless the Court holds that the loan itself was not made. A party admitting the receipt of a note for R1,000 on loan becomes primarily liable for it to the lender, and it is for him to show that the advance was made, not on his credit, but on that of some other person. MONOHUR DOSS *v.* GUNGA PERSHAD . . . **2 N. W., 264**

**ONUS PROBANDI**—*continued.*

15. DOCUMENTS RELATING TO LOANS, EXECUTION OF AND CONSIDERATION FOR, AND CASES OF MONEY LENT—*continued.*

**88. ——— Suit for value of hundi.**—*Proof of payment.—Possession of hundi.*—On 2nd August 1872 *A. K.* filed a plaint against *M. H.* and *M. R.*, in which he alleged that on 1st April 1870 *M. R.* had given a hundi for R500, for value received, to *A. K.*; that on 27th March 1871 *M. H.* purchased this hundi from *A. K.*, promising to pay him R534 for it; that *M. H.* gave the hundi to his brother *I. H.* for the purpose of obtaining payment of the amount from *M. R.*; and that *I. H.* subsequently informed *A. K.* that the hundi had been lost. *A. K.* accordingly prayed that defendants *M. H.* and *M. R.* might be decreed to pay to him R534 with profit and interest. *M. R.* admitted that he had executed the hundi, and had given it to *A. K.* for R500. He further alleged that it had been presented to him for payment by *I. H.*, to whom he had paid the amount with interest on 31st March 1871, and he produced the hundi with a receipt, purporting to be by *I. H.*, indorsed upon it. *I. H.* denied the payment by *M. R.*, and alleged the indorsement on the hundi to be a forgery. *Held* that the admission by *M. R.* of the drawing of the hundi for value received laid on him the burden of proving payment, and that, though the possession by *M. R.* of the hundi was a circumstance in his favour, yet, as it did not in itself amount to proof of payment, the *onus probandi* was not thereby shifted on to the plaintiff. ABDUL KARIM *v.* MANJI HANSRAJ

[I. L. R., 1 Bom., 295

**89. ——— Statement in ikrar reserving equity of redemption.**—*Loss of document.—Absolute sale, Deed of.*—Plaintiff sued for confirmation of possession and registration of certain property which had been mortgaged to him by defendants. The transaction on the face of the deed was an absolute sale, but an ikrar was executed at the same time as the mortgage which reserved the equity of redemption to the mortgagor. This ikrar was made over to the defendant, the mortgagor. Plaintiff's allegation was that the ikrarnamah was returned to him by the mortgagor, who thus surrendered the equity of redemption. Defendant alleged that the ikrar had been lost and had somehow found its way to the plaintiff. *Held* that the presumption of law was in favour of the plaintiff, who had possession of the ikrar, and that the onus of, proving its loss lay upon the defendant. RAJ COOMAR SINGH *v.* RAM SUHAYE ROY

[11 W. R., 151

**90. ——— Satisfaction of decree.**—*Proof of payment made out of Court.—Statement in receipt*—Where money was paid in satisfaction of a decree, not through the Court, and a receipt was taken, but execution was afterwards enforced in a suit for refund of the money so paid,—*Held* that the statement contained in the receipt to the effect that the decree had been satisfied was sufficient to shift the burden of proof to the defendant to show that it was an incorrect statement. DAVLATA *v.* GANESH SHASTRI

[I. L. R., 4 Bom., 295

**ONUS PROBANDI**—*continued.*

16. EASEMENTS.

**91. ——— Claim to restrain exercise of proprietary rights.**—*Criminal Procedure Code (Act X of 1882), s. 147.*—The right to restrain another from exercising ordinary proprietary rights over his own land is of the nature of an easement different from the ordinary rights of owners of land; the burden of proof would, therefore, lie upon the party alleging such rights. HARI MOHUN THAKUR *v.* KISSEN SUNDARI

[I. L. R., 11 Calc., 52

**92. ——— Right of way or water-course over land.**—*Suit to have right to easement determined after order of Magistrate under s. 532, Criminal Procedure Code, 1872.*—Where the right to have a way or water-course over certain land is disputed by the owner thereof, and an order, under section 532 of the Code of Criminal Procedure, has been passed by the Magistrate in favour of the person claiming the right, the fact of such an order having been made will not be sufficient to relieve the latter from the onus of proving the claim, in a subsequent suit by the owner to establish his right to the exclusive use of the land. *Puchai Khan* v. *Abed Sirdar, 21 W. R., 140,* dissented from. OBHOY CHURUN DEY *v.* LUKHY MONEE BEWA

[2 C. L. R., 555

**93. ——— Right of way.**—*Suit for declaration that party who has obtained an order under s. 320, Criminal Procedure Code, 1861, has no right of way.—Proof of right to possession.*—In a suit for a declaration that defendant had no right of way over certain land belonging to the plaintiff, where it appeared that the defendant hae obtained an order from the Magistrate under thd Criminal Procedure Code, 1861, section 320, it was held that the onus of proving an easement did not lie with the defendant, but that it was for the plaintiff to prove that he was entitled to exclusive possession. PUCHAI KHAN *v.* ABED SIRDAR

[21 W. R., 140

**94. ——— Right to water.**—*Suit for removal of outlets for water: plaintiff alleging right to its exclusive use.*—In a suit for the removal of certain outlets made by defendant in an aqueduct, on the ground that plaintiff was entitled to the exclusive use of the water of the aqueduct, where the defence set up was that the portion of the aqueduct to which the dispute related was where water flowed through the lands of the defendant's zemindari,—*Held* that it was for plaintiff to make good the title he alleged. ONRAET *v.* KISHEN SOONDUREE DOSSEE

[15 W. R., 83

17. EJECTMENT.

**95. ——— Suit for ejectment.**—*Limitation Act, 1859, s. 15.*—The law obtaining in India requires that, in actions of ejectment, the Courts should always enforce the rule that a plaintiff must recover by the strength of his own title; and a party who might have shifted the burden of proof, if he

**ONUS PROBANDI**—*continued.*

17. EJECTMENT—*continued.*

**Suit for ejectment**—*continued.*

had proceeded under section 15 of Act XIV of 1859, cannot, if he let slip that opportunity, obtain the same advantage in an action of ejectment. DADABHAI NARSIDAS *v.* SUB-COLLECTOR OF BROACH [7 Bom., A. C., 82

96. ——————— *Limitation.—Tenancy.*—When a plaintiff seeks to eject persons from premises claimed by him, on the ground that they are in wrongful possession of the premises, he is bound to show that he or some of the persons under whom he claims have been in possession of the property within twelve years before suit. A mere allegation in the plaint that the persons sought to be ejected were the tenants of the person through whom the plaintiff claims, will not shift the burden of proof. *Rao Karan Singh* v. *Bakar Ali Khan, L. R., 9 I. A., 99,* explained and distinguished. GOPAUL CHUNDER CHUCKERBUTTY *v.* NILMONEY MITTER [I. L. R., 10 Calc., 374

97. ——————— *Claim to joint ownership.*—In a suit to eject the special appellant from a portion of a house which he claimed to be in possession of as part owner,—*Held* that the lower Appellate Court was wrong in laying down that it was not called upon to decide whether the defendant was entitled to share in the house, as the onus of proving an exclusive title to the property lay on the plaintiff. ISUBJI *v.* KHATIZA [2 Bom., 189 : 2nd Ed., 181

98. ——————— *Proof of possession.—Quære,*—Whether a plaintiff in ejectment is entitled to succeed upon mere proof of antecedent undisturbed possession. JOYTARA DASSEE *v.* MAHOMED MOBARUCK [I. L. R., 8 Calc., 975 : 11 C. L. R., 399

99. ——— **Ejectment, Evidence of.**—*Presumption of acts of Court being bonâ fide.*—An ejectment alleged to have taken place under direct action of Court, and supported by documents issued by, and filed in, the Court, must be presumed to have been real and *bonâ fide,* until the party ejected proves that all these proceedings were fictitious, and that he never lost possession of the land, but still holds it. BUDUROODEEN *v.* HANIFF MULLICK . . . . . 5 W. R., 180

18. ENHANCEMENT OF RENT.

100. ——— **Suit for enhancement.**—*Fair and equitable rent.*—A plaintiff who sues for enhanced rent is bound to prove that the present rate is not fair and equitable. HILLS *v.* JENDAR MUNDUL . . . . . 1 W. R., 3

GOLAM ALI *v.* GOPAL LALL TAGORE [1 W. R., 56

SUMEERA KHATOON *v.* GOPAL LALL TAGORE [1 W. R., 58

101. ——————— *Act X of 1859, 13.*—Section 13 of Act X of 1859 was applicable,

**ONUS PROBANDI**—*continued.*

18. ENHANCEMENT OF RENT—*continued.*

**Suit for enhancement**—*continued.*

not merely to ryots having rights of occupancy, but to all under-tenants and ryots. The landlord cannot, by giving notice of enhancement, compel the tenant to pay more than a reasonable rent, and he cannot enhance without notice specifying the grounds of enhancement. The onus of proving the existence of the grounds alleged is upon the landlord. BAKRANATH MANDAL *v.* BINODRAM SEN [1 B. L. R., F. B., 25 : 10 W. R., F. B., 33

102. ——————— *Ground of enhancement.—Act X of 1859, s. 17.*—In a suit for enhancement of rent, on the ground that "the produce and productive powers of the land have increased otherwise than by the agency or at the expense of the ryot," the onus is upon the plaintiff to prove the grounds upon which he seeks enhancement. RAJKRISHNA MOOKERJEE *v.* KALI CHARAN DOBAIN [6 B. L. R., Ap., 122 : 15 W. R., 109

DHUNRAJ KOONWAR *v.* OOGGUR NARAIN KOONWAR . . . . . 15 W. R., 2

103. ——————— *Act X of 1859, s. 17, cl. 2.*—Where, in a suit for enhancement on the ground that the productive powers of the land have been increased otherwise than by the agency or at the expense of the ryot, the defendant admits the increase in productiveness, but denies the alleged cause, the onus of proving that the productiveness has been increased by other means lies on the plaintiff. PULIN BEHARI SEN *v.* WATSON [B. L. R., Sup. Vol., 904

S. C. POOLIN BEHAREE SEIN *v.* WATSON [9 W. R., 190

Overruling NOBEEN KISHEN BOSE *v.* SHOFATOOLLAH . . . . 1 W. R., 24

104. ——————— *Nature of tenancy.—Grounds of enhancement.*—In a suit to recover rent at an enhanced rate after notice had been granted, a kabuliat was put in in support of the plaintiff's case and admitted by defendants. A pottah put in by defendants was found by the lower Court to be a forgery. *Held* that plaintiff's contention that the kabuliat does not give the full terms of the agreement binds him to show beyond all reasonable doubt what were the actual terms of the pottah. Having failed to do this, the kabuliat was treated as complete and conclusive evidence of the nature of the tenancy, which was inferred by the Court to be permanent and at a fixed rate. *Held* that it lay upon the plaintiff to make out distinctly the different grounds on which he rested his right to enhance,—*viz.,* excess of area, increase of productiveness apart from the tenant's agency, and increase in the value of produce. GOLAM ALI *v.* GOPAL LALL THAKOOR [9 W. R., 65

S. C. on appeal to the Privy Council, SOORASOONDERY DEBI *v.* GOLAM ALI [15 B. L. R., 125, note 19 W. R., 142

ONUS PROBANDI—*continued.*

18. ENHANCEMENT OF RENT—*continued.*

Suit for enhancement—*continued.*

105. ——————— *Purchaser of estate settled in perpetuity.*—When the purchaser of a moiety of an estate settled in perpetuity some years ago according to a jummabundi then made, does not sue directly to set aside the jummabundi of settlement, but many years after the settlement he sues to enhance the rents entered therein, to entitle him to succeed he must show that since the period of settlement circumstances have occurred which have tended to raise the value of the ryot's lands, and consequently to entitle him to an increased share of the surplus profits arising from the lands. RAM LOCHUN PAUL *v.* BROJO MOHINEE [W. R., 1864, Act X, 118

106. ——————— *Similar rates.*—Where a plaintiff sues for enhancement, on the ground that the defendant does not pay the rents paid by others in the neighbourhood for similar lands, and the defendant denies his liability to pay such rents owing to his having mokurrari pottahs, the onus is on the defendant to prove those pottahs. PRANNATH ROY CHOWDHRY *v.* MOHEHOODEEN AHMED [6 W. R., Act X, 39

107. ——————— *Custom to exempt certain land.*—In a suit for enhancement, where the defendant pleads that rent has been assessed on lands covered by hedges and ditches and forming boundaries between fields, and that according to custom such land is not liable to pay rent at all, the onus is on the defendant to prove the custom. HAROO CHOWDHRY *v.* JOYESSUR NUNDEE [6 W. R., Act X, 46

108. ——————— *Excess lands.*—In a suit for enhancement of rent on the ground that defendant holds land in excess of what he pays rent for, it is plaintiff's duty to show that the lands in question are all included within the tenure of the defendant, but that the latter has been paying rent for a quantity less than the area of those lands. AHMED HOSSEIN *v.* BUNDEE . 15 W. R., 91

109. ——————— *Act X of 1859, s. 16.—Presumption.*—In a suit for enhancement, the burden of proof that a tenure is protected under section 16, Act X of 1859, is on the defendant, and it is only for the plaintiff to rebut any presumption which the defendant may make out under that section. NOBOKRISTO MOJOOMDAR *v.* TARA MONEE [12 W. R., 320

110. ——————— *Proof of variation in rate of rent.—Act X of 1859, s. 16.*—In a suit for enhancement, the presumption under section 16, Act X of 1859, established by twenty years' holding at a uniform rate, cannot be rebutted by the fact that the plaintiff did not obtain direct possession of the estate for many years, and was for other reasons prevented from suing, but the onus is on the plaintiff to prove that the present rent has been varied or fixed at a period subsequent to the decennial settlement. DHUN SINGH *v.* CHUNDER KANT MOOKERJEE . . . . W. R., 1864, Act X, 25

ONUS PROBANDI—*continued.*

18. ENHANCEMENT OF RENT—*continued.*

Suit for enhancement—*continued.*

111. ——————— *Variation of rent.*—The fact alone of variations in the amount of rent paid between one year and another does not necessarily establish a right in the plaintiff to enhance or affect the defendant's right to hold at a fixed rent. It is for the defendant to account for such variation. HURONATH ROY *v.* CHITTRAMONEY DOSSEE . . . . 3 W. R., Act X, 122

112. ——————— *Proof of uniformity of rent.*—In a suit for enhanced rent of a talook, the existence of which as an ancient talook is undoubted, and in which the only question is whether the rent is fixed or variable, the onus is first on the defendant to prove that he has held at a uniform rate for twenty years, and (if the defendant prove so much) then on the plaintiff to prove that the rent has varied since the permanent settlement. RASHMONEE DEBEA *v.* HURRONATH ROY [1 W. R., 280

113. ——————— *Beng. Reg. VIII of 1793, ss. 49, 51.—Registration.*—In a suit for enhancement of rent,—*Held* that in order to bring a talook within the scope of section 51, Regulation VIII of 1793, it was sufficient to show that the tenure existed, and was capable of being registered at the time of the decennial settlement, the fact of actual registration not being an essential element in the formation of a talook. *Held*, further, that the effect of proof of the existence of such a talook at the time of the decennial settlement was sufficient to throw the onus on the plaintiff to prove that it was held at a variable rent. RADHIKA CHOWDHRAIN *v.* BAMASUNDARI DASI . 4 B. L. R., P. C., 8

S. C. BAMASOONDUREE DOSSEE *v.* RADHIKA CHOWDHRAIN . . 13 W. R., P. C., 11 [13 Moore's I. A., 248

Reversing decision of High Court in BAMA SOONDEREE DOSSEE *v.* RADHIKA CHOWDHRAIN [1 W. R., 339

114. ——————— *Liability of land comprised in a zemindari to enhancement.—Dependent talook.—Resumed lakhiraji.—Beng. Reg. XIX of 1793.*—In a suit for enhancement of rent in respect of land which the defendant claimed to hold as a dependent talook,—*Held*, the onus was upon the zemindar to show that the land was included in the zemindari at the time of the permanent settlement. ASSANULLAH *v.* BUSSARAT ALI CHOWDHRY [I. L. R., 10 Calc., 920

115. ——————— *Plea that some lands never paid rent.—Suit for enhancement.*—When a landlord sues for enhanced rent and is met by an allegation that certain plots of land never paid any rent at all, the onus is on him to prove that the lands did at some former time pay him rent. GUNGADHUR SINGH *v.* BIMOLA DOSSEE [5 W. R., Act X, 37

SHEEB NARAIN ROY *v.* CHIDAM DOSS BYRAGEE [6 W. R., Act X, 45

ONUS PROBANDI—*continued.*

18. ENHANCEMENT OF RENT—*continued.*

Suit for enhancement—*continued.*

DHUN MONEE DEBEE *v.* SUTTOORGHUN SEAL [6 W. R., Act X, 100

UMBIKA CHURN MUNDLE *v.* RAMDHONE MOHURIR . . . . 11 W. R., 35

GUMANI KAZI *v.* HARIHAR MOOKERJEE [B. L. R., Sup. Vol., 15 : W. R., F. B., 115

RAM COOMAR GHOSAL *v.* DEBEE PERSHAD CHATTERJEE . . 6 W. R., Act X, 87

116. ——— *Lakhiraj.*—The suit was for enhancement of rent. The defendant set up that certain plots of land, the rent of which was sought to be enhanced, were lakhiraj, and therefore not liable to pay rent. *Held* that the onus was not upon the defendant to prove the land was lakhiraj, but upon the plaintiff to prove that the land was mal, or rent-paying. *Semble,*—The Courts are accustomed to require some *primâ facie* evidence from defendants raising such defence that they hold some lakhiraj lands. SRIDHAR NANDI *v.* BRAJA NATH KUNDU CHOWDHRY . 2 B. L. R., A. C., 211 [S. C. 14 W. R., 286, note

117. ——— *Separation of mal and lakhiraj lands.*—In a suit for assessment at enhanced rates, in which the defendant admits that the main portion of the lands in dispute are mal, but does not separate the rent-free lands, the plaintiff is not bound to prove that the lands are mal until the defendant points out their precise situation. SUTTO CHURN GHOSAL *v.* TARINEE CHURN GHOSE [3 W. R., 178

ASHRUFOONISSA *v.* UMUNG MOHUN DEB ROY [5 W. R., Act X, 48

NEHAL CHUNDER MISTREE *v.* HUREE PERSHAD MUNDUL . . . . 8 W. R., 183

118. ——— *Plea that certain of the lands included in notice are not enhanceable.—Onus of proof of such fact.—Notice of enhancement.*—In suits for enhancement of rent, where the tenant pleads that a portion of the land sought to be enhanced is held by him rent-free, the onus is on the tenant to prove *primâ facie* that such portion of the land is so held by him; and if he be successful in this, the onus is then shifted upon the landlord to rebut such *primâ facie* evidence. NEWAJ BUNDOPADHYA *v.* KALI PROSONNO GHOSE [I. L. R., 6 Calc., 543 : 8 C. L. R., 6

119. ——— *Allegation of land being lakhiraj.*—In a suit for enhancement of rent upon a certain area of land which plaintiff alleged to be mal, defendant set up that a portion of that area was lakhiraj and did not belong to plaintiff's zemindari. *Held* that plaintiff was bound to prove that he had received rent for the disputed portion before he could obtain a decree for rent for such portion. *Quære,*—Is it sufficient that defendant's plea is a mere allegation of lakhiraj, or must it be supported by *primâ facie* evidence? MUN MOHUN DEY *v.* SREEBAM ROY . . 14 W. R., 285

ONUS PROBANDI—*continued.*

18. ENHANCEMENT OF RENT—*continued.*

Suit for enhancement—*continued.*

120. ——— *Evidence of receipt of rent.*—In a suit for enhancement of rent, where defendant gives *primâ facie* proof of a rent-free title, such as a proceeding of the resumption authorities releasing his lands under section 48, Bengal Regulation XIX of 1793, the onus is on the plaintiff to prove receipt of rent. HEERA RAM BHUTTACHARJEE *v.* ASHRUF ALI . . 9 W. R., 103

121. ——— *Allegation of debutter land.*—In a suit for enhancement of rent, where defendant pleads that a parcel of it is debutter land, the property of another party, the onus lies on the plaintiff to prove that the land is mal, even though the alleged owner puts forward no claim. PREM CHAND BARIK *v.* BROJONATH KOONDOO CHOWDHRY . . . . 10 W. R., 205

122. ——— *Suit for arrears of rent.*—In a suit for arrears of rent at an enhanced rate, where the defendant set up that he had relinquished all the mal land in his occupation, and that the residue of the land in dispute was lakhiraj,—*Held* that the onus was upon the plaintiff to prove that the land for which he sued for enhanced rent was rent-paying, and not on the defendant to make good his defence. MAHOMED AZEEAR ALI *v.* NASSIR MAHOMED . . 3 B. L. R., A. C., 304

123. ——— Suit to contest enhancement.—*Act X of 1859, s. 14.*—In a suit brought by a ryot under section 14, Act X of 1859, to contest a notice of enhancement, the *onus probandi* is on the ryot. PRITHEE RAM CHOWDHRY *v.* CHIDAM CHUNDEE SHAHA . . . . 8 W. R., 8

19. GENEALOGICAL DESCENT.

124. ——— Suit for partition of hereditary property.—*Proof of genealogical descent.*—In a suit for partition of hereditary property, it is not necessary for the plaintiff to trace back his genealogy to the original grantee and to prove that no other descendant of that grantee except himself and the defendants are in existence. It is sufficient for him to show that he and they are the only representatives of the person who last held the property. If others claim a share, it is for them to show that they have any rights which operate to restrict the plaintiff's *primâ facie* right to treat such property as the exclusive property of himself and the defendants. KAKAJI BIN RANOJI *v.* BAPUJI BIN MADHAVRAV [8 Bom., A. C., 205

125. ——— Common ancestor.—*Claim as collateral heir.*—Where the plaintiff claimed as paternal uncle's grandson and only heir of *N.*, and the evidence showed that *N.'s* father was one of three brothers, but it was not stated in the plaint, nor shown by the evidence, who was the father of the three brothers,—*Held* that the suit ought to be dismissed, it being incumbent on the plaintiff, claiming as a collateral heir, to show whe the common

ONUS PROBANDI—*continued.*

19. GENEALOGICAL DESCENT—*continued.*

**Common ancestor**—*continued.*

ancestor was from whom he derived title. KEDARNAUTH DOSS *v.* PROTAB CHUNDER DOSS [I. L. R., 6 Calc., 626: 8 C. L. R., 238

20. HINDU LAW.

(*a*) ADOPTION.

**126. ——— Suit to set aside adoption.**—*Invalidity of adoption.*—A plaintiff suing for a declaration that an adoption is invalid is bound to prove the invalidity. BROJO KISHOREE DOSSEE *v.* SREENATH BOSE . . . 9 W. R., 453

**127. ——— *Allegation of fraudulent adoption.***—In a suit to have it declared that an adoption which has long taken place, and has been acted upon, and in virtue of which defendants are in possession, is a fraudulent and false adoption, the onus lies on the plaintiff to make out, to some extent at any rate, the fraud and falsehood alleged. GOOROO PROSUNNO SINGH *v.* NIL MADHUB SINGH [21 W. R., 84

**128. ——— *Improper and unauthorised adoption.***—In a suit in which plaintiffs, claiming as heirs of a deceased Hindu, sought to set aside an adoption effected by the widow as without authority and otherwise improper, the lower Appellate Court held that the onus lay with the plaintiffs to prove their affirmation in respect to the adoption. HUR DYAL NAG *v.* ROY KRISTO BHOOMICK [24 W. R., 107

**129. ——— *Adoption under will.***—*Proof of validity of adoption.*—A Hindu died leaving a son (who afterwards died a minor and unmarried), a widow, and three daughters. On the death of the minor the widow succeeded to the property, and, under a will of her late husband, adopted in 1851 a son of her husband's brother. The widow died in 1866. One of the daughters, as guardian of her infant son born in 1853, brought a suit to set aside the will, and with it the adoption, and for recovery of possession of the property left by her minor brother. The defence set up was that the will was genuine; that the plaintiff should have sued within twelve years from the adoption; and that she had in 1851 admitted the adoption in having accepted a dur-putni from the guardian of the adopted son. *Held* that the onus was upon the adopted son to prove the validity of the adoption, and not upon the plaintiff suing as heir to prove its invalidity, even though he alleged fraud and adduced no evidence in support of it. TARINI CHARAN CHOWDHRY *v.* SARODA SUNDARI DASI [3 B. L. R. A. C., 145: 11 W. R., 468

(*b*) ALIENATION.

**130. ——— Alienation by Hindu widow.**—*Proof of necessity.*—Where the validity of an alienation by a Hindu widow is the question for

ONUS PROBANDI—*continued.*

20. HINDU LAW—*continued.*

(*b*) ALIENATION—*continued.*

**Alienation by Hindu widow**—*continued.*

the consideration of the Court, the onus of proving the necessity for the alienation rests with the alienee. Where in such a case the plea of necessity fails, the Court will not grant a decree for immediate possession, unless a very strong case of waste and deterioration be made out. What is sufficient evidence to support a sale by a Hindu widow of property in which she has only a life interest. CHUTTER DHAREE SINGH *v.* HURCOOMAREE . I Ind. Jur., O. S., 99

NUND COOMAR SINGH *v.* GUNGA PERSAUD NARAIN SINGH . . . 10 W. R., 94

And the same is the case in a suit by a son to annul an alienation of ancestral property by the father. JUGDEL NARAIN SUHAYE *v.* LALLA RAM PROKASH . . . . . 2 W. R., 292

**131. ——— Purchaser, Duty of.**—*Suit for possession.*—*Plea of bonâ fide purchase.*—In a suit to recover possession the onus is on the defendant who pleads that he is a *bonâ fide* purchaser for value without notice of plaintiff's title to make out that plea. JEEBUNISSA *v.* UMUL CHUNDER CHACKLANUVIS . . . . . 18 W. R., 151

*See* VARDEN SETH SAM *v.* LUCKPATHY ROYJEE [9 Moore's I. A., 303

**132. ——— *Widow's power of alienation.***—It is incumbent on the purchaser of realty from a Hindu widow to enquire whether the circumstances are such as to confer on her the power of alienation. HEERALALL SHAHA *v.* JADUB CHUNDER CHENCHKEY . . . Cor., 119

**133. ——— *Good faith.*—*Failure to make inquiry as to widow's right to sell.***—A purchaser from a childless Hindu widow is bound to satisfy himself as to her right to sell. If he does not act with due care in the matter, he cannot be said to have acted legally in good faith, although he may have fully believed, or taken for granted, that all was right. RAMDHONE BHUTTACHARJEE *v.* ISHANEE DABEE . . . 2 W. R., 123

**134. ——— *Purchase from Hindu widow.***—Upon those who claim under an alienation from a Hindu widow rests the onus of showing that the transaction was within her limited power. COLLECTOR OF MASULIPATAM *a.* CAVALY VENCATA NARAINAPAH [2 W. R., P. C., 61: 8 Moore's I. A., 529

So with a purchaser of immoveable property dealing with any one with a qualified power.

*See* VADALI RAMAKRISTNAMA *v.* MANDA APPANYA [2 Mad., 407

**135. ——— Necessity for alienation.**—*Adequacy of consideration.*—*Purchaser.*—The onus of proving the necessity for a sale by a Hindu widow and the adequacy of the purchase-money lies on the purchaser. JADU NATH SIRCAR *v.* SONAMONEE DOSSEE . . . . . Cor., 70

ONUS PROBANDI—*continued.*

20. HINDU LAW—*continued.*

(*b*) ALIENATION—*continued.*

**Necessity for alienation**—*continued.*

BISSONAUTH ROY *v.* LALL BAHADOOR SINGH . [1 W. R., 247

WOOMA CHURN BANERJEE *v.* HARADHUN MOOKERJEE . . . 1 W. R., 347

136. ——— *Mortgage by Hindu widow.*—The burthen of proving the necessity for a mortgage by a Hindu widow rests on the mortgagee, where that necessity is disputed by the next heir. GOLAB SING *v.* RAO KURUN SING. RAO KURUN SING *v.* MAHOMED FYAZ ALI KHAN [10 B. L. R., P. C., 1: 14 Moore's I. A., 176

137. ——— *Purchaser of ancestral property.—Proof of inquiry as to existence of necessity.*—In justifying the purchase of ancestral property, the purchaser is not bound to prove the fact that family necessity actually existed; it is sufficient if he establishes that he made *bonâ fide* inquiry into the matter and was in that inquiry reasonably led to suppose that the necessity did exist. SOOBENDEO PERSHAD DOBEY *v.* NUNDUN MISSER [21 W. R., 196

138. ——— *Duty of purchaser of ancestral property.*—Where ancestral property is to be sold or mortgaged, all that the purchaser has to do is to see that there is sufficient pressure upon the estate to render the transfer necessary. The fact of there being a decree, an attachment, and a proclamation for sale, is sufficient pressure. SHEORAJ KOOER *v.* NUCKCHEDEE LALL . 14 W. R., 72

139. ——— *Alienation by Hindu.*—In a suit brought by a Hindu son, for himself and on behalf of three infant brothers, to set aside a sale of certain ancestral lands which had been made by his father without his concurrence,—*Held* that the onus of proving that the payment of the debts, on account of which the property was sold, was not a common family necessity, was properly laid by the District Judge upon the plaintiff. BABAJI SAKHOJI *v.* RAMSHET PANDUSHET . . 2 Bom., 23

140. ——— *Proof of power to alienate.—Degree of proof.*—Although as a general rule it may lie upon those who claim under an alienation of ancestral property for necessary purposes to show that the transaction was within the limited power of the party alienating, yet particular circumstances may shift the burden of proof. No fixed rule can be laid down as to the degree of proof requisite in such cases. KAIHUR SINGH *v.* ROOP SINGH . . . . . 3 N. W., 4

TASOUWAR ALI *v.* KOONJ BEHAREE LAL [3 N. W., 8, note

141. ——— *Malabar law.—Loan to karanavan.*—There is no invariable presumption on whom the burden of proof lies as to the necessity of a loan made to the karanavan. ELAYA-

ONUS PROBANDI—*continued.*

20. HINDU LAW—*continued.*

(*b*) ALIENATION—*continued.*

**Necessity for alienation**—*continued.*

CHANIDATHIL KOMBI ACHEN *v.* KENATUMKORA LAKSHMI AMMA . . I. L. R., 5 Mad., 201

142. ——— *Application of purchase-money.—Sale by Hindu widow.—Duty of purchaser.*—Where a Hindu widow sells as guardian of her minor son and for his maintenance the purchaser must show the necessity for the sale, but he need not see to the application of the money. RADHA KISHORE MOOKERJEE *v.* MIRTOONJOY GOW [7 W. R., 23

KOOL CHUNDER SURMA *v.* RAMJOY SURMONA [10 W. R., 8

RAM PERSHAD SINGH *v.* NAJBUNNISSA KOOER [9 W. R., 501

143. ——— *Duties of purchaser.—Application of purchase-money.*—A purchaser for value is not bound to prove the antecedent economy or good conduct of a Hindu widow who alienates a portion of her husband's estate, nor to account for the due appropriation of the purchase-money, but he is bound to use diligence in ascertaining that there is some legal necessity for the loan, and he may be reasonably expected to prove the circumstances connected with his own particular loan. GOBINDMONEE DOSSEE *v.* SHAM LOLL BYSACK. KALI COOMAR CHOWDHRY *v.* RAM DOSS SHAHA [W. R., 1864, 153

144. ——— *Application of purchase-money.—Alienation by Hindu widow.*—In a sale by a Hindu widow under necessity, where the vendee pays a fair price and acts *bonâ fide*, the mere fact of only two thirds of the purchase-money being paid to creditors does not invalidate his conveyance, as he is not bound to see to the application of the purchase-money. RAM GOPAL GHOSE *v.* BULLODEB BOSE . . . . W. R., 1864, 385

145. ——— *Obligation on creditor seeking to enforce a charge on property sold.*—In transactions such as the alienation by a widow of her estate of inheritance derived from her husband, any creditor seeking to enforce a charge on such estate is bound at least to show the nature of the transaction, and to show that in advancing his money he gave credit on reasonable grounds to an assertion that the money was wanted for one of the recognised necessities. KAMESWAR PERSHAD *v.* RAM BAHADUR SINGH [I. L. R., 6 Calc., 843: 8 C. L. R., 361 L. R., 8 I. A., 8

KASHINATH SITARAM OYE *v.* DADKI [6 Bom., A. C., 211

146. ——— *Creditor, Obligation of.—Proof of satisfaction of debt.*—Where a party, entitled to impeach an alienation by a widow of her husband's estate, sues to set aside such an alienation, and the defendant establishes not only

**ONUS PROBANDI**—*continued.*

20. HINDU LAW—*continued.*

(*b*) ALIENATION—*continued.*

**Necessity for alienation**—*continued.*

that he had a charge on the estate in virtue of a mortgage-deed executed by the widow, but that the debt to him was on account of advances made to her for purposes for which she would have been entitled to alienate the estate as against the next heirs, it does not follow that because plaintiff had a right to demand this peculiar proof of the ordinary rule which requires the party who alleges payment to prove payment is to be inverted in his favour, or that the debt is to be presumed to be satisfied, unless the contrary is shown by the creditor; and if he alleges that the mortgage-deed was not *bonâ fide*, the burthen lies on him to prove his allegation. CAVALY VENCATA NARAINAPAH *v.* COLLECTOR OF MASULIPATAM

**[10 W. R., P. C., 47: 11 Moore's I. A., 619**

**147. ——— Suit to set aside alienation.**—*Suit to set aside sale in execution of decree of joint family property as improperly made.*—Where joint family property is sold in execution of a decree against the head of the family, and purchased *bonâ fide* and for valuable consideration, the onus lies on members of the family who impugn the sale to show that the decree was an improper one. SHEO PERSHAD SINGH *v.* SOORJBUNSEE KOOER

**[24 W. R., 281**

**148. ——— Suit for share of alienated property.**—*Mortgage by one member of joint family.—Suit for possession of property.*—In a suit by a Hindu widow to recover a share of property alleged to have been inherited from her husband (*J.*), and which had been mortgaged by her husband's brother (*B*). and sold under a decree obtained on the mortgage, the question was raised whether the money for which the property was mortgaged had been borrowed by *B.* for his own private use, or for the benefit of the family. *Held* that the onus was on the defendant to show that the plaintiff had derived any benefit from the money. SREEMUTTY *v.* LUKHEE NARAIN DUTT . . **22 W. R., 171**

**149. ——— Alienation by Hindu father.**—*Necessity.—Specific performance, Suit for, against father.*—There is no legal presumption in the Madras Presidency that a sale by a Hindu father is valid until the contrary is shown. Where a suit is brought against the father of an undivided Hindu family having an infant son, for the specific performance of a contract to sell land, presumably ancestral, the Court, having thereby notice that the vendor's powers can be exercised without a breach of trust only where there exists a necessity sufficient in law to justify the sale, and that the infant son is entitled to interdict the sale, is bound to require the plaintiff to give some proof of the necessity for the sale. GURUSAMI SASTRIAL *v.* GANAPATHIA PILLAI

**[I. L. R., 5 Mad., 337**

**150. ——— Purchase by son at sale for arrears of rent against father.**—*Proof of bona fides of sale.*—Where a son purchased a property sold for arrears of rent, on account of the default of his father, and both father and son were living together at the time of the purchase,—*Held* that the onus was on the son to prove that his purchase was *bonâ fide.* HUR SUHAYE MISSER *v.* DEEN DYAL SINGH . . . . . **7 W. R., 275**

**151. ——— Alienation by manager of infant's estate.**—*Presumption of bona fides.—Obligation of purchaser to inquire.—Necessity for charge.*—Under the Hindu law, the right of a *bonâ fide* incumbrancer who has taken from a *de facto* manager a charge on lands created honestly, for the purpose of saving the estate, or for the benefit of the estate, is not (provided the circumstances would support the charge had it emanated from a *de facto* and *de jure* manager) affected by the want of union of the *de facto* with the *de jure* title. The question as to the onus of proof in such cases is one not capable of a general and inflexible answer, but the presumption proper to be made will vary with circumstances. Thus, a mortgagee, who is setting up a charge in his favour made by one whose title to alienate he knew to be limited, must prove the facts which embody the representations made to him of the alleged deeds of the estate and the motives influencing his immediate loan; but such proof must not be required from one not an original party, after a lapse of time and enjoyment and apparent acquiescence. Where, also, a charge is created by the substitution of a new security for an older one, and the consideration for the older one was an old precedent debt of an ancestor not previously questioned, the presumption will arise in favour of a consideration that binds the estate. The lender is bound to inquire into the necessity for the charge, and to satisfy himself that the manager is acting for the benefit of the estate. But if he does so inquire and acts honestly, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge, and he is not bound to see to the application of the money. HUNOOMAN PERSHAD PANDEY *v.* MUNDRAJ KOONWEREE

**[6 Moore's I. A., 393: 18 W. R., 81, note**

**152. ——— Sale of property by guardian for minor.**—*Allegation of fraud.*—In a suit by three brothers to recover an estate sold by their two brothers as their guardians during their minority, as they alleged, without necessity and in collusion with the purchaser,—*Held* that the onus was on the plaintiff to prove the sale fraudulent and collusive. ACHUNTH SINGH *v.* KISHEN PERSHAD SINGH

**[W. R., 1864, 37**

**153. ——— Sale of property of minor or person under disqualification by party in fiduciary position.**—*Proof of bona fides.*—When a person, after attaining majority, questions any sale of his property made by his guardian during

ONUS PROBANDI—*continued.*

20. HINDU LAW—*continued.*

(*b*) ALIENATION—*continued.*

**Sale of property of minor or person under disqualification by party in fiduciary position—*continued.***

his minority, the burden lies on the person who upholds the purchase not only to show that, under the circumstances of the case, either the guardian had the power to sell or that the purchaser reasonably supposed he had such power, but, further, that the whole transaction, so far as regarded the purchaser's part in it, was *bonâ fide*. Following the principle laid down by the Court in the case of *Kanailal Jowhari* v. *Kaminee Dabee, 1 B. L. R., O. C., 31, note*, it was held that when either the person who sells labours under disqualification, or the purchaser stands in a fiduciary relation to the owner of the property, the *bona fides* of the dealing cannot be presumed, but must be made out by the purchaser. ROOP NARAIN SINGH *v.* GUGADHUR PERSHAD NARAIN . . . . . **9 W. R., 297**

**154. ———— Suit to set aside sale made by guardian.**—*Act XL of 1858, s. 18.—Fraud or collusion.—Purchaser.*—Where a plaintiff alleges fraud or illegality as a ground for setting aside a sale made under section 18, the onus lies upon him to make out a *primâ facie* case of fraud or illegality, and to show that the debt, which formed the consideration for the sale in such case, was one for which the minor was not responsible. *Per* PRINSEP, *J.*—A stranger purchasing from a guardian, acting under the authority granted under section 18 of Act XL of 1858, will be entitled to every protection from the Courts, so long as it is not shown that he acted in a fraudulent or collusive manner, knowing that the debts, for the liquidation of which the purchase-money would be applied, were not debts lawfully binding on the minor. The burden of proof in such a case would lie heavily on the person seeking to set aside the alienation. But where the purchaser is himself the creditor, and, therefore has the means of satisfying a Court as to the origin and nature of the debts and how they are binding on the minor, the burden of proof is shifted on the purchaser, when the plaintiff has established a *primâ facie* case. SIKHER CHUND *v.* DULPUTTY SINGH **[I. L. R., 5 Calc., 363: 5 C. L. R., 374**

**155. ———— Alienation for debt contracted by karanavan.**—*Presumption.—Proof of agency and authority to contract debts.*—There is no presumption of law that every debt contracted by the karanavan of a Malabar tarwad is for the uses of the tarwad and chargeable on the tarwad estate. The creditor must show, in the first instance, if it is disputed, that the obligor had authority from the tarwad as their agent and manager to contract debts, and that he assumed to act in the particular instance as such agent and manager. The creditor having established these facts, it lies on the tarwad to show that the obligor was not acting within the scope of his authority in the particular instance. KUTTI MANNADIYAR *v.* PAYANU MUTHAN **[I. L. R., 3 Mad., 288**

ONUS PROBANDI—*continued.*

20. HINDU LAW—*continued.*

(*b*) ALIENATION—*continued.*

**156. ———— Alienation by ancestor.**—*Suit by heir.*—Where an heir's title to an estate is uncontested, and his possession is only obstructed by an alleged conveyance on the part of an ancestor, it lies upon the party holding possession, and who causes the obstruction, to prove that such a conveyance has taken place. KAMINEE MOHUN CHUCKERBUTTY *v.* KALEE KANT SEIN . **14 W. R., 275**

**157. ———— Subject of purchase.**—*Evidence of right and interest on purchased property.*—A purchaser of another's rights and interests is bound to show what may be properly comprised under that denomination. RAM NATH ROY *v.* SALEEM AHMED KHAN. JADOO NATH ROY *v.* SALEEM AHMED KHAN . . . . . **3 N. W., 188**

(*c*) MAINTENANCE.

**158. ———— Right in property beyond mere maintenance.**—*Right of widow exercising rights of ownership over estate of husband.*—Where the widow has been allowed to exercise acts of ownership in respect of landed property belonging to her deceased husband incompatible with a mere right to maintenance from his estate, the onus of proof that the widow is entitled to nothing beyond a bare maintenance lies upon the party asserting this. NOWINDH SINGH *v.* SOHUN KOOER . . **3 N. W., 12**

(*d*) STRIDHAN.

**159. ———— Purchase with stridhan, Proof of.**—*Hindu wife seeking to exempt property from the debts of her husband.*—A Hindu wife seeking to exempt property from responsibility for her husband's debts must clearly prove that she had stridhan, and that the property was purchased *bonâ fide* with her exclusive funds. BROJOMOHUN MYTEE *v.* RADHA KOOMAREE . . **W. R., 1864, 60**

**160. ———— Proof of property being stridhan.**—*Gift of Hindu widow.*—The burden of proving property (the subject of a gift of a Hindu widow) to be stridhan rests with those claiming under her. CHUNDER MONEE DOSSEE *v.* JOYKISSEN SIRCAR . . . . . **1 W. R., 107**

BISSESSUR CHUCKERBUTTY *v.* RAM JOY MOJOOMDAR . . . . . **2 W. R., 326**

21. HUSBAND AND WIFE.

**161. ———— Suit by wife to recover property from husband.**—*Alienation by husband of securities belonging to wife.*—In a suit by a Mahomedan wife, who had left her husband's protection on account of ill-usage, for recovery, among other property, of certain securities belonging to her which had got into the husband's possession, and the detention of which he justified on the ground that he had purchased them from her, and on their endorsement and delivery to him had paid the full value for them, the correct principle as to the onus of the

**ONUS PROBANDI**—*continued.*

21. HUSBAND AND WIFE—*continued.*

**Suit by wife to recover property from husband**—*continued.*

proof is that, although the wife may have failed to establish affirmatively the precise case alleged by her, her husband, having admitted the receipt of the securities from her, was bound to show something more than mere endorsement and delivery; that the relation of the parties being what it was, it lay upon him to prove that the transactions which he set up were *bonâ fide* sales and purchases, and that he actually gave full value for what he received from her; and where it was proved that the wife had the securities while under her husband's protection, and some had passed from her to him and others to his creditors, and that the wife left her husband's house in destitution, the proof adduced by the husband as to the sale for full consideration to him must be full and clear, and such as to satisfy a Court of Justice that the transactions were conducted fairly and properly, and with a due regard to the rights and interests of the wife. Where it was in proof that a portion of the immoveable property of the wife had passed to a *bonâ fide* purchaser under conveyances executed by the wife to her husband or to such purchaser, the burden of proof in a suit by her to recover the property is upon her, as she seeks to be relieved from the effect of her own conveyances, the execution of which she does not dispute, against one who, if not an absolute stranger, stands in no fiduciary relation to her. BUZLOOR RUHEEM *v.* SHUMSOONNISSA BEGUM. JUDOONATH BOSE *v.* SHUMSOONNISSA BEGUM **[8 W. R., P. C., 3 : 11 Moore's I. A., 551**

S. C. in High Court. BUZZUL RUHIM *v.* SHUMSHEROONNISSA BEGUM. MIRTUNJOY BOSE *v.* SHUMSHEROONNISSA BEGUM. JUDOONAUTH BOSE *v.* SHUMSHEROONNISSA BEGUM . **W. R., F. B., 60**

**162. ——— Suit by wife for property after divorce.**—*Mahomedan law.*—In a suit by a Mahomedan lady against her husband after divorce for recovery of property belonging to her which her husband held before the divorce, the possession of the husband being the possession of the wife, the onus lies on the husband to prove his right to the property; till that was done the presumption was that the property so held by the husband was held by him on behalf of the wife. ABDOOL ALI *alias* SHOAGEEA *v.* KUBRUMNISSA . . . **9 W. R., 153**

**163. ——— Suit for possession of property of which husband and wife have been tenants.**—*Nature of possession.*—In a suit to recover certain property on the allegation that plaintiff's father had obtained it in gift from his wife *L.*, and that it had been in the possession of father and son more than thirty years, defendant having had his name recorded in the Collectorate as heir to *L.*,—*Held*, with reference to the fact that there had been a tenancy of husband and wife together, that it was incumbent on plaintiff to prove that his possession was possession on his own account, and not that of an agent. VELAET ALI KHAN *v.* AZMUN **[11 W. R., 513**

**ONUS PROBANDI**—*continued.*

22. INTERVENORS.

**164. ——— Suit for rent.**—*Proof of receipt and enjoyment of rent.*—In a suit for rent under a kabuliat, if a third party intervenes and supports the defendant's case that the rents have been paid, not to the plaintiff, but to the intervenor, the onus of proving such previous receipt and enjoyment is altogether on the intervenor; and until his intervention is disposed of, the plaintiff need not prove his title or the kabuliat. RAM BHUROSE SINGH *v.* JEWA MAHATOON . **11 W. R., 319**

RADHA KISHORE TALOOKDAR *v.* GOLUCK CHUNDER ROY . . . **11 W. R., 366**

**165. ——— *Suit against person holding under decree under s. 77, Act X of 1859.***—The onus of proving title was on a plaintiff seeking to oust a person formally declared by a decree under section 77, Act X of 1859, to be in enjoyment of the rent of disputed land and consequently in possession. RUNGO MONEE DOSSEE *v.* UNNOPOORNA DEBIA . . . . . **7 W. R., 149**

**166. ——— *Suit to get rid of decision in favour of intervenor.***—In order to get rid of the effect of a Collector's decision in favour of an intervenor under section 77, Act X of 1859, the party entitled must bring a suit to establish his title, it being not enough for him merely to establish a vague allegation of dispossession and throw it upon the defendant to prove title. MOHESSUR MOOKERJEE *v.* KALEE DOSS MOOKERJEE **[11 W. R., 573**

**167. ——— *Suit after successful intervention under s. 77, Act X of 1859.***—Plaintiffs' suit for rent against the ryots of certain land alleged to belong to a mouzah (Baboolee) which they had bought at an auction sale having been dismissed in consequence of defendant's intervention, under section 77, Act X of 1859, they brought an action against her to recover possession. The defence was that the land in dispute did not belong to plaintiff's mouzah, but to defendant's mouzah, Gyrutpore. *Held* that the plaintiffs were bound to prove their own case, and to show that the land belonged to their purchased estate (Baboolee). In this case, however, both parties had consented to have the case decided on the question whether mouzah Gyrutpore was or was not in existence, and the defendant could not therefore make out a new case in special appeal. MOONDUR BIBEE *v.* HONOOMAN PERSHAD . . . **11 W. R., 277**

**168. ——— *Suit after intervention under s. 77, Act X of 1859.—Right to rent.***—Where a suit by the purchaser of an alleged lakhiraj tenure for rent from his under-tenant was thrown out by the intervention of the superior landlord, under section 77, Act X of 1859,—*Held* that all the plaintiff had to do in a regular suit brought by him in consequence, was to prove that he was entitled to the rent from the under-tenant. It was not necessary for him to prove that his land was valid lakhiraj. RAJ CHUNDER GHOSE *v.* JOY CHUNDER DUTT . . . . . **12 W. R., 197**

ONUS PROBANDI—*continued.*

22. INTERVENORS—*continued.*

**Suit for rent**—*continued.*

**169.** ——————— *Civil Procedure Code, s. 73.*—Where the plaintiff sued to recover possession of certain property which he alleged he had purchased from *H.*, and proved his purchase, and *B.*, the mother of *H.*, intervened and contended that the property was her own and purchased for herself and not on behalf of *H.*,—*Held*, the onus was on *B.* to prove the title. JAGGADANAND MISSER *v.* HAMID RASUL . 8 B. L. R., 182, note

S. C. JUGGODANUND MISSER *v.* HAMID RUSSOOL [10 W. R., 52

**170.** ——————— In a suit upon a registered kobala for possession of certain property the appellant intervened alleging a prior purchase by him from the plaintiffs' vendor, and was made a defendant. On the plaintiffs having proved their title against the original defendants, the lower Courts held that the onus was on the appellant, who was not shown to be actually in possession, to prove his allegation. *Held* that the lower Courts were right in so holding. *Jaggadanand Misser* v. *Hamid Rasul, 8 B. L. R., 182, note : 10 W. R., 52,* approved and followed. BALNIA KUNDU DUBOYE *v.* ADIKUNDA PUNDA . . . 7 C. L. R., 560

**171.** ——————— *Proof of title.*—A plaintiff who sues by right of inheritance for the recovery of lands in the possession, not illegal or forcible, of defendants, to the rents whereof it was held in a previous suit, in which he intervened, that he had not been in the actual enjoyment, is bound to prove as well his title to the estate, as his lineal descent from, or relation in such degree of contiguity as would entitle him to part succession to, the original acquirer thereof. CHYTUN MYTEE *v.* LUKHEE CHURN PATNAIK . . 8 W. R., 258

**172.** ——— **Suit for kabuliat.**—*Act X of 1859, s. 77.—Intervenor.*—In a suit to obtain a kabuliat, the defendant admitted the plaintiff's title. A third party intervened (under section 77, Act X of 1859) alleging that he was in actual receipt and enjoyment of the rent. *Held* that the onus was on the intervenor to prove that he was *bonâ fide* in actual receipt and enjoyment of the rent, and not on the plaintiff to prove his possession. BAHARULLA *v.* MAJAN . . . 3 B. L. R., Ap., 61

KISHEN CHUNDER DOSS *v.* BURATEE SHEIKH [2 W. R., Act X, 36

**173.** ——— **Suit for declaration of right.**—*Suit for usufruct of property.—Unsuccessful intervention.*—The mortgage of certain property having been purchased by *S.* he sold it to *G.* who foreclosed, got a decree for possession, and sold it to *W. W.'s* intervention having failed in a suit for arrears of rent by a party setting up a title intermediate between him and the ryot, on the ground of a miras pottah obtained from the mortgagor subsequently to the mortgage, he (*W.*) sued to have his right declared to the rents payable by the ryot.

ONUS PROBANDI—*continued.*

22. INTERVENORS—*continued.*

**Suit for declaration of right**—*continued.*

*Held* that it was not only not necessary for the plaintiff to prove possession, but the very ground he took was want of possession, his cause of action being that he was prevented from enjoying the usufruct. *Held*, also, that it was for the defendant to show that the incumbrance did not injure the outturn of the property. GOBIND CHUNDER BANERJEE *v.* WISE . . . . . 12 W. R., 19

23. LANDLORD AND TENANT.

**174.** ——— **Allegation that lands are held under different title.**—Where a ryot holds lands of considerable extent under a zemindar, and alleges that one or two plots occupied by him are held under a different title, the onus is on him to prove his allegation. RAM COOMAR ROY *v.* BEJOY GOBIND BURAL . . . . . 7 W. R., 535

**175.** ——— **Allegation of independent title.**—*Suit to confirm title.*—In a suit by the lessee of the purchaser of the rights and interests of the first defendant to obtain possession of some portions of land alleged to fall within the share of the zemindari so purchased, defendants contended that the plots which were the subject of suit, although falling within the ambit of the zemindari, did not in fact form a portion of it, but were lakhiraj lands belonging to themselves by a title independent of the title to the zemindari. The evidence showed the principal defendant to have been in receipt of the rents and profits of the land in suit, as well as of his share of the zemindari. *Held* that the onus lay upon the defendants to show the alleged independent title; failing to do so, the *primâ facie* title made out by the plaintiff ought to prevail. SHUMDAN ALI *v.* MUTHOORNATH DUTT . 14 W. R., 226

**176.** ——— **Rival tenants.**—*Resignation of tenancy.*—In a suit between two rival tenants claiming to hold under the same landlord, where one of them admitted the tenancy of the other, but pleaded resignation by him of his tenancy and a lease to himself, the onus of proof was held to rest upon him who made the allegation. KISHEN CHUNDER SHAHA *v.* HOOKOOM CHAND SHAHA [W. R., 1864, 47

**177.** ——— **Allegation of particular tenure.**—*Proof of title.*—The onus in a suit in which the plaintiff seeks to obtain a declaration that the defendants held a tenure under him lies on the plaintiff, who must prove strictly the title under which he seeks that declaration. ROYES MOLLAH *v.* MUDHOOSOODUN MUNDUL . . 9 W. R., 154

**178.** ——————— *Non-transferable tenure.*—Where a plaintiff sets up a case of an exceptional nim-ousut-howala, alleging it to be not transferable, the plaintiff should be called on to prove the allegation, before a defendant in possession, under an order of a Revenue Court, can be

**ONUS PROBANDI**—*continued.*

23. LANDLORD AND TENANT—*continued.*

**Allegation of particular tenure**—*continued.*

called on to prove title. HURRO SOONDERY DEBIA *v.* AMEENA BEGUM . **1 Ind. Jur., N. S., 188 [5 W. R., Act X, 72**

**179.** ——————— *Suit for possession under mokurrari lease.*—In a suit to recover possession of land under a mokurruari lease granted to plaintiff by the zemindar (defendant who admitted its validity) from the other defendant who had been in possession twenty years, and who also claimed a mokurrari interest,—*Held* that the onus lay with the substantive defendant to show that his lease was mokurrari. RUGHOONATH DOBEY *v.* PURESH RAM MAHATA . . . . . **10 W. R., 9**

**180.** ——————— *Khadimi tenure.*—Where persons have long held as khadims under the superior holders or managers of endowed property, and claim to hold a permanent khadimi tenure from which they are not liable to be ejected except for misconduct, the *onus probandi* is on them. CHAND MEAN *v.* KHONDKAR ASHRUTOLLAH **[6 W. R., 89**

**181.** ——————— *Allegation that lands are sír.—Sale in execution of decree.*—Where a person whose proprietary rights in a mehal have been sold in execution of a decree, alleges that land held by him at the time of such sale was held as sír, the burden of proof lies on him. HARI DAS *v.* GHANSHAM NARAIN . **I. L. R., 6 All., 286**

**182.** ——————— *Suit for possession of ayma land.—Identification by plaintiff.*—Where a plaintiff establishes a *primâ facie* case of the identity of ayma land which he claims through his ancestor, who had been allowed by the Collector to retain it, it will rest with defendant to prove that the land is his own, or that it is not the ayma land which the plaintiff's ancestor once held. MOLLA ABDOOR RUB *v.* HURRYHUR MOOKERJEE **[1 Ind. Jur., N. S., 50**

**183.** ——————— *Gorabundi tenure.—Transferability, Proof of.*—The onus lies on a plaintiff claiming in virtue of a purchase of the tenure from a former holder to be entitled to possession of gorabundi lands, to prove that such lands are transferable. CHUTTERBHUJ BHARTI *v.* JANKI PROSAUD SINGH . . . . . **4 C. L. R., 298**

**184.** ——————— *Khoti tenure, Proof of.—Suit for rent.*—In a suit by a kabuliatdar khot for rent from cultivators holding land in a khoti village, the onus does not lie on the plaintiff to prove the land to be khoti; but the holder of land in a khoti estate must prove that he is exempted from paying rent according to the custom of the country. MUHAMMAD YAKOUB *v.* MUHAMMAD ISMAIL . . . . . **9 Bom., 278**

**185.** ——————— *Suit for value of trees cut by tenant.—Nature of tenure.*—There is no presumption that orchard lands in Behar are held on a bhaoli tenure, there being many instances of orchards there held on a nukdi tenure. The onus of proving the special nature of the tenure is on the zemindar suing for the value of trees cut down, and not on the tenant-defendant. DOOMUN SINGH *v.* SOOKUN LALL . . . . . **2 W. R., 12**

**186.** ——————— *Orchard land.—Possession of planter of trees.*—Although generally it may be taken that land whereon an orchard is planted belongs to the zemindar, and has been granted to a stranger to plant trees thereon, in which case it reverts to the zemindar after the trees have disappeared and the land has become arable, yet when it is asserted that the land belongs to the planter of the orchard, having been acquired by purchase, it is for the zemindar to prove that the land belongs to him and was given for plantation; and in the absence of such proof the holder or occupant may rely on his long possession. DHUNEE RAM *v.* AMANUT HOSSEIN . . **2 Agra, Pt. II, 161**

**187.** ——————— **Suit by landlord for possession of land in his estate.**—*Right to possession.*—When a landlord sues for possession of land within his estate, the onus is on him to prove that he is entitled to that possession. GUDADHUR BANERJEE *v.* KANYE DEKHOORIA . . . **8 W. R., 191**

**188.** ——————— **Suit by talookdar purchaser at sale.**—*Dispossession and disputed title.*—A talookdar who had purchased at an execution sale the under-tenure of one of his tenants, sued him to obtain possession of the land contained in the purchased holding, of some of which he said he had been dispossessed, and in regard to the remainder of which his title was disputed. *Held* that the deputation of an Ameen was improper, and that the onus lay on the plaintiff to prove his case. SHUSTEE RAM PAUL *v.* NOBO KANT ROY CHOWDHRY **[14 W. R., 190**

**189.** ——————— **Lease of land of particular nature.**—*Proof that it came under that designation.*—Where a landlord leased out some land to a tenant, reserving to himself only such portion of it as fell under the definition of nila zamin,—*Held* that it was for the landlord, in a suit for the possession of such nila zamin, to bring evidence to prove what portion of the land leased out was nila; and that in the absence of such evidence, the whole land must be taken as having been leased out to the tenant. REILY *v.* BAMA SOONDUREE DOSSEE **[25 W. R., 398**

**190.** ——————— **Suit for possession.**—*Dispute as to ground and nature of possession.*—In a suit for possession of a portion of land on the allegation that it had belonged to plaintiff as his ancestral property up to the date of his being ousted, when the defendant, admitting the alleged possession, contended that it had been not that of an owner, but only permissive possession as that of a tenant,—*Held*

ONUS PROBANDI—*continued.*

23. LANDLORD AND TENANT—*continued.*

Suit for possession—*continued.*

that the burden of proof lay on the defendant. BOISTUB CHURN SEIN *v.* TEAHEE RAM SEIN [15 W. R., 32

191. ——— **Suit to recover share of holding after sale in execution of decree for rent.**—*Proof of status as tenant and recognition of division of tenure.*—In a suit to recover a share of a holding, the whole of which had been sold in execution of a decree for arrears of rent, the plaintiff, who claimed to hold a divided portion of the tenure, was held bound to prove either that such division had been recognised and ratified by the zemindar or that the latter received rent from him, *i.e.*, he would have to prove his status as tenant in respect of the share in question. HURHUR SINGH *v.* OOMA KOOER [16 W. R., 93

192. ——— **Exercise of right incidental to tenure.**—*Objection to right.*—When a party objects to the exercise by another of an ordinary legal right incidental to his tenure, it is for the objecting party to give some *primâ facie* evidence as to the grounds on which that objection is founded. GYARAM MUNDUL *v.* GYARAM NAIK [1 Ind. Jur., O. S., 22: Marsh., 28: 1 Hay, 65

193. ——— *Right of occupancy.—Permanent cultivators.—Suit for ejectment.*—The defendants' ancestors were the only cultivating tenants of the lands of a certain temple from the year 1829, and in a suit brought by the temple trustees against one of the defendants in 1858 it was found that the occupancy of the defendants' ancestors dated back at least to 1806. In 1833 the defendants' ancestor was recognised by the Collector, who then managed the temple, as an hereditary ryot. In the paimaish account of 1827 defendants' ancestor was described as a "cultivating parakudi ulavadai," a term which does not necessarily imply a right of occupancy. *Held*, in a suit by the trustee of the temple to eject the defendants after notice to quit, that the burden of proving that a right of occupancy was not an incident of defendants' tenure lay on the plaintiff. KRISHNASAMI PILLAI *v.* VARADARAJA AYYANGAR [I. L. R., 5 Mad., 345

194. ——— *Right of tenant to dig a tank on his land.*—In a suit by a zemindar alleging that the defendant, his tenant, had dug a tank on his land, and thereby done him damage by converting the land from its original state, and the conversion is admitted by the defendant, but his defence is that he had a right to convert it, the onus is on the defendant to show his right to dig the tank. In the absence of clear proof of the nature of his tenure, he should at least show that the digging the tank is a fair and reasonable use of the land, and one which will not be to the detriment of the zemindar. TARINI CHARAN BOSE *v.* DEBNARAYAN MISTRI [8 B. L. R., Ap., 69

ONUS PROBANDI—*continued.*

23. LANDLORD AND TENANT—*continued.*

195. ——— **Proof of zemindari rights.**—*Right to garden planted with trees.*—The owner of a bagh in an estate in which he is not possessed of any zemindari rights must, if he claim a higher right than that ordinarily possessed by a tenant planter or the successor of such a planter, produce evidence in support of his claim: but when the bagh has been admittedly planted by a zemindar and has been, on the sale of his zemindari rights, reserved by him, it is incumbent on the purchaser to prove that by the reservation the vendor reserved only the interest which a tenant-planter would have possessed in the bagh. ALI BUKSH *v.* MUDUN GOPAL [3 Agra, 369

196. ——— **Suit for assessment of lands accreted to zimma tenure.**—*Beng. Reg. VIII of 1793, s. 51.—Beng. Reg. XI of 1825.*—A suit for the assessment of lands accreted to a zimma tenure must be tried upon section 51, Regulation VIII of 1793, the burden being on the plaintiff to prove that the tenure is liable to the assessment sought; and the provisions of that law are not affected by Regulation XI of 1825, as regards the mode in which, the condition on which, and the burden of proof with which, the zemindar may proceed to assess. PANIOTY *v.* JUGGUT CHUNDER DUTT [9 W. R., 379

Upholding, on review, JUGGUT CHUNDER DUTT *v.* PANIOTY . . . . . 8 W. R., 427

197. ——— **Acknowledgment of tenancy.**—*Suit for kabuliat.*—In a suit before the Collector for a kabuliat, on the ground that the defendant had occupied and cultivated certain lands of the plaintiff, the defendant pleaded that he was coparcener with the plaintiff of the land, but he admitted that he had given a kabuliat for some of the lands he occupied. *Held* that since by giving the kabuliat the defendant had acknowledged the plaintiff to be his landlord, the onus of proving the plea was upon the defendant. JUGGOBUNDOO MOZOOMDAR *v.* GOOROOPERSAUD ROY . Marsh., 54

GOOROO PERSAD ROY *v.* JUGGOBUNDOO MOZOOMDAR . . W. R., F. B., 15: 1 Hay, 228

198. ——— **Suit by ryot for pottah at fair and equitable rates.**—The proprietors of a certain holding having refused the terms of the Government, a farming settlement was made with the present defendant, who undertook to confirm and ratify all amulnamahs granted by the zemindars while the settlement proceedings had been pending. Plaintiff being a ryot without a right of occupancy, but one who had got an amulnamah, sued for a pottah at the rate fixed by the amulnamah. *Held* that the amulnamah formed the basis of a special contract between the parties, and took their case out of the purview of the sections 5 and 8 of the Rent Law; and that by the terms of the amulnamah the defendant was bound to give plaintiff a pottah on fair and equitable rates ("upajukta"), which were to depend on the rates which he himself obtained from Government. *Held* that the onus of proving that the rate which

**ONUS PROBANDI**—*continued.*

23. LANDLORD AND TENANT—*continued.*

**Suit by ryot for pottah at fair and equitable rates**—*continued.*

he claimed was fair and equitable was upon the plaintiff. KISHEN PERSHAD SINGH *v.* MOHUN SINGH . . . . . 15 W. R., 420

199. ——— **Suit for rent.**—*Waste and lakhiraj land.*—In a suit for rent, when the ryot pleads that part of the land is waste and lakhiraj, the onus is on the landlord to prove that such land has paid rent to him in previous years. MOTEE LALL ADUCK *v.* JUDOOPUTTEE DOSS [2 W. R., Act X, 44

GUMANI KAZI *v.* HARIHAR MOOKERJEE [B. L. R., Sup. Vol., 15: W. R., F. B., 115 Marsh., 527

MIRTOONJOY CHUCKERBUTTY *v.* BURODA KANT ROY . . . . . 6 W. R., Act X, 18

BISSESSUR CHUCKERBUTTY *v.* WOOMA CHURN ROY . . . . . 7 W. R., 44

200. ——— *Plea of payment.*—In a suit for rent if the tenant pleads payment the *onus probandi* is on him. PUREEAG LALL *v.* RAM JEWAN LALL . . . 1 W. R., 264

KOONJO BEHARY BANERJEE *v.* ROY MOTHOORANATH CHOWDHRY . . 1 W. R., 155

201. ——— *Intervenor.*—*Plea of payment.*—In a suit for rent where defendant denies the relationship of landlord and tenant as subsisting between himself and the plaintiff, and states that he paid his rent to an intervenor, it is not enough that the intervention is set aside; it still remains for the Court to investigate the question whether the defendant is a ryot of the plaintiff. JAGURDEE *v.* RADHA KISHORE . 13 W. R., 259

202. ——— *Eviction of tenant by title superior to lessor.*—Where a tenant is sued for rent he can set up eviction by title paramount to that of his lessor as an answer, and if evicted from part of the land an apportionment of the rent may take place. The onus is on the lessor who claims to be entitled to an apportionment to show what is the fair rate of the lands out of which the tenant was not evicted. GOPANUND JHA *v.* LALLA GOBIND PERSHAD . . . . . 12 W. R., 109

203. ——— *Suit under special arrangement.*—In a suit for rent alleged to be due under a particular arrangement, the existence of which is repudiated by defendant, it is for plaintiff to prove the arrangement. SHUMBHOO GEER GOSSAIN *v.* RAM JEWAN LALL . . 8 W. R., 509

204. ——— *Rent of whole tenure.*—*Suit by shareholder.*—In a suit for rent by a shareholder where the defendant contends that he is not bound to pay otherwise than by entirety to the person entitled to the whole rent the onus is on the plaintiff to show that he is entitled to sue for a fractional portion. LALUN *v.* HEMRAJ SINGH [20 W. R., 76

**ONUS PROBANDI**—*continued.*

23. LANDLORD AND TENANT—*continued.*

**Suit for rent**—*continued.*

205. ——— *Evidence.*—*Plea of payment.*—In a suit by a landlord against his tenant for arrears of rent due for a portion of the year 1283 (1876), the defendant pleaded payment and called as his witness the plaintiff's agent, who admitted the receipt of certain payments from the defendant's under-tenants during the time for which the arrears were demanded; but swore that they were payments made in respect of arrears due on account of previous years. The lower Appellate Court, reversing the decree of the Court of first instance, gave the defendant credit for the payments so admitted. *Held* that the lower Appellate Court was wrong; that the defendant having pleaded payment was bound to prove that the admitted payments were in respect of that portion of the year 1283 for which the arrears were claimed. Section 12 of the Rent Law applies to receipts given directly by the landlord to the tenant, and not to receipts given to third persons. SYEFUN *v.* RUDDER SOHAY . . I. L. R., 7 Calc., 582

206. ——— *Proof of determination of tenancy.*—*Beng. Act VIII of 1869, s. 20.*—The defendant held under a lease from the plaintiff which expired in 1867, when he gave up possession without any notice. In a suit subsequently brought against him for arrears of rent of 1867, 1868, and 1869,—*Held* that the onus was on the plaintiff to prove that the defendant held on after the term of the lease had expired. No written notice of relinquishment was necessary. Section 20, Bengal Act VIII of 1869, did not apply. TILAK PATAK *v.* MAHABIR PANDAY [7 B. L. R., Ap., 11: 15 W. R., 454

207. ——— **Suit for arrears of rent.**—*Proof of rate of rent.*—In a suit to recover arrears of rent from the defendants who, as ticcadars of the plaintiff's share in a certain mouzah, had been in possession from 1262 to 1281, without having paid any rent, the plaintiff who claimed a bhowli rent at the rate of 9 annas of the crop, proved that in the mouzah in question the ryots paid rent at that rate. *Held* that, under the particular circumstances, the onus was on the defendants who alleged that the proper rate was 8 annas to prove their allegation. LOCHUN CHOWDHRY *v.* ANUP SINGH [8 C. L. R., 426

208. ——— *Alleged possessions of portions only of land.*—In a suit to recover arrears of rent under a kabuliat the defendant who had paid rent for upwards of four or five years pleaded that he had obtained possession of portions only of the lands demised. *Held* (reversing the decision of FIELD, *J.*) that the onus was upon the defendant. BANY MADHOB MOOKERJEE *v.* SRIDHUR DEB GHUTTUCK . . . . . 10 C. L. R., 555

209. ——— **Suit for ejectment and for arrears of rent.**—*Disputed rate of rent.*—In a suit for arrears of rent, and for ejectment in consequence of non-payment, where defendant challenged

**ONUS PROBANDI**—*continued.*

23. LANDLORD AND TENANT—*continued.*

**Suit for ejectment and for arrears of rent**—*continued.*

the rate claimed as well as plaintiff's right to sue alone,—*Held* that the onus lay on plaintiff to prove his claim to the rate of rent sued for and to show that he was sole proprietor. ASHRUF *v.* RAM KISHEN GHOSE . . . . **23 W. R., 289**

**210.** ——— **Suit for ejectment.**—*Ground for retaining possession, Proof of.*—In a suit for ejectment by landlord against tenant after proof of due service of notice, the onus is on the tenant to show any ground for retaining possession. NUBO COOMAR GHOSE *v.* OOZIR SHIKDAR **[23 W. R., 238**

**211.** ——— *Nature of tenure, Evidence of.*—In a suit in ejectment valued under R100, the defendants, who were sued as yearly tenants, replied that their tenure was a mirasi gujasta tenure, and in proof of their allegation adduced evidence which was not displaced by the plaintiffs. The lower Courts considered that defendant's allegation was well founded. *Held* that there being evidence of the defendant's allegation, the plaintiffs, having failed to make out a *primâ facie* case, were not entitled to a decree for ejectment. BYJI NATH SAHOO *v.* RAMDOUR ROY . . **7 C. L. R., 369**

**212.** ——— *Suit by landlord to eject tenant on expiration of tenancy.*—Where a landlord sues to eject a ryot on the ground of his tenancy having expired, the tenant is not called upon to state the character of his tenancy until the plaintiff has given *primâ facie* proof that it is of a terminable character and that it has terminated. *A.* sued to eject *B.*, on the ground that a temporary settlement effected with him had expired. *B.* set up a gujasta title to the land. The lower Courts disbelieved plaintiff, but called on *B.* to support the title he had set up, and he failing to do so, gave *A.* a decree. *Held* that *A.'s* suit should have been dismissed when it was found that the evidence he put forward was unworthy of credit. BULLEE AHEER *v.* NISHAN SINGH . . **3 C. L. R., 209**

**213.** ——— *Suit to eject tenant holding over after expiry of lease.*—In a suit to eject a tenant holding over after the expiry of a pottah which was merely for a number of years, the onus is on the landlord to show that the tenure was such that the express limit of years may be fairly applied to the possession and construed to give the right of re-entry. ROY ODYTE NARAIN SINGH *v.* UBHURUN ROY . . . **4 W. R., Act X, 1**

SHEEB DYAL PAULEET *v.* DWARKANATH SOOKUL **[2 W. R., Act X, 54**

**214.** ——— *Right of occupancy.*—Where a tenant holding under a terminable lease which does not provide for re-entry makes no allegation of previous possession, and there is no admission of it on the other side, the tenant is bound to go out at the expiration of his term; and if he claims

**ONUS PROBANDI**—*continued.*

23. LANDLORD AND TENANT—*continued.*

**Suit for ejectment**—*continued.*

a right of further occupancy, it is for him to prove that right. PUDDOMONEE DOSSIA *v.* JHOLLA PALLY **[7 W. R., 283**

**215.** ——— *Ejectment.*—*Right of occupancy.*—In a suit by a zemindar against a ryot for recovery of possession of land, of which the plaintiff alleged he had granted the defendant a lease and taken a kabuliat, and that the lease had expired, the defence was that the defendant did not hold under any lease from the plaintiff, that the kabuliat was not genuine, and that the defendant by his holding had acquired a right of occupancy. *Held*, the onus was on the plaintiff to prove the kabuliat, and not on the defendant to prove that he had acquired a right of occupancy. Therefore, where the plaintiff failed to prove the kabuliat, the suit was held to be rightly dismissed though the defendant failed to show any right of occupancy. WALLAH ALLEE *v.* GOLAM GOUS **[10 B. L. R., Ap., 32 : 19 W. R., 215**

**216.** ——— *Refusal to quit after notice.*—In a suit by a zemindar to obtain khas possession of land within his estate, if a defendant is a middleman the right of plaintiff follows as a matter of course, unless defendant can make out his claim to exclude the zemindar; but if defendant is a ryot, plaintiff must show some cause of action beyond the bare circumstance of defendant's refusal to quit after notice under Act X of 1859. He must show that the ryot is of a class liable to eviction. LALLA JOYNATH SAHEB DEO *v.* LUTCHUN CHRISTIAN **[16 W. R., 158**

*See* PRAHLAD SEN *v.* DURGAPRASAD TEWARI **[2 B. L. R., P. C., 111 : 12 W. R., P. C., 6 12 Moore's I. A., 286**

**217.** ——— *Suit under Act X of 1859, s. 23, cl. 5.*—In a suit under clause 5, section 23, Act X of 1859, the question of illegal ejectment was the only question for adjudication. The onus in such a case was upon the plaintiff. ASGUR *v.* GOLUCK CHUNDER CHOWDHRY . **8 W. R., 383**

**218.** ——— **Suit for possession by tenant.**—*Appropriation of crops by another tenant.*—In a suit to recover possession where a plaintiff had held over the term of his lease and raised a crop which was appropriated by defendant (an adjacent tenant), on the ground that the disputed land was his alluvion,—*Held* that the onus lay upon the defendants (tenant and zemindar) to show that the land held by the plaintiff was removed from the control of the owner of the estate by circumstances which brought it under the control of the defendant-tenant. HEMA PANDEY *v.* GUJADHUR ROY **[24 W. R., 108**

24. LEGITIMACY.

**219.** ——— **Proof of legitimacy.**—*Proof of heirship depending upon illegitimacy of defend-*

**ONUS PROBANDI**—*continued.*

24. LEGITIMACY—*continued.*

**Proof of legitimacy**—*continued.*

*ant.—Suit for possession.*—The plaintiffs in a suit to eject the defendant from land of which he was in actual possession having to prove not only their relationship (which was not disputed), but their heirship, which depended upon the illegitimacy of the defendant, were held bound to give sufficient general evidence in support of their case, to throw upon defendant the onus of proving his legitimacy. MAHOMED GOUR ALI KHAN *v.* ASHRUFFOONISSA **[2 W. R., P. C., 13 : 9 Moore's I. A., 492**

MAHOMED GOUR ALI KHAN *v.* AHMED KHAN **[2 W. R., P. C., 13 : 9 Moore's I. A., 504**

25. LIMITATION AND ADVERSE POSSESSION.

**220. ——— Plea of limitation.**—When a defendant pleads limitation, the *onus probandi* is on the plaintiff. BROJENDRO COOMAR ROY CHOWDHRY *v.* RADHA GOBINDO SHAH . **1 W. R., 235**

COLLECTOR OF RUNGPORE *v.* PROSUNNO COOMAR TAGORE . . . . . **5 W. R., 115**

PANDURANG GOVIND *v.* BALKRISHNA HARI **[6 Bom., A. C., 125**

KUMOLA DASSEE *v.* AZMUR ALI . **7 W. R., 13**

NOBOKISHORE DEY *v.* RAMKISHEN **[9 W. R., 131**

BHILOO MUNDUL *v.* MOTEE LALL GHOSE MUNDUL **[9 W. R., 251**

GOSSAIN DOSS KOONDOO *v.* SIROO KOOMAREE DEBIA . **12 B. L. R., 219 : 19 W. R., 192**

GHOGOOLEE *v.* MUZHUR HOSSEIN **[24 W. R., 389**

**221. ——— Limitation.**—*Suit for possession.—Dispossession.—Cause of action.*—In a suit between two zemindars, the appellant sought to disturb the admitted possession for about eleven years of the defendant. The defendant insisted on a possession of much longer duration as a statutory bar to the suit. *Held* that the onus was on the appellant to prove that the cause of action accrued to him on a dispossession within twelve years before suit, and that he, or some other person through whom he claims, was in possession during that period. MITRASUR SINGH *v.* NUND LOLL SINGH . **1 W. R., P. C., 51**

S. C. NITRASUR SINGH *v.* NUND LALL SINGH **[8 Moore's I. A., 199**

SIDHEE NUZEER ALI KHAN *v.* WOOMESH CHUNDER MITTER . . . . **2 W. R., 75**

MAHOMED HOSSEIN *v.* SURAHTOONISSA KHANUM **[2 W. R., 89**

KEDARNATH ACHARJEE *v.* BHUGWAN CHUNDER NUNDEE . . . . . **2 W. R., 153**

GOOROODOSS ROY *v.* HURONATH ROY **[2 W. R., 246**

JUGODUMBA CHOWDHRAIN *v.* RAM CHUNDER DEO **[6 W. R., 327**

**ONUS PROBANDI**—*continued.*

25. LIMITATION AND ADVERSE POSSESSION—*continued.*

**Limitation**—*continued.*

BOOLEE SINGH *v.* HUROBUNS NARAIN SINGH **[7 W. R., 212**

LALL SINGH *v.* MODHOOSOODUN DAY **[8 W. R., 36**

DINOBUNDHOO SUHAYE *v.* FURLONG **[9 W. R., 155**

BUSSEEROONISSA CHOWDHRAIN *v.* LEELANUND SINGH . . . . . **14 W. R., 135**

AMEER ALI *v.* INDERJEET KOOER **15 W. R., 43**

KALEE NARAIN BOSE *v.* ANUND MOYEE GOOPTA **[21 W. R., 79**

**222. ——— Adverse possession.**—*Proof of loss of title by.—Held* by the Privy Council (affirming the judgment of the High Court) that, where the plaintiff has established his title to land, the burden of proving that the plaintiff has lost that title by reason of the adverse possession of the defendant is upon the defendant. RADHA GOBIND ROY *v.* INGLIS . . . **7 C. L. R., 364**

**223. ——— *Joint ancestral property.—Limitation.—Held*** that the admission of certain property being joint ancestral throws the burden of proving exclusive and adverse possession beyond limitation upon the sharer refusing to admit other heirs. DABEE SUHAI *v.* SHEO DASS RAI **[1 Agra, 285**

**224. ——— *Suit for possession.***—Where a defendant pleads partly title and partly purchase, and asserts his own possession on ancient titles, denying that the plaintiff's father or ancestor had been in possession of any portion of the land in dispute for a very long period, the onus of proving possession within the period of limitation is on the plaintiff. ISHUR CHUNDER BISWAS *v.* BISSUMBHUR BISWAS . . . . . **W. R., 1864, 107**

KEDARNATH MOOKERJEE *v.* MOHESH CHUNDER PAULIT . . . . . **1 W. R., 67**

**225. ——— *Suit for possession.—Proof of adverse possession.***—In a suit to recover possession, where defendants plead limitation, and plaintiff proves that the commencement of the possession of the party through whom defendants' claim was as tenant, it is for those who set up the plea of limitation to show when the nature of that possession was changed, and how it became adverse. RAMDHUN SATRA *v.* NOBIN CHUNDER CHOWDRY **[12 W. R., 250**

**226. ——— *Suit for possession.—Limitation.***—Where a plaintiff brought a suit in 1856 to recover landed property which was in the possession of the defendant since 1845, and at the time of the institution of the suit, it was held that before the plaintiff could recover he must prove, first, possession within twelve years before suit; and,

ONUS PROBANDI—*continued.*

25. LIMITATION AND ADVERSE POSSESSION—*continued.*

Adverse possession—*continued.*

secondly, title to possession. BEER CHUNDER JOBRAJ *v.* DEPUTY COLLECTOR OF BHULLOOAH [13 W. R., P. C., 23

227. ——— *Benami transaction.—Limitation.*—In a suit for immoveable property under a kobala more than twelve years old, where defendant pleads that plaintiff was only a benamidar and was never in possession, plaintiff must prove not only title but also possession within twelve years of the filing of the suit. KEDARNATH MAHATA *v.* KADUMBINEE DEBEA . . 10 W. R., 239

228. ——— *Suit for possession.—Limitation.*—In a suit for possession of land on the ground that it belonged to plaintiff's talook, where defendant pleaded limitation,—*Held* that the burden lay with the plaintiff to prove that he had possessed (*i.e.*, enjoyed the land) within twelve years of the suit. RAM LOCHUN CHOWDHRY *v.* JOY DOORGA DOSSIA . . . . . 11 W. R., 283

229. ——— *Suit for possession.*—The plaintiff's ancestors having been declared by a decree of the Peishwa's Government in 1722 to be entitled to the whole of the patilki watan of Panderai and the defendants having a watan patra from the Raja of Satara in 1742 in favour of their claim to a half share, but being unable to show that their ancestors had any concern with the watan for a period of ninety-six years subsequent thereto, during which the plaintiff's ancestors were recognised as owners,—*Held* that the onus was on the defendants to show sufficient adverse possession previous to suit as to entitle them to the property. AMRITRAV P. KOKDI *v.* MANAJI J. JAGTAP . . 3 Bom., A. C., 49

230. ——— *Suit to recover possession of land.—Limitation.*—A suit to recover possession of an unenclosed piece of ground must be brought within twelve years from the time the cause of action accrued, and in deciding this the issue is, not that the plaintiff must show that he exercised some right of ownership over the ground within the twelve years preceding the filing of the action, but that twelve years have not elapsed between the day the defendant interfered with the plaintiff's possession and the date on which the plaintiff filed his claim. SAGANGOWDA BIN BASANGOWDA *v.* BASAPA BIN CHENAPA . . . . . 9 Bom., 62

231. ——— *Limitation.—Settlement.*—In a suit for possession, where defendant denies plaintiff's title and sets up a defence involving the plea of limitation, the question of limitation does not depend upon whether defendant was in possession, but upon whether plaintiff was in possession. Where defendant admitted that the permanent settlement was ordered to be made with the party in possession, and that it was made within twelve years prior to the suit with the party from whom plaintiff claimed,—*Held* that, until the contrary was shown, that party was rightly presumed to be in possession, and plaintiff's claim was not barred by limitation. MAHOMED KOBEER *v.* ABDOOL AZEEM [24 W. R., 315

232. ——— *Suit for possession.—Proof of title.*—In a suit to obtain possession, where defendant pleads limitation, plaintiff is bound not only to prove his title, but also to show affirmatively that his cause of action accrued within twelve years before the commencement of the suit; and he must succeed upon the strength of his own title, not upon the weakness of his opponent's. LUTCHOO KHAN *v.* FOLEY . 24 W. R., 273

233. ——— *Suit for possession.—Limitation.*—In a suit for possession of land the defendants claimed to hold under a valid miras tenure so as to be entitled to the ground rent from the ryots, and to pay the plaintiff who was the superior landlord merely the miras rent. *Held* that the plaintiff being admitted to be landlord, the onus was upon the defendants to prove either that they had a valid miras tenure, or that they had held adversely to the plaintiffs as mirasdars for more than twelve years, and that the plaintiffs had notice of such adverse holding. *Prahlad Sen* v. *Budhu Sing, 2 B. L. R., P. C., 111,* cited and followed. OGRA KANT CHOWDHREE *v.* MOHESH CHUNDER SICKDAR [4 C. L. R., 40

234. ——— *Dispossession.—Presumption.—Onus probandi.—Limitation.—Joint owners, Adverse possession between.*—Under the former Limitation Act the cause of action, and under the present law the event from which limitation is declared to run, must have occurred within the prescribed period, and it lies on the plaintiff to show this. Accordingly, where the suit is for possession, and the cause of action is dispossession, the plaintiff is bound to prove possession and dispossession within twelve years. Possession is not necessarily the same thing as actual user. When land has been shown to have been in a condition unfitting it for actual enjoyment in the usual modes, at such a time and under such circumstances that that state naturally would, and probably did, continue till within twelve years before suit, it may properly be *presumed* that it did so continue, and that the previous possession continued also until the contrary is proved. Such a presumption is in no sense a conclusive one. Its bearing upon each particular case must depend upon the circumstances of that case. Many acts which would be clearly adverse, and might amount to dispossession as between a stranger and the true owner of land, would, between joint owners, naturally bear a different construction. MAHOMED ALI KHAN *v.* ABDUL GUNNY [I. L. R., 9 Calc., 744: 12 C. L. R., 257

235. ——— *Suit for possession.—Previous dispossession.—Limitation.—Evidence.*—In every suit for the recovery of land, on

ONUS PROBANDI—*continued.*

25. LIMITATION AND ADVERSE POSSESSION—*continued.*

Adverse possession—*continued.*

the allegation of previous dispossession by the defendant, the plaintiff must start his case by showing that, at some time within twelve years previous to the institution of the suit, he has been in possession of the land sued for. *Perhlad Sein* v. *Rajender Kishore Singh, 12 Moore's I. A., 337; Dawkins* v. *Lord Penrhyn, 4 App. Cases, 951;* and *Noyes* v. *Crawley, 10 Ch. D., 31-36,* cited. BHOOTHNATH CHATTERJEE *v.* KEDARNATH BANERJEE . I. L. R., 9 Calc., 125

236. ——————— *Suit for possession.—Previous dispossession.—Limitation.*—Where, in a suit for the recovery of land based on title, the plaintiff alleges that he has been in possession of the land and was dispossessed therefrom by the defendant within twelve years prior to the institution of the suit, mere proof of such possession will not be sufficient to entitle the plaintiff to a decree. *Wise* v. *Ameerunnissa Khatoon, L. R., 7 I. A., 73,* followed. *Kawa Manji* v. *Khowaz Nussio, 5 C. L. R., 278,* disapproved. ERTAZA HOSSEIN *v.* BANY MISTRY . I. L. R., 9 Calc., 130: 11 C. L. R., 393

237. ——————— *Ejectment, Suit for.—Limitation.*—In an action of ejectment the plaintiff need not fail merely because he cannot prove that he has been in possession of the land claimed within twelve years; he must show that his cause of action (that is, the taking possession of the land by another person) has accrued within that period. PANDURANG GOVIND *v.* BALKRISHNA HARI . . . . . 6 Bom., A. C., 125

238. ——————— *Suit for possession.—Ejectment.—Evidence.—Previous possession.*—Where, in a suit for possession of land, the plaintiff proves merely that he has been in possession of the disputed land at some time within twelve years previous to the filing of the plaint, such evidence is not sufficient to throw upon the defendant the burden of proving his title to the land. *Wise* v. *Amirunnissa Khatoon, L. R., 7 I. A., 73,* followed; and *Gour Paroy* v. *Wooma Soondurse Debia, 12 W. R., 472,* cited. DEBI CHURN BOIDO *v.* ISSUR CHUNDER MANJEE [I. L. R., 9 Calc., 39: 11 C. L. R., 342

239. ——————— *Ejectment, Suit for.—Proof of possession.—Dispossession.*—In an ejectment suit, where the plaintiff claims land from which he alleges that he has been dispossessed, the general rule is that the burden is upon the plaintiff to show possession and dispossession within twelve years, or, at least, that the cause of action arose within twelve years, and this rule is not intended to be interfered with by the Privy Council in *Radha Gobind Roy* v. *Inglis, 7 C. L. R., 364.* MORO DESAI *v.* RAMCHANDRA DESAI . I. L. R., 6 Bom., 508

240. ——————— *Right of Crown to waste lands.—Title suit by Crown for declaration of title and possession.*—Assuming that the Crown has the right to oust any person who, without sanction, occupies waste land which has not been appropriated for any public purpose, it cannot, by a suit brought for a declaration of title or for ejectment, the date at which the cause of action arose not being stated in the plaint, compel a defendant to prove possession for sixty years. As a general rule, a plaintiff must not only show he has a title, but that he has a subsisting title, which he has not lost by the prescriptive sections of the Limitation Act. The probable explanation of the ruling in *Radha Gobind Roy's case, 7 C. L. R., 364,* is, that when a plaintiff proves title and possession, it is to be presumed that his possession continues till the defendant proves that the possession was interrupted, but that where the plaintiff can prove title only, and not possession, he must prove that the adverse possession of the defendant, or the acts of which he complains as impugning his title, occurred within the period prescribed by the Limitation Act. SECRETARY OF STATE FOR INDIA *v.* VIRA RAYAN . . I. L. R., 9 Mad., 175

241. ——————— *Dispossession.—Ejectment.—Evidence.—Proof of title.*—In June 1878 the plaintiff sued the defendant for the recovery of possession of certain land. At the trial it was proved that he had been continuously in peaceable possession of the land until the month of May 1878, when he was forcibly and illegally dispossessed by the defendant. *Held* that the evidence was sufficient to call upon the defendant to show his title to the land. MOHABEER PERSHAD SINGH *v.* MOHABEER SINGH [I. L. R., 7 Calc., 591: 9 C. L. R., 164

242. ——————— *Suit for possession after wrongful dispossession.—Proof of title.*—In a suit for possession, it was found that the plaintiff had been in possession within twelve years from the institution of the suit, but he had been wrongfully dispossessed by the defendant. The plaintiff was unable to prove possession previous to being ousted for a longer period than eleven years. *Held* that the ouster by the defendant having been wrongful, the onus was not thereby shifted to the plaintiff, and that under the circumstances the defendants were bound to prove their title. See *Mohabeer Pershad Singh* v. *Mohabeer Singh, I. L. R., 7 Calc., 591: 9 C. L. R., 164.* BROJO SUNDER GOSSAMI *v.* KOILASH CHUNDER KUR [11 C. L. R., 133

243. ——————— *Suit for possession where defendants have been long in possession.—Limitation.*—In a suit by Government against ghatwals, the defendants were found to have been in possession "for a very long time," and although they had failed to prove possession in excess of sixty years, the onus was held to lie on the Government to prove possession within sixty years. BROMANUND GOSSAIN *v.* GOVERNMENT . . 5 W. R., 136

244. ——————— *Limitation.—Boundaries.*—No proof of anterior title in the claim-

ONUS PROBANDI—*continued.*

25. LIMITATION AND ADVERSE POSSESSION—*continued.*

Adverse possession—*continued.*

ant such as would be involved in the decision of a question of boundaries in his favour can relieve him of the burden of proving that he was in possession within twelve years prior to suit, or shift it upon his adversaries so as to compel them to prove the time and manner of his dispossession. TARA SINGH *v.* CHAIDA MULL . . . . 2 Agra, 177

245. ——————— *Limitation.—Suit by reversioner to set aside alienation by widow.*—In a suit for possession by the purchaser of the right of a reversioner to the estate of a widow, which was instituted within one day of the extreme time of twelve years allowed by the Law of Limitation, reckoning from the alleged date of the widow's death,—*Held* that it was necessary, under such circumstances, for the plaintiff, in order to rebut the plea of limitation, to prove, not only that the widow died on the date alleged, but that she actually held possession up to the time of her death. KALEE NATH *v.* JOY DOORGA DOSSEE . 11 W. R., 173

*246. ——————— *Suit for possession.—Limitation.—Chur lands.*—In a suit to recover possession of land under cultivation, when the defendant pleads adverse possession, it is, under ordinary circumstances, for the plaintiff to show *primâ facie* that the cause of action upon which he is suing is not barred by limitation, and not for the defendant to prove his adverse possession in the first instance. When a suit is brought for possession of jungly or unculturable lands, or lands which have never been under cultivation, the rule is different, and the defendant must establish his adverse possession for more than twelve years. When a suit is brought for possession of chur or other land under cultivation at the time of the institution of the suit, but previously jungly or unculturable, the *onus probandi* still lies on the plaintiff; but on his proving that the chur was formed, or the land first became culturable, within twelve years before he instituted his suit, the onus is shifted to the defendant, who must establish his adverse possession for more than twelve years. MAHOMED IBRAHIM *v.* MORRISON [I. L. R., 5 Calc., 36

247. ——————— *Suit for possession of land after submersion.—Limitation.*—Where the suit was for possession of certain land, on the allegation that it was land belonging to plaintiff's village, but submerged at the time of settlement, if the plaintiff could show the identity of the land submerged with the land which has since been left dry, the onus is on the defendant to show that some other person had been in adverse possession for twelve years before the plaintiff preferred his claim, and that such adverse possession commenced from a time when plaintiff was in a position to dispute it. HUR SAHAI *v.* MAHOMED DAIM KHAN [2 Agra, 64

248. ——————— *Accreted lands.—Re-survey of lands.*—In a suit in which plaintiff claimed some land as an accretion to his estate, but in which defendant claimed the said land as forming part of his estate according to the survey of 1846, and an Ameen reported that, though an erroneous survey in 1865 included the said land in plaintiff's estate, yet, in the earlier survey, it had been thaked as defendant's, who indeed had obtained a decree for it against the Government,—*Held* that, before plaintiff could be entitled to a decree for the land in suit, he must establish facts which, according to the law of accretion, would be sufficient not only to extinguish defendant's title, but also to create a right in plaintiff's favour: the mere circumstance of the survey of 1865 including the said land in plaintiff's estate not being sufficient proof of the facts to be found. MOWLA KOOMAREE *v.* MUTTY SINGH . 25 W. R., 129

249. ——————— *Suit for possession of alluvial land.—Evidence of possession in absence of landmarks.*—The plaintiff sued to recover a tract of chur land as parcel of his mouzah of J., the defendant alleging the said land to be a parcel of his mouzah of G. About the year 1830, a large tract of land was diluviated by the River Chutol within the mouzahs belonging respectively to the plaintiff and defendant, and after re-formation in 1837 a proceeding was taken by the plaintiff before the Magistrate under which he was ordered to be put in possession of a considerable tract of such newly-formed land, the Magistrate laying down the boundaries. After nearly twelve years (*i.e.*, in 1849) the defendant's father brought a civil suit to set aside the Magistrate's decision, and the ultimate finding was that the plaintiff had been in possession of the land described in the Magistrate's order from and since the date of that order. *Held* that that decree must be taken to have established that the plaintiff was in possession of the land described in the Magistrate's order, and had continued in such possession: the question in the present suit being whether the lands now claimed are identical with those so described. *Held*, also, that the onus of proving that issue lay upon the plaintiff, because the foundation of his suit was that, having been in possession, he was dispossessed as a consequence of certain measurements made by Government officers. *Held*, further, that plaintiff had failed to sustain the burden of proof. He relied principally on the boundaries given by the Magistrate and certain maps prepared then and later as compared with the Government map of 1853: but their Lordships were unable to place firm reliance upon any inference drawn from these maps. Their Lordships were also of opinion that in questions of this kind, where the natural boundaries and landmarks have disappeared, evidence of possession was very important and satisfactory, and that there was no reason to distrust the witnesses of the respondent proving such possession. GRIJA KANT LAHORY CHOWDHRY *v.* HURISH CHUNDER CHOWDHRY . . 19 W. R., P. C., 114

250. ——————— *Right to alluvial land.—Change in course of river.—Boundaries.*

ONUS PROBANDI—*continued.*

25. LIMITATION AND ADVERSE POSSESSION—*continued.*

**Adverse possession**—*continued.*

—*Disputed settlement.*—At the permanent settlement the River Gunduck divided mouzah Sohagpore (zillah Tirhoot) from the village of Dumri (zillah Sarun). In 1837 the river got into its southern channel, and a quantity of chur land to the north was resumed by Government and settled with the zemindars of Sohagpore. In 1846 it was again settled with the same zemindars, who remained in possession until 1848, when the river having returned to its northern channel the deara land was claimed by proprietors on the southern or Sarun side of the river: the consequence was an Act IV of 1840 suit which was decided in favour of the zemindars of Sohagpore. In 1856, on the expiry of the last temporary settlement, the question arose with whom Government should engage for the revenue, and it was finally decided by the Board of Revenue that a settlement should be made with the zemindars of Dumri, who accordingly obtained possession. The Board's decision proceeded on two principles,—*viz.*, that a usage existed that the main channel of the Gunduck should be the boundary of the zemindaries, and that therefore the interest of the zemindars of Sohagpore had been of a limited, temporary, and conditional character. These zemindars then brought a suit to impeach this settlement and to recover possession. After decision, appeal, and remand, it was finally decided by the High Court that the land in dispute was identical with that formerly settled with the maliks of Sohagpore, who (it was assumed) had a permanent proprietary interest therein. *Held* that the proper issues to be tried were: first, whether the land had been settled in 1837 with the maliks of Sohagpore as proprietors of alluviums which had gradually accreted to their estate, or upon what other grounds such settlement was made, the onus of proving gradual accretion being on the plaintiffs; and, secondly, whether there was at the permanent settlement, and has been since, a clear and definate usage such as supposed by the Board of Revenue, the burden of proving the affirmative of this being on the defendant. RAJENDUR PERTAB SAHEE *v.* LALLJEE SAHOO . . . . **20 W. R., P. C., 427**

**251.** ——————— *Alluvial land after diluvion.—Re-formation of chur land.—Limitation.*—In a suit for possession of chur lands as re-formations on the original site of plaintiff's or his vendor's lands, or accretions thereto, where limitation is pleaded by defendant in adverse possession, the onus lies on plaintiff to prove that, before disappearance or diluvion, the land in dispute was in the possession of his vendor. GOKOOL KRISTO SEN *v.* DAVID . . . . . **23 W. R., 443**

The evidence to be given and the onus of proof in cases of re-formed chur lands was also discussed in AUKHIL CHUNDER CHOWDHRY *v.* DELAWAR HOSSEIN . . . . . **6 C. L. R., 93**

**252.** ——————— *Re-formation on old site of lands after diluvion.—Limitation.*—Where, in a suit for possession of lands which have re-formed upon the old site after diluviation, the defendant relies upon a statutory title of twelve years' possession, the plaintiff, in order to succeed, must, according to the rule laid down in the case of *Nitrasur Singh* v. *Nund Loll Singh, 8 Moore's I. A., 199,* prove satisfactorily that the defendant has not been in possession for the period of twelve years next preceding the commencement of his suit. And where the evidence is not sufficient to support an affirmative finding that the whole of the lands claimed have re-formed within twelve years preceding the institution of the suit, it is incumbent on the plaintiff to show specifically the portion, if any, which has not so re-formed. *Per* JACKSON, *J.*—I am unable myself to see on what principle or by what means the Court could of itself undertake to divide the portion of the land which may have re-formed within twelve years from the larger part which evidently re-formed more than twelve years ago, and had been in the adverse possession of the defendants. RUNJIT SINGH *v.* SCHOENE, KILBURN, & Co. . . **4 C. L. R., 390**

**253.** ——————— *Diluvion.—Possession on re-formation.—Subsequent diluvion.—Possession, Suit for.—Per* GARTH, *C. J.*—Where a person can show that he has been in possession of certain lands prior to such lands becoming diluviated, his possession must be considered as continuing during the time of diluvion, until such time as he becomes dispossessed by some other person; and in such a case, the onus lies upon the dispossessor to show that he has acquired a title under the law of limitation which has put an end to the rights of the original possessor. *Nitrasur Singh* v. *Nund Loll Singh, 8 Moore's I.A., 199;* and *Radha Gobind Roy* v. *Inglis, 7 C. L. R., 364,* distinguished. KALLY CHURN SAHOO *v.* SECRETARY OF STATE FOR INDIA **[I. L. R., 6 Calc., 725: 8 C. L. R., 90**

**254.** ——————— *Suit for possession of land.—Presumption of possession and ownership.*—If, in a suit for possession of land which was covered with water more than twelve years before the institution of the suit, the plaintiff proves that he exercised acts of ownership, as by letting out the julkur to tenants, that is *primâ facie* evidence of possession and ownership; and unless the defendant can make out a twelve years' statutory title by adverse possession, the plaintiff's possession must be presumed to have continued, and it is not necessary for him to show a possession by acts of ownership within the twelve years. MOHINY MOHUN DAS *v.* KRISHNO KISHORE DUTT **[I. L. R., 9 Calc., 802: 12 C. L. R., 337**

**255.** ——————— *Alluvion and diluvion.—Title.—Limitation.—Acts of ownership.*—In a suit for declaration of title to, and recovery of possession of, alluvial lands, which had been diluviated more than twelve years before the institution of the suit, the plaintiffs proved their title and possession up to the time of diluviation,

ONUS PROBANDI—*continued.*

25. LIMITATION AND ADVERSE POSSESSION—*continued.*

Adverse possession—*continued.*

and alleged that the lands had re-formed within twelve years, without alleging or proving possession during that period. The defendants, on the other hand, alleged that the re-formation had taken place more than twelve years before suit, and that they had acquired a title to the lands by adverse possession for that period. *Held* that in such a case the submergence of the lands after diluvion ought to be presumed until the contrary was shown, and that the onus of proving re-formation before twelve years and adverse possession was shifted to the defendants. *Per* WILSON, *J.*—As a general rule, where a plaintiff claims land from which he alleges he has been dispossessed, the burden is upon him to show possession and dispossession within twelve years. Proof of possession within twelve years does not necessarily mean proof of acts of ownership within that time. The nature of the proof of possession must depend on the nature of the case. There are many cases in which the party on whom the burden of proof in the first instance lies, may shift the burden to the other side by proving facts giving rise to a presumption in his favour. In the case of lands gradually diluviated and gradually re-formed, if the diluviation has been more than twelve years before suit, the claimant, unless he can show possession since the re-formation, must at least show that he was in possession down to the date of the diluviation. Where the true owner is in possession at the time of diluviation, his possession is presumed to continue as long as the land continues submerged: probably also afterwards, until he is dispossessed. *Per* FIELD, *J.*—Although, according to the general rule, it lies upon the plaintiff, who is met with a plea of limitation, to show his own possession within twelve years before the institution of the suit when the property in dispute is capable of actual or visible possession, yet, in the case of property which is not susceptible of actual and visible possession, an exception from the nature of the thing must be made to the general rule. In such cases, when the title and possession have been proved to be in a certain person up to a certain point of time,—when there has been no transfer of the title to any third person, and there is no evidence that possession was exercised by a person other than the person having the title,—so long as actual visible possession was possible, the possession of the person having the title will be presumed to continue until the property has again become susceptible of actual visible possession. Proof of possession is presumptive proof of ownership, because men generally own the property which they possess. And if the ownership of property is proved, and there is nothing to show that the possession of such property is with any person other than the owner, it may fairly be presumed to be with the owner. Such a presumption then takes the place of evidence to show the plaintiff's possession, within twelve years before suit, of a property in which, from the nature of the thing, evidence of actual possession is impossible. MANO MOHUN GHOSE *v.* MOTHURA MOHUN ROY

[I. L. R., 7 Calc., 225: 8 C. L. R., 126

ONUS PROBANDI—*continued.*

25. LIMITATION AND ADVERSE POSSESSION—*continued.*

Adverse possession—*continued.*

256. ——————— *Suit for possession of lands forming bed of river.—Fishery rights.—Presumption.—Possession.*—In a suit to recover possession of certain lands in the bed of a river which had changed its course, and to get rid of the effect of a Deputy Magistrate's order under section 318, Criminal Procedure Code, 1861, it was found that plaintiffs had been in possession when the lands were surveyed some years previously as part of their village, and had continued in possession up to the year in which the criminal proceeding was held. *Held* that the presumption raised by the plaintiff's continued and undisturbed possession was not rebutted by defendant's allegation that he was entitled to the julkur of the river. HOGG *v.* DENONATH KOONDOO . . . . . 11 W. R., 566

257. ——————— *Omission to give purchaser possession until long after sale.—Suit to recover possession.*—Where the right, title, and interest of a party had been sold in execution, but possession was delivered to the purchaser more than fifteen years after the sale, such irregularity was held not to entitle the party first mentioned to a decree in a suit to recover the property unless he could prove possession for a period of more than twelve years before he was dispossessed. ATTOTRAM DOSS *v.* BALUNKEE DOSS . . 14 W. R., 357

258. ——————— *Suit for confirmation of title.—Possession.*—In a suit by a Hindu widow for confirmation of her title to certain land in right of her husband, the defendant, who had a possessory award of the property given to her under section 15, Act XIV of 1859, pleaded that the plaintiff was never in possession. *Held* that the onus was on the plaintiff to show that she was in possession within the period of limitation. SHANTO MONEE GOOPTAH *v.* SUTTO BHAMA GOOPTAH

[7 W. R., 34

259. ——————— *Suit to establish proprietary right.*—Where plaintiff sues to establish proprietary right as against a mokurraridar, it is not necessary for him to prove that he has been in actual possession within twelve years. PROTAP NARAIN MOOKERJEE *v.* KARTICK CHUNDER MOOKERJEE . . . . . 10 W. R., 192

260. ——— Limitation.—*Suit on bond.—Instalment-bond.—Indorsement of payment of instalments.*—Where a defendant sets up the defence of limitation, he must plead it, and show that the claim is barred. If, when the plaintiff has proved his case, the facts show that the cause of action accrued at a date earlier than the period of limitation, and the plea of limitation has been set up by the defendant, the latter will be entitled to take advantage of the plaintiff's evidence that the claim is barred, and to have judgment given in his favour. The obligee of a bond, by which the obligor covenanted to pay the sum of R3,800 by annual instalments of R200 and in

ONUS PROBANDI—*continued.*

25. LIMITATION AND ADVERSE POSSESSION—*continued.*

Limitation—*continued.*

which it was also agreed that payments of the instalments should be indorsed on the bond, brought a suit against the obligor alleging default in payment, and claiming to recover the amount of the bond. He gave credit for payment of the instalments for seven years, and alleged that his cause of action arose upon default in payment of the eighth instalment. The bond showed on its face indorsements of the payments for which credit was given. The obligor alleged that no instalments were paid after the third year, that therefore the debt became due at an earlier date than that stated by the plaintiff, and that the claim was barred by limitation. *Held* that, inasmuch as the defendant adduced no evidence to show that the later instalments were not paid, and inasmuch as the evidence produced by the plaintiff did not show that the debt accrued at a date earlier than the limitation period, the plea of limitation failed. RADHA PRASAD SINGH *v.* BHAJAN RAI . I. L. R., 7 All., 677

26. MESNE PROFITS.

261. ——— **Suit for mesne profits.**—*Possession by wrong-doer.*—In suits for mesne profits, when the defendants have been in possession of the property as wrong-doers, it lies upon them to show what were the sums realised as rent during the time of their possession. BROJENDRO COOMAR ROY *v.* MADHUB CHUNDER GHOSE [I. L. R., 8 Calc., 343

27. MINORITY.

262. ——— **Plea of minority.**—Where a defendant pleads minority, the onus is on him to prove his plea. NILMONEE CHOWDHRY *v.* ZUHEERUNISSA KHANUM . . . . . 8 W. R., 371

CHYET NARAIN SINGH *v.* BUNWAREE SINGH [23 W. R., 395

28. MORTGAGE.

263. ——— **Suit for redemption of mortgage.**—*Alleged sale.*—In a suit for redemption of property which the plaintiff alleges to be mortgaged, but which the defendant contends was sold absolutely, the onus is on the plaintiff to prove the mortgage; and the existence of a mortgage cannot be presumed from the failure of the defendant to establish the alleged sale. BALAJI NARJI *v.* BABU DHOLI [5 Bom., A. C., 159

264. ——— *Evidence Act, I of 1872, s. 110.*—The plaintiff sued to redeem certain land, alleging that it had been mortgaged by his father to the defendant in 1854-55. The defendant denied the mortgage, and alleged that he purchased it under a deed of sale from the plaintiff's father in 1849, and had ever since been in his possession as owner. The deed of conveyance was not forthcoming, nor was the alleged mortgage-deed. The Court of first instance rejected the plaintiff's claim on the ground that the mortgage was not proved. The lower Appellate Court reversed the decree of the Court of first instance. The defendant appealed. *Held* that the defendant's possession was *primâ facie* evidence of a complete title, and that the plaintiff, who alleged that the defendant was merely a mortgagee, was bound to prove his own right as mortgagor, clearly and indefeasibly. Mere statements that the property had been mortgaged, which failed to establish any particular mortgage, did not shift the burden of proof, or require the mortgagee to show what were the terms of such mortgage, or his right to retain possession under it. RAMCHANDRA APAJI *v.* BALAJI BHAURAV . . . . I. L. R., 9 Bom., 137

265. ——— *Lost mortgage-deed.*—In a suit for redemption, the mortgage-deed, dated 21st July 1840, having been lost, the Judicial Commissioner held that the onus lay, not upon the mortgagor to prove that the term did not expire before 13th of February 1856, but upon the mortgagee to prove that it did. *Held* by the Privy Council that the burden of proof was *primâ facie* on the mortgagor, regard being had, as respects the quantum of evidence required, to the opportunities which each party might naturally be supposed to have of giving evidence. KISHEN DUTT RAM PANDEY *v.* NARENDAR BAHADOOR SINGH . . . I. L. R., 3 I. A., 85

266. ——— *Beng. Reg. XVII of 1806.—Promulgation of statute.*—The plaintiff sued, on the 31st of December 1861, to redeem a mortgage of lands in Sarun, dated the 30th of November 1801. The mortgage-money was payable on the 28th September 1806. If not paid, the property was to vest absolutely in the mortgagee without foreclosure. The defendant admitted that he had not foreclosed, but stated that Regulation XVII of 1806 was promulgated in Sarun on the 7th January 1807, and, consequently, that the money became due before the Regulation was promulgated. *Held*, the onus was on the plaintiff to prove that the Regulation was promulgated before 28th September 1806. SARIFUNNISSA *v.* INAYET HOSSEIN [B. L. R., Sup. Vol., 415: 5 W. R., 88

267. ——— *Accounts.*—In taking an account on a mortgage in a suit for redemption, where the mortgagee had been in possession, it lies upon the mortgagee to prove what is due from the mortgagor in respect of principal and interest. GANGA MULIK *v.* BAYAJI [I. L. R., 6 Bom., 669

268. ——— *Profits.*—In a suit for redemption, on the ground that the debt has been satisfied with interest, the onus is on the plaintiff. A mortgagee is not an assurer of the continuation of the same rate of profits as his mortgagor was able to raise. Hence an estimate of the rental preceding the mortgagor's possession is not sufficient

**ONUS PROBANDI**—*continued.*

28. MORTGAGE—*continued.*

**Suit for redemption of mortgage**—*continued.*

proof of the profits in his time. SHAH MAKHANLAL v. SRIKRISHNA SINGH [2 B. L. R., P. C., 44: 11 W. R., P. C., 19 12 Moore's I. A., 157

**269.** ——— *Evidence Act, I of 1872, s. 110.*—The plaintiffs, averring that their ancestor had mortgaged three villages to the ancestors of the defendants in 1842 for R2,500, putting the mortgagees into possession, sued to recover possession of 15 biswas of each village, asserting that the mortgage-debt had been redeemed from the usufruct. The defendants, admitting the proprietary title of the ancestor of the plaintiffs to the villages, alleged as to 10 biswas of each village that they were sold to their ancestors in 1842 by him for R1,250, and as to the other 10 biswas of each village, that they were subsequently mortgaged to their ancestors by him for R14,000, borrowed by him from them for the purpose of defending a suit arising out of the previous sale, which sum had not been satisfied from the usufruct. *Held* (STUART, *C. J.*, dissenting) that the burden of proving the mortgage of the 10 biswas of each village of which the defendants alleged the sale lay on the plaintiffs. *Per* STUART, *C. J.*, *contra.* RATAN KUAR v. JIWAN SINGH . I. L. R., 1 All., 194

**270.** ——— *Possession.*—Where a suit was brought to redeem a mortgage, and the defendants pleaded possession under a sale,—*Held*, under the circumstances, there having been long undisputed possession, that the onus of proving that the possession was less than a proprietary possession, and was referable to a mortgage, lay on the person who claimed to redeem it. RUGHOO NATH RAI v. CHUNDOO LALL . 2 Agra, Pt. II, 195

**271.** ——— *Joint mortgage.—Redemption by one mortgagor.—Suit by other mortgagor for his share.*—*K.* and *J.* jointly mortgaged 36 sihams or shares of an estate to *C.*, giving him possession. *C.* transferred his rights as mortgagee to *T.* and *M.* In execution of a decree for money against *K.* held by *M.*, *K.'s* rights and interests in the mortgaged property were sold, and were purchased by *P.*, whose heirs paid the entire mortgage-debt. *R.*, an heir of *J.*, sued the heirs of *P.* to recover from them possession of *J.'s* sihams in the mortgaged property, on payment of a proportionate amount of the mortgage-money paid by *P.* The plaintiff alleged that the mortgage to *C.* had been made forty years before suit. The defendants contended that a much longer period had expired since the date of the mortgage, that forty-one years had elapsed since *C.* transferred his rights as mortgagee, that they had redeemed the property twenty-one years ago and had been since its redemption in proprietary and adverse possession of the sihams in suit, and that the suit was barred by limitation. Neither party was aware of the date of the mortgage, and neither adduced any proof on the point. *Held* that the defendants being admittedly in possession, though the existence of a mortgage as the origin of their possession was conceded by them, it lay upon the plaintiff to give *primâ facie* proof of the subsistence of that mortgage at the date of suit; but that, assuming that notice was given to the defendants by the plaintiff to produce the mortgage-deed, and that they failed to do so, very slight evidence would have been sufficient to satisfy the obligation which lay on the plaintiff. *Kishen Dutt Ram Pandey* v. *Narendar Bahadoor Singh, L. R., 3 I. A., 85,* referred to. NURA BIBI v. JAGAT NARAIN . . . . I. L. R., 8 All., 295

**272.** ——— *Sale of land in execution of decree.—Suit by third party to recover.*—In a suit to redeem certain land demised on kanam in 1850 by *A.* to the predecessor of *B.*, *C.*, who was in possession of the land, was made a defendant. *A.* proved his title to the land and possession up to 1850. *C.* pleaded title to the land and denied that *B.* had ever been in possession. Both pleas were found to be false. It was found, however, that *C.* had been in possession from 1869 to 1885, and that in 1876 the land had been sold in execution of a decree against *C.* (to which *A.* was not a party) and purchased by *D.*, who re-sold to *C.* in 1879. The lower Court held that *C.'s* possession must be taken to have been derived from *B.*, till the contrary was proved. *Held* that the burden of proving that his possession was not derived from *B.* lay upon *C.* NILAKANDAN v. THANDAMMA . . . I. L. R., 9 Mad., 460

**273.** ——— **Usufructuary mortgage.**—*Mortgagee in possession.—Suit for balance of mortgage-money.*—A plaintiff in possession under an usufructuary mortgage, and suing for the balance due, is bound to prove that he has not realised the amount due under the conditions of the lease from the usufruct. CHUTTUR DHAREE SINGH v. SUREER HOSSEIN [1 W. R., 28

**274.** ——— *Suit by mortgagee for possession under usufructuary mortgage.*—An estate was mortgaged with the stipulation that the interest of the mortgage-debt should be deducted out of the usufruct, and that if the profits fell short the mortgagor would make up the deficiency. After a time the mortgagor tendered the amount of the principal sum and forcibly took possession of the property. The mortgagee sued to recover possession and obtained a decree with wasilat. *Held* that the plaintiff might have sued under Act XIV of 1859, section 15; but that, suing as he did, the onus was on him to produce the accounts and show that something was due to him as interest. PRANKISHOREE v. CHUNDEE CHURN BISWAS . . 19 W. R., 429

**275.** ——— *Suit by mortgagee for possession and to set aside mokurrari lease.*—In a suit by mortgagees under a zur-i-peshgi mortgage, not only for possession, but also for setting aside a mokurrari lease which was alleged to have been granted by the mortgagor prior to the mortgage, and

**ONUS PROBANDI**—*continued.*

28. MORTGAGE—*continued.*

**Usufructuary mortgage**—*continued.*

under which defendants had been in possession for some time in accordance with a Magistrate's order,—*Held* that the onus was on the plaintiffs to give some evidence to impeach the validity of the mokurrari; but this having been done, and a strong *primâ facie* case made out, the onus was shifted, and it became incumbent on the defendants to show that the mokurrari was executed before the zur-i-peshgi, and that it was granted *bonâ fide* for a real consideration and intended to be co-operative as between the mortgagors and the lessee. SHAMNARAIN *v.* ADMINISTRATOR GENERAL OF BENGAL [23 W. R., P. C., 111

**276.** ——— *Suit by mortgagee under usufructuary mortgage.*—In a suit in which the plaintiff prayed for the sale of property which had been mortgaged to him as security for a loan under a zur-i-peshgi ijara lease, and of which he had been dispossessed by the defendant under colour of a decree, it was held that, as the plaintiff had had for a great many years the usufruct of the land for the very purpose of repaying himself the principal and interest of his loan, the burden was on him to show that there was anything remaining due to him, and that the onus also was on him to prove that the ijara gave him the right to sell the property upon some contingency. MUJEEDUNNISSA *v.* DILDAR HOSSEIN [20 W. R., 178

**277.** ——— **Suit for possession after foreclosure.**—*Civil Procedure Code, 1859, ss. 239, 240.—Suit on mortgage.—Attachment.*—A suit on a mortgage foreclosed under Beng. Regulation XVII of 1806, section 8, comprising property attached before the date of the mortgage under section 81 and the following sections of Act VIII of 1859, was brought against the purchaser of the attached property, which had been sold under the decree obtained by the attaching creditor. The defence was that the mortgage falling within the provisions of section 240 of the Act was void as against the attaching creditor and those claiming under him. For the mortgagee it was contended that the attachment could not prevail, it not having been proved affirmatively that the requirements of section 239 relating to the intimation of the attachment had been complied with. *Held* that this objection to the validity of the attachment could not be raised for the first time on this appeal, even if it was not rather for the mortgagee, seeking to deprive the attaching creditor of his possession, to prove the non-observance of the formalities in question. RAMKRISHNA DASS SURROWJI *v.* SURFURNISSA BEGUM [I. L. R., 6 Calc., 129: L. R., 7 I. A., 157

29. NOTICE.

**278.** ——— **Liability under Act.**—*Road Cess Act (Beng. Act IX of 1880), ss. 52, 53.—Evidence Act, s. 114.—Presumption.*—Where under an Act certain things are required to be done before any liability attaches to any person in respect of any right or obligation, it is for the person who alleges

**ONUS PROBANDI**—*continued.*

29. NOTICE—*continued.*

**Liability under Act**—*continued.*

that that liability has been incurred to prove that the things prescribed in the Act have been actually done. *Held* that the notice provided by section 52 of the Road Cess Act did not come within the presumption of section 114, clause (*e*) of the Evidence Act, and must be proved. ASHANULLAH KHAN BAHADUR *v.* TRILOCHAN BAGCHI . I. L. R., 13 Calc., 197

**279.** ——— **Service of notice.**—*Execution of decree.—Presumption.*—In the case of execution of decree of twelve years' standing, the defendant is not bound to prove service of notice, but the Court may presume that notice has been regularly served, unless the party alleging irregularity can produce evidence to the contrary. KASEE KANT *v.* GOPAL KISTO MOITRO . . W. R., 1864, 314

30. PARTITION.

**280.** ——— **Suit for partition.**—*Plea of prior separation.*—In a suit for partition of joint family property, in which the defendant pleads that a partition has already taken place, the onus is on the defendant to prove the alleged partition. GOOROO PERSHAD MOOKERJEE *v.* KALEE PERSHAD MOOKERJEE . . . . . 5 W. R., 121

**281.** ——— **Private partition.**—*Private arrangement.—Subsequent partition by Collector.*—*A.* and *B.* were joint owners of a mouzah. *B.* leased his share in putni to *C.* By arrangement between *A.* and *C.* a partition of the lands was made, and each party collected the rents of the lands allotted to him. Forty years afterwards, a butwarra of the mouzah was made by the Collector between *A.* and *B.*, whereby lands held by *C.* under the previous arrangement were allotted to *A.* *C.* was no party to the butwarra proceedings. In a suit brought by *A.* against *C.* for possession of the lands so allotted, the plaintiff alleged that the previous division of the lands between *A.* and *C.* was a temporary one, made after the commencement of the butwarra proceedings. The lower Appellate Court found that the plaintiff's allegations had not been proved, and dismissed the suit. *Held* (TOTTENHAM, *J.*, dissenting) that the decree of the lower Court was correct, as it lay on the plaintiff to show that the private partition had come to an end. OBHOY CHURN SIRKAR *v.* HURI NATH ROY [I. L. R., 8 Calc., 72: 10 C. L. R., 81

**282.** ——— **Suit for possession on allegation of partition.**—In a suit to obtain possession of certain lands, on the ground that they had been assigned to plaintiffs by a partition made by the Collector,—*Held*, in the matter of certain of the plots which plaintiffs alleged to be included in particular daghs in the butwarra chittahs, that as defendants denied that they were so included, it was on the plaintiffs to prove their allegation *Held*, in respect to a dagh in which plaintiffs were admitted to be entitled to a certain quantity of land, it was their business to prove that the particular lands which they claimed had been assigned to them by the but-

**ONUS PROBANDI**—*continued.*

30. PARTITION—*continued.*

**Suit for possession on allegation of partition**—*continued.*

warra proceedings. BHUGGOBUTTY GOOPTA *v.* SARODA SOONDUREE DEBEA . . . 11 W. R., 337

**283. ——— Suit for possession after partition.**—*Interference with possession after Collector's award.*—In a suit for possession with mesne profits, on the ground that the lands claimed were allotted to plaintiff's share by a butwarra under Beng. Regulation XIX of 1814, where defendant, admitting the allegation, urged that plaintiff had given up possession as soon as the butwarra was completed,—*Held* that it was for plaintiff to prove that defendant had interfered with the possession awarded to him by the Collector. MOBARUK ALI *v.* IMDAD ALI [16 W. R., 200

**284. ——— Suit to have property excluded from partition.**—*Nature of possession.*—In two suits in which the prayer was substantially to have certain property which had been included in a butwarra before the Collector excluded from such butwarra, it was held that as plaintiff's possession was admitted, and defendant had failed to prove his plea that such possession was in the quality of tenant under him, plaintiff was entitled to a decree. BIPIN BEHAREE LUKKUN *v.* GHASOO . 11 W. R., 16

31. POSSESSION AND PROOF OF TITLE.

**285. ——— Suit for possession.**—*Weakness of defendant's case.—Title, Proof of.*—In a suit for possession of land, where plaintiff's title and previous possession are both denied, it is not proper for a Court to start with the case put forward by the defendant, the onus of proof being primarily on plaintiff. WALKER *v.* ATNA RAM MUNDUR [14 W. R., 478

**286. ——— *Proof of title.***—A decree-holder sued to establish that certain proprety was the property of *W.*, his judgment-debtor, such property being claimed by *A.* as his. He proved that for five years and more *W.* had been in possession of such property as ostensible owner. *Held* that, this being so, it rested with *A.* to prove his title. MATHURA DAS *v.* MITCHELL [I. L. R., 4 All., 206

**287. ——— *Evidence of title.—Dispossession, Proof of.***—Possession is evidence of title; and if the plaintiff proves that he had possession, and that his possession has been forcibly disturbed, he makes out a *primâ facie* title for the defendant to rebut. MAHOMED BUX *v.* ABDUL KUREEM *alias* ABOO . . . 20 W. R., 458

**288. ——— *Person in possession without title.***—In the case of the owner of land seeking to recover possession on the allegation that the party in possession has no right to continue in it, and showing a *primâ facie* title to possession, he can claim a decree unless the party in possession has a tenure entitling him to retain possession. RAM MONEE *v.* ALEEMOODEEN . . 20 W. R., 374

RAJKISHEN MOOKERJEE *v.* PEAREE MOHUN MOOKERJEE . . . 20 W. R., 421

JOYKISHTO MOOKERJEE *v.* HUREEHUR MOOKERJEE . . . . . 12 W. R., 365

KOONJ BEHAREE RAU *v.* BUKSHEE LUCHMUN DOSS . . . . . 19 W. R., 188

HÛREE MOHUN PODDAR *v.* GUREEBOOLLAH MULLICK . . . . . 22 W. R., 417

KALEE KISHEN ROY *v.* BROJENDRO COOMAR ROY CHOWDHRY . . . 24 W. R., 266

BATAI AHIR *v.* BHUGGOBUTTY KOER [11 C. L. R., 476

**289. ——— *Dispossession.—Proof of title.***—When a person forcibly dispossessed sues to recover possession, the burden of proving title is on the party by whom he was forcibly dispossessed. SHAMA SOONDUREE DEBIA *v.* COLLECTOR OF MALDAH . . . . 12 W. R., 164

**290. ——— *Dispossession.—Proof of title.***—In a suit to recover possession, on the allegation of a previous possession and forcible ouster, both being denied by defendants, who set up a title of their own, it is for plaintiffs to prove the alleged ouster. If they do so to the satisfaction of the Court, the burden of proof will be on the defendants to show the title on which they ousted the plaintiffs. Should the defendants prove such a *primâ facie* title, then it will be the duty of the Judge to call upon the plaintiffs to establish their title. GOUR PAROY *v.* WOOMA SOONDUREE DEBIA [12 W. R., 47?

DAITARI MOHANTI *v.* JUGO BUNDHOO MOHANTI [23 W. R., 293

**291. ——— *Dispossession.***—Proper procedure pointed out in a suit for recovery of possession of certain lands on an allegation of illegal dispossession, where defendant sets up a superior title as proprietor against the allegation of a similar title on the part of plaintiff. If defendant in such a case established his better title as a landlord, then plaintiff cannot, in a Civil Court, succeed on the title of an under-tenant. KOBEEROODDEN *v.* NYAN BIBEE [8 W. R., 354

DABJEE SAHOO *v.* TUMEEZOODDEEN [10 W. R., 102

RADHA BULLUB GOSSAIN *v.* KISHEN GOBIND GOSSAIN . . . . 9 W. R., 71

**292. ——— *Ejectment.—Proof of title.***—Where *A.* was illegally dispossessed by *B.* of land for which *A.* obtained a decree in a suit with *C.*, and *A.* brought a suit to recover possession,—*Held* that the dispossession being proved, the onus of proving the title was in the first instance on

**ONUS PROBANDI**—*continued.*

**31. POSSESSION AND PROOF OF TITLE**—*continued.*

**Suit for possession**—*continued.*

*B.*, and that the mere fact of the land being identical with that decreed to *A.* in his suit with *C.* could not entitle him to a decree in his suit with *B.* JADUB NATH *v.* RAM SUNDUR SURMA . **7 W. R., 174**

**293.** ——————— *Proof of title.—Forged evidence.*—Suit by *A.* to recover immoveable property in the possession of *B.* and his predecessors, whose title had been unchallenged for forty-four years, on the ground that the estate was mortgaged only by *A.'s* ancestors, and that *B.* and those claiming under him were only usufuctuary mortgagees in possession. *Held* that the *onus probandi* was on *A.* who could only succeed by the strength of his own title, and not by reason of the weakness of *B.'s* title. SEVVAJI VIJAYA RAGHUNADHA VALOJI KRISTNAN GOPALDAR *v.* CHINNA NAYANA CHETTI **[10 Moore's I. A., 151**

**294.** ——————— *Title.—Suit after ejectment.*—The plaintiff, a lessee in perpetuity of a piece of land from the inamdar of the village in which it was situated, sued the defendant, who had dispossessed him more than six months before the date of suit, to eject him from the land. The defendant set up a lease from the same inamdar, but it was held to have been granted without any authority. Both the leases required to be registered under Act XX of 1866, but were not registered. *Held* that the plaintiff, although suing more than six months after the date of dispossession and without resorting to a possessory suit (Act XIV of 1859, section 15; Act I of 1877, section 9), was entitled to rely on the possession previous to his dispossession as against a person who had no title; the onus being on defendant to prove his title. KRISHNARAV YASHVANT *v.* VASUDEV APAJI **[I. L. R., 8 Bom., 371**

**295.** ——————— *Suit to establish title and for possession after decree under section 15, Act XIV of 1859.*—In a suit to establish title and recover possession from a person who has obtained possession under section 15, Act XIV of 1859, the defendant need not prove his title, and his possession cannot be distributed, unless the plaintiff gives proof of a better title; the onus being on the plaintiff to prove everything. MAHNOODDEEN *v.* GREESH CHUNDER ROY CHOWDHRY **[7 W. R., 230**

**296.** ——————— In a suit against a landlord to recover possession of land of which plaintiff alleged himself to have been illegally dispossessed,—*Held* that if plaintiff sought to recover possession without reference to any right or title, but simply on the ground of having been illegally ejected, his remedy would have been under section 15, Act XIV of 1859. Not having availed himself of this remedy, he was bound to show that he had title to re-enter, and that the landlord had ejected him without any right to do so. NUND KISHORE LALL *v.* SHEO DYAL OOPADHYA . . **11 W. R., 168**

**ONUS PROBANDI**—*continued.*

**31. POSSESSION AND PROOF OF TITLE**—*continued.*

**Suit for possession**—*continued.*

RAM MOHUN DOSS *v.* JHUPPRO DOSS **[14 W. R., 41**

CROWDY *v.* RAM BHUROSE CHOWDHRY **[23 W. R., 383**

a suit brought under section 27, Bengal Act VIII of 1869.

**297.** ——————— *Suit by heirs of last full owner of property.—Proof of title.*—Where a defendant in possession of certain property resists a suit for possession thereof, brought by parties who have proved themselves to be the nearest heirs of the last full owner, the onus is on the defendant to prove his title. *Tariny Churn Chowdhry* v. *Saroda Soonduree Dassee, 3 B. L. R., A. C., 145;* and *Thakoor Deen Tewary* v. *Ali Hossein Khan, 13 B. L. R., 427,* cited and followed. RAMPROTAB MISSER *v.* ABHILACK MISSER **[3 C. L. R., 170**

**298.** ——————— *Written statement.—Admission.*—In a suit by *A.* against *B.* for recovery of ancestral jammai lands, of which he alleged that he had been dispossessed by *B.*, *B.* stated in his written statement that *A.'s* ancestor having relinquished the land, the zemindar had leased the same to him, *B.*, and he had been in possession since. He also stated how *A.'s* ancestor relinquished, and that he, *B.*, had thereupon obtained a pottah. He denied that he had dispossessed *A.* *Held* that *B.* having admitted the possession of *A.'s* ancestor, it lay upon *B.* to prove his title. BAIKANTHANATH KUMAR *v.* CHUNDRA MOHUN CHOWDHRY **[1 B. L. R., A. C., 133 : 10 W. R., 190**

**299.** ——————— *Allegation of ownership as mortgagee only.*—Where a person is alleged to be in possession, not as owner of the full proprietary right, but as mortgagee, the burden of proof of such qualified ownership lies on the party asserting it. Such a case falls within the scope of section 110, Act I of 1872. SHEORUTTUNGIR *v.* DOORGA . . . . . **6 N. W., 36**

**300.** ——————— *Land purchased benami by plaintiff for defendant.—Evidence Act (I of 1872), s. 110.*—The plaintiff sought to recover possession of certain lands, alleging that he had been dispossessed. The defendants, who were in possession, alleged that, at an auction sale, the plaintiff had bought the lands benami for the defendants. *Held* that the burden of proving a *primâ facie* case that the land belonged to the plaintiff was on him. HARI RAM *v.* RAJ COOMAR OPADHYA **[I. L. R., 8 Calc., 759**

**301.** ——————— *Title.*—In a suit to recover possession of certain property, on proof that the plaintiff had been dispossessed by a benamidar, in whose favour a conveyance had been executed by the plaintiff's father,—*Held* that the presumption arising from the defendant's recent and unexplained

**ONUS PROBANDI**—*continued.*

**31. POSSESSION AND PROOF OF TITLE**
—*continued.*

**Suit for possession**—*continued.*

possession being rebutted by the plaintiff's prior continuous and peaceful possession, the defendant must show affirmatively that his title was a valid one, and could not raise the defence that the plaintiff was prevented from showing it to be invalid. MAHESH CHANDRA BANERJEE *v.* BARADA DEBI
**[2 B. L. R., A. C., 274 : 11 W. R., 185**

**302.** ——————— *Obstruction to execution of decree by a claimant.—Civil Procedure Code (Act VIII of 1859), s. 229 (Acts X of 1877 and XIV of 1882), s. 331.*—In a suit under section 229 of Act VIII of 1859 (section 331 of Acts X of 1877 and XIV of 1882), the onus is on the plaintiff to establish a *primâ facie* case of possession, and it is then incumbent on the claimant to answer that case, and show, if possible, a better title. RAKHAL CHURN MUNDUL *v.* WATSON & Co.
**[I. L. R., 10 Calc., 50**

**303.** ——————— *Proof of title.—Unregistered deed of sale.—Oral evidence inadmissible.*—On the 18th January 1876 plaintiff became a purchaser at a Court's sale of the right, title, and interest of *G.* and *N.* in a shop, and having been obstructed by defendant in obtaining possession of it, sued to recover it from him. The plaint was filed on the 27th January 1877. Defendant answered that he purchased it from *G.* under a deed of sale dated 5th January 1865, and that he had been in possession since that day. The deed of sale was not admitted in evidence for want of registration, but it was found that defendant had been in possession as owner since 5th January 1865. *Held* that, as the defendant admitted that he had derived his title from *G.* (of whose interest in the shop the plaintiff was assignee), the burden of proof lay upon the defendant, and that he had failed to prove his purchase, inasmuch as his unregistered deed of sale could not be received in evidence, and oral evidence was inadmissible in place of the deed. SAMBHUBHAI KARSANDAS *v.* SHIVLALDAS SADASHIVDAS . . . **I. L. R., 4 Bom., 89**

**304.** ——————— *Suit to have property declared liable in execution of decree.*—In a suit for the sale of certain property in satisfaction of a decree against a judgment-debtor (since deceased), where it was found that the judgment-debtor had made over the property to his wife in lieu of her dower, and that she had transferred it to defendant, —*Held* that the onus was on the plaintiff. LYAKUT ALI *v.* COURT OF WARDS . . **10 W. R., 423**

**305.** ——————— *Proceedings to obtain possession in execution of decree.*—Where a judgment-creditor admits having obtained possession of a portion of the land without opposition from the judgment-debtor, the onus lies on him to show that he was unable, nevertheless, to obtain possession of the remainder. AMJATT ALI *v.* AZHUR ALI . . . . . **21 W. R., 241**

**ONUS PROBANDI**—*continued.*

**31. POSSESSION AND PROOF OF TITLE**
—*continued.*

**Suit for possession**—*continued.*

**306.** ——————— *Khas mehals in 24-Pergunnahs.—Relation between owners and the Government.—Right to possession.—Ejectment.*—There is no relation of landlord and tenant between the Government and the owner of khas mehals in the 24-Pergunnahs. The latter is the landlord of the ryots, and is not himself a ryot. The right and title of the Government are to the rent, but do not include a right to the possession of the lands, though such a right might arise by forfeiture or extinction of the ownership; and the onus is on the Government to prove its claim to the possession of the lands. GUNGA GOBIND MUNDUL *v.* COLLECTOR OF 24-PERGUNNAHS
**[7 W. R., P. C., 21 : 11 Moore's I. A., 345**

**307.** ——————— *Suit to establish title.—Bom. Reg. XVII of 1827, s. 7, cls. 1 and 2.—Bom. Act I of 1865.—Miras land.*—On the 28th August 1857 the plaintiff passed a kabuliat to Government and took possession of certain miras land, abandoned by the mirasdar for four or five years previous to that date. The plaintiff continued in possession of his land, and paid the Government assessment from 1864 till 1872. In an action brought by the plaintiff to recover possession of the land, he alleged in the plaint that he had taken the defendants as partners in the cultivation of the land, and had been dispossessed by them. Both the lower Courts rejected the claim. The lower Appellate Court based its decision on the ground that as the plaintiff failed to prove the fact of his alleged partnership with the defendants, he could not succeed, notwithstanding that Court found in the plaintiff's favour the other facts stated above. *Held* on special appeal that as the suit was one to establish title and recover possession, the Judge should, on the facts found, and having regard to Regulation XVII of 1827, section 7, clauses 1 and 2, and Bombay Act I of 1865, have called upon the defendants to prove their claim to hold possession as against the plaintiff's right of occupation. TRIMBAK RANU *v.* NANA BHAVANI . . . . . **12 Bom., 144**

**308.** ——————— *Title.*—In a suit to recover possession of land and wasilat under a ganti jumma, which had originally belonged to the defendants, the main question was as to ten cottahs, of which possession by receipt of rent only was claimed from the defendants, whose dwelling-house was thereon. The defendants alleged that the ten cottahs were not included in the ganti jumma under which plaintiffs claimed. *Held* that the onus was on the plaintiffs to prove that the ten cottahs were included in the ganti jumma under which they claimed. It was not on the defendants to show the extent of that tenure while it was in their possession and when it was transferred to the plaintiffs, although the fact was one peculiarly within their knowledge. GIRDHAR HARI *v.* KALIKANT ROY CHOWDHRY
**[3 B. L. R., A. C., 161 : 11 W. R., 501**

ONUS PROBANDI—*continued.*

31. POSSESSION AND PROOF OF TITLE —*continued.*

Suit for possession—*continued.*

309. ——————— *Evidence.—Jagir tenure.—Auladad grant.*—By a sanad dated March 1854, the plaintiff's ancestor granted to *B.*, the defendant's ancestor, a jaghir of a certain mouzah. *B.* died in 1872, and plaintiff subsequently brought a suit to recover possession of the mouzah, alleging that the grant to *B.* was an ordinary service jaghir. The plaintiff filed a kabuliat which had been executed by *B.*, the terms of which supported the plaintiff's allegation as to the nature of the grant. The defendant alleged that the grant was auladad, but failed to produce the sanad or account for its non-production. *Held* that the plaintiff was entitled to a decree. *Juggernath Sahee* v. *Ahlad Kowur, 19 W. R., 140,* distinguished. THAKUR DOYAL *v.* RAM NARAIN SINGH . I. L. R., 8 Calc., 375

310. ——————— *Suit for lands granted as jaghir tenure.—Non-production of documentary evidence.*—In a suit to recover possession of certain lands upon the ground that they were granted as a jaghir tenure by the plaintiff's ancestor to one *P.* and his lineal descendants, and that such descendants had failed,—*Held* that it was necessary for the plaintiff to prove the grant alleged in his plaint, without which no cause of action would have been shown: and as the tenure was created in the proper and usual manner,—*i.e.*, by pottah and kabuliat,—the latter would be in the possession of the plaintiff's ancestors. As this was not produced, no secondary evidence given of it, and no foundation laid for giving such evidence, it was unnecessary to go further into the plaintiff's case. JUGGERNATH SAHEE *v* ALHAD KOWUR . . . . . 19 W. R., 140

311. ——————— *Proof of title.*—The plaintiff sued for possession under the allegation that the property in dispute was under the management of the defendant. The defendant having denied management, and set up a title by purchase, and his possession for more than thirty years having been proved,—*Held* that the onus of showing a possession for his benefit was rightly thrown on the plaintiff. KIRAT SINGH *v.* RAM DOSS [W. R., F. B., 8

312. ——————— *Adverse or permissive occupancy.—Proof of title.*—A donee, under a deed of gift, brought a suit to recover a piece of land which he alleged his donors had given for a temporary purchase to the defendant in possession six years before; and the Munsif found that it was so, and allowed the claim. But the District Judge, on appeal, considering that the plaintiff had failed to prove his donors' title to the land, reversed the Munsif's decree. *Held* that the Judge was in error in requiring the plaintiff to establish the title of the donors, without enquiring whether the defendant had obtained possession merely by their permission; and that the suit must be remanded for a finding by the District Judge on that point. SAKALCHAND SAVAICHAND *v.* DAYABHAI ICHHACHAND [4 Bom., A. C., 70

ONUS PROBANDI—*continued.*

31. POSSESSION AND PROOF OF TITLE —*continued.*

Suit for possession—*continued.*

313. ——————— *Suit for land attached under s. 3 of Act IV of 1840.*—In a suit for possession of land attached by the Magistrate under section 3 of Act IV of 1840, the *onus probandi* is on the plaintiff. MOHESHUR SINGH *v.* RAMAPUT SINGH [W. R., F. B., 7: 1 Ind. Jur., O. S., 35

314. ——————— *Suit by zemindar against trespasser.*—An award under Act IV of 1840 does not relieve a party of the obligation to prove his right and title, when sued by the zemindar as a trespasser. BYDONAUTH SORBHON *v.* KENOORAM HOLDAR . . . . . 1 W. R., 211

315. ——————— *Possession under order of Criminal Court.—Suit to eject on ground of title.*—*A.* being in possession of lands, as purchaser under deeds of sale from *B.*, the person last seised, was forcibly ousted from possession by *C.* and *D.*, who set up a title to the lands under an alleged deed of gift from *B.* *A.* made a complaint to the Criminal Court, and under an order of that Court was again put into possession; *C.* and *D.* being directed to institute a suit in the Civil Court to establish their claim, which they accordingly did, relying upon their title, and impeaching the deeds of sale. In such circumstances,—*Held* by the Judicial Committee, reversing the decree of the Court at Calcutta (without prejudice, however, to any question which might arise between *A.* and any other party claiming under *B.*), that it was incumbent on *C.* and *D.* to prove some title to the lands claimed before they could put *A.* to proof of his title. RAM RUTTON RAE *v.* FUBROOKOONNISSA BEGUM [4 Moore's I. A., 233

316. ——————— *Ejectment by order of Magistrate under s. 319, Code of Criminal Procedure, 1861.—Suit to recover possession.*—The plaintiffs were in possession of certain land when the Magistrate, acting under section 319 of the Criminal Procedure Code, 1861, placed the defendant in possession until the rights of the parties should be determined by a competent Civil Court. *Held*, in a suit to recover possession of the property instituted more than six months after the plaintiffs were dispossessed, that they could not recover without showing their title, the onus being on them to prove it. ASHUMANDE AGATH KUNHI PATHUMAH *v.* MAKACHINDE AGATH MAKACHI . 4 Mad., 478

RAJESSUREE DEBIA *v.* BRINDABUTTY DEBIA [7 W. R., 212

LUCHMUN PERSHAD *v.* MAHARANEE OF BURDWAN . . . . . 17 W. R., 181

317. ——————— *Suit after order of Criminal Court under s. 530, Act X of 1872.*—In a suit for possession and for establishment of title against parties in possession under an award of the criminal authorities under Act X of 1872, section

ONUS PROBANDI—*continued.*

31. POSSESSION AND PROOF OF TITLE —*continued.*

**Suit for possession**—*continued.*

530, the *onus probandi* is on the plaintiffs. HURI RAM *v.* BHIKAREE ROY . . **25 W. R., 20**

As also under section 318 of the Code of Criminal Procedure of 1861. HURRO SOONDUREE *v.* SONATON DOSS . . . . . **25 W. R., 464**

**318.** ——— *Suit after order under the Land Registration Act (Beng. Act VII of 1876).*—Where a person who, by an order of the Collector passed under the provisions of the Land Registration Act (Bengal Act VII of 1876), has been declared to be out of possession of certain land, brings a suit for the recovery of possession, it lies on him in the first instance to make out a *primâ facie* case. MUDDUN MOHUN PODDAR *v.* BHAGGOMANTO PODDAR . . . . . **I. L. R., 8 Calc., 923**

**319.** ——— *Suit for produce of trees.—Title, Proof of.*—In a suit to prevent the defendants from obstructing the plaintiff in his enjoyment of fruits of certain trees, which he claimed as heir of a person who purchased that right, the defendants denied the existence of the right, and alleged possession and enjoyment in themselves. *Held* that the District Judge, in appeal, having found the possession and enjoyment to be in the defendants, was right in throwing upon the plaintiff the burden of proving his title to the trees or their produce. LALDAS RAMDAS *v.* KASHIRAM **[4 Bom., A. C., 60**

**320.** ——— *Civil Procedure Code, 1859, s. 230, Suit under.—Title, Proof of.*—Section 230, Act VIII of 1859, only gave an applicant the right, without instituting a separate suit, of contesting the decree-holder's right to dispossess him, but did not exempt the applicant from the onus of proving his case. MAHOMED AUSUR *v.* PROKASH CHUNDER SHA . . . . . **8 W. R., 8**

**321.** ——— *Claim.—Dispossession.—Act VIII of 1859, s. 230.*—One shareholder, being dispossessed by the other of a certain julkur in execution of his decree, brought a suit under section 230, Act VIII of 1859, alleging that the julkur had been a part of their joint mehal; and that, on partition thereof, the julkur was left ijmali. The decree-holder set up that the julkur had been formed after the partition, and by diluvion of one of his own villages. *Held* that the onus was upon the claimant to prove his case. UDAI TARA CHOWDHRAIN *v.* ABDUL GANI . . . **3 B. L. R., Ap., 90**

S. C. WOODOY TARA CHOWDHRAIN *v.* ABDOOL GUNNY . . . . . **12 W. R., 16**

**322.** ——— *Title by possession.—Attachment and sale under a decree of property claimed by a third person.—Suit by a third person to establish his title.—Civil Procedure Code (Act VIII of 1859), ss. 230-246.*—*S.* obtained a money-decree against the sons and heirs of *A.*, and under that decree attached a shop as part of *A.'s* estate. *N.* (father of *A.*) applied to have the attachment removed under section 246 of the Civil Procedure Code (Act VIII of 1859), alleging that the shop was his. The application was rejected, and the shop was sold in execution and bought by *P.*, the defendant. *N.* then brought his suit against *P.* (the purchaser) to establish his title. The Subordinate Judge dismissed the suit. On appeal, the District Judge reversed that decree, holding that the plaintiff had been in possession of the shop and had proved his title. The defendant appealed to the High Court. *Held* that the plaintiff having proved his possession at the date of the execution sale, it lay upon the defendant (*P.*), who claimed the property, to prove a title in himself or in the judgment-debtor *A.*, and that, he having failed to do this, the plaintiff was entitled to a decree declaratory of his right to the property as against the defendant. Where a dispossessed party proceeds, under section 230 of Act VIII of 1859, to vindicate the possession of which he has been deprived, although he may give evidence of his title, he is not bound to do so, but may rest his right to recover on his possession, and cast upon the decree-holder the burden of proving his title,—*i.e.*, his right to dispossess the applicant. *Per* WEST, *J.*—A person in possession of property which is sold in execution as that of another, is not called upon, when suing to establish his title, to prove his proprietorship as by an action *in rem* against all the world. It is enough if he establishes a good title as against the judgment-debtor whose right has been sold; and as he is in possession, that possession in itself affords a ground for an assertion of full proprietorship for the purpose of the suit, except so far as the right vested in the judgment-debtor can be shown affirmatively to contradict or qualify it. Possession constitutes an interest requiring affirmative proof of a superior title on the part of any one who seeks to disturb it, and, therefore, where a person in possession of property which has been sold in execution as being the property of another, sues to establish his title to such property, the burden of proof lies, not upon him, but upon the person who claims as purchaser at the execution sale. PEMRAJ BHAVANIRAH *v.* NARAYAN SHIVARAM **[I. L. R., 6 Bom., 215**

**323.** ——— **Suit for confirmation of possession.**—*Proof of title.*—In a suit for confirmation of possession of certain lands sold in execution of a decree as lakhiraj, the onus was held to lie on the plaintiff to prove his title, notwithstanding the defendant's admission that the lands in question were within the boundaries of the plaintiff's zemindari. PURSEEDH NARAIN SINGH *v.* BISSESSUR DYAL SINGH **[7 W. R., 148**

**324.** ——— Where a party, who asserts that he is in possession without adducing any evidence in support of his title, sues for confirmation of title as against a *bonâ fide* purchaser for valuable consideration, without notice from the

ONUS PROBANDI—*continued.*

31. POSSESSION AND PROOF OF TITLE —*continued.*

**Suit for confirmation of possession**—*continued.*

party in whose name the property stood, who exercised acts of ownership and gave himself out to the world as the real proprietor, plaintiff cannot put the defendant to proof of his title till he has proved his own. LEKHRAJ ROY *v.* MUTTY MADHUB SEN [14 W. R., 95

32. PRE-EMPTION.

**325. ——— Suit for pre-emption.**—*Proof of antedating of deed.*—In a suit by *A.* to enforce a right of pre-emption, in which the purchase to *B.* was admitted, but it was alleged that *B.'s* deed of purchase had been antedated, the onus lay on *A.* to prove that *B.'s* deed had been antedated. KUMUR ALI *v.* AZMUT ALI . . . 8 W. R., 383

**326. ———** *Suit on ground of vicinage.—Ownership.*—In a suit to establish a right of pre-emption on the ground of ownership of contiguous land, no amount of mis-statement on the part of the defendant as to the ownership of such land can relieve plaintiff of the onus of proving his ownership. BEHAREE RAM *v.* SHOOBHUDRA [9 W. R., 455

**327. ———** *Recital in deed of sale as to price.*—In a suit to establish a right of pre-emption to property which had been sold, in which plaintiff alleged that the actual value was different from that which was recited in the deed of sale between the defendants, the vendor, and the vendee,—*Held* that it was for plaintiff to give some evidence in support of the allegation that the amount stated as the price by the defendant was wrong. GOLAM AYHYA *v.* JOY MUNGUL SINGH . 13 W. R., 435

MAHOMED MORUL HOSSEIN *v.* HYDER BUKSH [W. R., 1864, 304

**328. ———** *Purchase-money.—Evidence Act (I of 1872), s. 106.*—In a suit to enforce the right of pre-emption, in which the plaintiff impugns the correctness of the price stated in the instrument of sale, although the burden of proof *primâ facie* is on him to show that the property has in fact been sold below the stated price, yet very slight evidence is ordinarily sufficient to establish his case; and when such case is established, it rests upon the defendants, the vendor and vendee, to prove by cogent evidence that the stated price is the correct one. The principle laid down by the Privy Council in *Kishen Dutt Ram Panday* v. *Narendar Bahadoor Singh, L. R., 3 I. A., 85,* applied. *Mahomed Noorul Hossein* v. *Hyder Buksh, W. R., 1864, 304; and Golam Ayhya* v. *Joy Mungul Singh, 13 W. R., 435,* referred to. BHAGWAN SINGH *v.* MAHABIR SINGH [I. L. R., 5 All., 184

**329. ———** *Dispute as to price—Assessment of amount.—Bhagwan Singh* v. *Mahabir Singh, I. L. R., 5 All., 184,* followed as

ONUS PROBANDI—*continued.*

32. PRE-EMPTION—*continued.*

**Suit for pre-emption**—*continued.*

to the rule of *onus probandi,* where the plaintiff in a suit to enforce a right of pre-emption impugns the correctness of the price stated in the instrument of sale. In determining the amount of the price which a pre-emptor has to pay, the Court is not called upon to assess the amount which would be a fair and reasonable price for the property, but to ascertain what amount actually changed hands as consideration for the sale. TAWAKKUL RAI *v.* LACHMAN RAI [I. L. R., 6 All., 344

33. RECOGNISANCE TO KEEP PEACE.

**330. ——— Likelihood of breach of peace.**—*Party obtaining summons.*—The onus lies on the person who has obtained the summons to prove that the defendant is likely to commit a breach of the peace. BEHARI PATAK *v.* MAHOMED HYAT KHAN . . . . 4 B. L. R., F. B., 46 [12 W. R., Cr., 60

34. RELINQUISHMENT OF PORTION OF CLAIM.

**331. ——— Objection of former suit for same cause of action.**—*Civil Procedure Code, 1859, s. 7.—Omission to sue for portion of claim.*—Where a defendant objected under Act VIII of 1859, section 7, that the plaintiff omitted in a former suit to include the portion which he now claimed, and in respect of which he then had a cause of action, the objection being one of fact, the burden of proof was held to lie with the objector. SKINNER & CO. *v.* SHAMA SOONDUREE . 19 W. R., 429

35. RESUMPTION AND ASSESSMENT.

**332. ——— Suit for resumption.**—*Suit under Beng. Reg. XIX of 1793, s. 10.*—In suits in a Civil Court for resumption under Regulation XIX of 1793, section 10, the onus was upon the plaintiff to prove a *primâ facie* case. The decisions in *Sonatun Ghose* v. *Abdool Farar, B. L. R., Sup. Vol., 109;* and *Heera Monee Debi* v. *Koonj Behary Holdar, B. L. R., Sup. Vol., Ap., 8,* upheld. The mere fact of the lands falling within the ambit of his estate does not show that the lands are mâl or rent-paying. HARIHAR MUKHOPADHYA *v.* MADHAB CHANDRA BABU NABAKRISHNA MOOKERJEE *v.* KAILAS CHANDRA BHUTTACHARJEE [8 B. L. R., 566 : 20 W. R., 459 14 Moore's I. A., 152

BISHNATH CHOWDHRY *v.* RADHA CHURN GANGOOLY . . . . 20 W. R., 485

**333. ———** *Rent-free tenure.—Beng. Reg. XIX of 1793, s. 10.—Reg. II of 1819, s. 30.*—In a suit brought in the Civil Court before Act XIV of 1859 came into operation, to enforce a right under section 10, Regulation XIX of 1793,—that is, to resume lands alleged to be held by the defendant under an invalid lakhiraj grant,—*Held* that the suit

**ONUS PROBANDI**—*continued.*

35. RESUMPTION AND ASSESSMENT —*continued.*

**Suit for resumption**—*continued.*

was not barred by section 28, Act X of 1859. The onus was on the plaintiff to prove that the case fell within section 10, Regulation XIX of 1793,—*i.e.*, that the grant was made subsequent to December 1st, 1790. PARBATI CHARAN MOOKERJEE *v.* RAJKRISHNA MOOKERJEE . B. L. R., Sup. Vol., 162

S. C. SONATUN GHOSE *v.* ABDUL TUBRUB [2 W. R., 105

*Contra*, OMESH CHUNDER ROY *v.* DUKHINA SOONDERY DEBIA . . . W. R., F. B., 95

ELIAS *v.* TITHARAM ROY . 1 W. R., 164

**334.** ——————— *Invalid lakhiraj tenure.*—In a suit to resume and assess lands under 100 bighas held as rent-free on an invalid title, if the defendant files his sanad showing the area to be above 100 bighas, it is for the plaintiff who alleges the *primâ facie* good title of the defendant to be bad to prove it to be so. BEER CHUNDER JOOBRAJ *v.* SHIBJOY THAKOOR . . . W. R., 1864, 8

**335.** ——————— *Auction-purchaser.*—Certain lands which had been let out in putni were, on default by the putnidar in payment of rent, sold by auction under Beng. Regulation VIII of 1819, and purchased by *M.*, who granted them in putni to the plaintiff. In a suit for resumption on the allegation that the defendants were in possession of a portion of the lands as invalid lakhiraj by withholding payment of the mâl rent thereof from after 1793, the defence was that the lands in dispute were valid rent-free lands existing as such from before 1790. *Held* that, on the grounds of the decision of the Privy Council in *Harihar Mukopadhya* v. *Madab Chandra Babu, 8 B. L. R., 566*, the principle that the onus is on the plaintiff to show that the lands are mâl applies to cases where the plaintiff, as in the present case, is the representative of an auction-purchaser. ARFUNNESSA *v* PEARY MOHUN MOOKERJEE [I. L. R., 1 Calc., 378 : 25 W. R., 209

**336.** ——————— *Proof of rent-free grant before permanent settlement.*—In the year 1862 the plaintiff brought a resumption suit against *A.* in respect of the lands in dispute in this case, upon the ground that she was holding them by an invalid lakhiraj title, and obtained a decree. After some years the plaintiff brought the present suit against *B.*, who derived her title through *A.*, to have the rent assessed. *B.* pleaded by way of bar to the jurisdiction, that the lakhiraj grant, under which *A.* claimed, was made previously to 1790. *Held* that the onus of proving this plea was upon *B.* HEERA LALL PORAMANIC *v.* BABIKUNNISSA BIBEE [I. L. R., 3 Calc., 501 : 1 C. L. R., 596

**337.** ——————— *Lakhiraj and mâl lands.*—In a suit by a zemindar to resume land which has been held as lakhiraj, if the lakhirajdar claims under a grant of date prior to the 1st of December 1790, the onus is on him to prove it. If the

**ONUS PROBANDI**—*continued.*

35. RESUMPTION AND ASSESSMENT —*continued.*

**Suit for resumption**—*continued.*

lakhirajdar claims under a grant subsequent to that date, the zemindar is not entitled to a decree until he has shown in the first instance that the land claimed is part of his zemindari and at one time was mâl land. And in the latter case, the lakhirajdar is not put to proof of his title until the zemindar has established the fact of the land having once, at some time subsequent to 1st December 1790, been rent-paying land. MAHOMED AKHIR *v.* REILY [24 W. R., 447

**338.** ——————— *Declaration of lakhiraj title.—Assessment of rent.*—In a suit instituted in 1877, *A.* prayed for a declaration that he had a lakhiraj title to certain lands; the defendant stated that the lands, for a declaration of a title to which *A.* now sued, formed part of certain lands which had been the subject of resumption proceedings, which were terminated in 1863 by a decree declaring that the lands which were the subject of that suit, including the lands now claimed by *A.*, were not lakhiraj. It being found as a fact that *A.* had neither been a party to, nor been represented in, the resumption proceedings; that he had been in quiet and undisturbed possession of the lands which he now claimed for more than twelve years before the institution of his suit; and that proceedings had been taken by the defendant calculated to disturb such possession,—*Held* that, although the onus of proof lay on the plaintiff, it was not necessary for him to prove that the lands claimed by him to be held as lakhiraj had been held rent-free from before the date of the permanent settlement; but it was sufficient for him to prove that the defendant was, at the time of the institution of the suit, debarred by lapse of time from instituting a suit for the resumption or assessment of rent upon the land. ABHOY CHURN PAL *v.* KALLY PERSHAD CHATTERJEE [I. L. R., 5 Calc., 949

S. C. OBHOY CHURN PAL *v.* KALI PROSAD CHATTERJEE . . . . 6 C. L. R., 260

**339.** ——————— *Lakhiraj grant.*—If a person claiming under a badshahi-lakhiraj grant made before the 1st of December 1790 can show that he has held the land as lakhiraj since the 1st of December 1790, this will be a conclusive bar to a suit for resumption, whether brought by the Government, or by a purchaser at a revenue sale, or by any other person;—that is, in order to prove a grant anterior to the 1st of December 1790, it is sufficient to give evidence of possession dating back to the 1st of December 1790. *Sristeedhur Sawunt* v. *Romanath Rokhit, 6 W. R., 58*, cited. A person seeking to resume lakhiraj land must give *primâ facie* evidence to show that rent has been paid for that land at some time since the 1st of December 1790. *Parbati Charan Mookerjee* v. *Rajkrishna Mookerjee, B. L. R., Sup. Vol., 162; Sonatan Ghose* v. *Abdul Farar, B. L. R., Sup. Vol., 109;* and *Harihar Mukhopadhya* v. *Madhab Chandra*

ONUS PROBANDI—*continued.*

35. RESUMPTION AND ASSESSMENT —*continued.*

Suit for resumption—*continued.*

*Babu, 8 B. L. R., 566,* referred to. KOYLASH-BASHINY DOSSEE *v.* GOCOOLMONI DOSSEE [I. L. R., 8 Calc., 230: 10 C. L. R., 41

340. ——— *Rent-free lands.*—*Landlord and tenant.*—In suits for the resumption of lands alleged by the defendant to be lakhiraj, the burden of proof is in the first instance on the plaintiff to show that the lands are mâl. The fact that the defendant is a tenant of the plaintiff's is a matter to be taken into consideration by the Court in determining whether, on the facts of the case, the plaintiff has made out a *primâ facie* case; but unless the Court finds that the plaintiff has made out a *primâ facie* case, judgment should be given for the defendant. *Harihar Mukhopadhya* v. *Madhab Chandra Babu, 8 B. L. R., 566 · 14 Moore's I. A., 153; Abkar Ali* v. *Bhyea Lall Jha, I. L. R., 6 Calc., 666;* and *Newaj Bundopadhya* v. *Kali Prosunno Ghose, I. L. R., 6 Calc., 543,* cited. BACHARAM MUNDUL v. PEARY MOHUN BANERJEE [I. L. R., 9 Calc., 813: 12 C. L. R., 475

341. ——— *Rent-free lands.*—*Landlord and tenant.*—In a suit for resumption of lands, where the defendants allege that the lands are lakhiraj, the onus is on the plaintiff, in the first instance, to show that the lands are mâl, and if he fails to make out a *primâ facie* case the suit should be dismissed. *Bacharam Mundul* v. *Peary Mohun Banerjee, I. L. R., 9 Calc., 813,* followed. *Newaj Bundopadhya* v. *Kali Prosono Ghose, I. L. R., 6 Calc., 543;* and *Akbar Ali* v. *Bhyea Lal Jha, I. L. R., 6 Calc., 666,* cited and distinguished. NARENDRA NARAIN RAI *v.* BISHUN CHUNDRA DAS [I. L. R., 12 Calc., 182

342. ——— *Suit for rent of land where defendant pleads a lakhiraj tenure.*—The rule which, in cases where the defendant pleads lakhiraj, lays on the plaintiff the onus of proving that the land is mâl, is not inflexible, but may be altered according to circumstances, as in this case, where the defendant admitted plaintiff's title as landlord and never set up any plea of lakhiraj until years after the suit was brought, when a second Ameen was deputed to the spot to make a local enquiry. GOONOMONEE DOSSEE *v.* BURRODAKANT ROY . . . . . 18 W. R., 191

343. ——— *Alleged lakhiraj lands.*—The Full Bench decision—*Parbati Charan Mookerjee* v *Rajkrishna Mookerjee, B. L. R., Sup. Vol., 162,* ruling that before a plaintiff can resume lakhiraj lands he must first prove that he has collected mâl rents, and defendant need not first prove his lakhiraj title—was held not to be applicable to the present case, in which it was proved the plaintiff collected mâl rents from the time the land was capable of bearing any. RAMSOONDUR CHUCKERBUTTY *v.* RAMESSUR ACHARJEE . 8 W. R., 454

ONUS PROBANDI—*continued.*

35. RESUMPTION AND ASSESSMENT —*continued.*

Suit for resumption—*continued.*

344. ——— *Beng. Regs. XIX of 1793 and XIV of 1825.*—*Evidence of exemption from resumption.*—*Semble,*—The exclusion of lands as lakhiraj from the decennial and permanent settlements is of no weight, *per se,* as evidence of exemption from resumption under Regulation XIX of 1793. The general presumption is in favour of the liability to assessment of land, and by Bengal Regulations XIX of 1793 and XIV of 1825 the *onus probandi* lies on a claimant to lakhiraj to establish his title to exemption,—not by inference, but by positive proof of a grant to hold as lakhiraj, or by a proprietary right, prior to the grant of the Dewanny (12th August 1765); and that the possession was *bonâ fide* taken under it, or an enjoyment of lands as such, and descendible to heirs at or since that time. DHEERAJ RAJA MAHATAB CHUND BAHADOOR *v.* GOVERNMENT OF BENGAL [4 Moore's I. A., 466

345. ——— *Suit by lakhirajdar.*—One lakhirajdar cannot maintain a suit for resumption against another, and force the defendant to prove his title. The onus is on the plaintiff. KAEM KHAN *v.* SAHEBA JAN . 7 W. R., 362

346. ——— *Invalid lakhiraj.*—The Government when acting as agent of a zemindar can only sue to resume invalid lakhiraj lands under 100 bighas; the onus of proof of its being mâl when so claimed is on the zemindar. RAM LOCHUN SIRCAR *v.* DENONATH PAUL . 2 W. R., 279

347. ——— Suit for assessment.—*Suit by zemindar to assess lands usurped or alienated by lakhirajdar.*—The onus in a case in which the plaintiff is an ordinary zemindar, suing to assess lands which he asserts to have been illegally usurped or alienated by a dependent lakhirajdar subsequent to the permanent settlement, rests on the plaintiff. BEHAREE LALL ROY *v.* KALEE DOSS CHUNDER [8 W. R., 451

348. ——— *Suit by auction-purchaser at sale for arears of revenue to assess rent on lakhiraj land.*—*Limitation Act, 1859, s. 1, cl. 14.*—In a suit by an auction-purchaser to assess rent on land claimed as valid lakhiraj, the onus is on the ryot to prove that the land has been held as lakhiraj from the year 1790. SHAM LALL GHOSE *v.* SEKUNDER KHAN . . . . . 3 W. R., 182

FORBES *v.* MEAN JAN . . 3 W. R., 69

HEERA MONEE DEBIA *v.* LOKENATH MUNDUL . [2 W. R., 135

NOBO LAL KHAN *v.* ADHEERANEE NARAIN KOONWAREE . . . . . 5 W. R., 191

349. ——— *Lakhiraj land.*—*Beng. Reg. XLI of 1795, s. 10.*—Where certain land apparently lakhiraj was represented in village papers as part of mâl land, and included within the boundary of the revenue-paying mehal,—*Held,* on the

ONUS PROBANDI—*continued.*

35. RESUMPTION AND ASSESSMENT —*continued.*

**Suit for assessment**—*continued.*

zemindar's suit for assessment of the land, that the onus of showing that the case is within section 10, Regulation XLI of 1795, lay on the zemindar. The inclusion of the land in the boundary is not conclusive evidence, nor is it binding when the boundary has not been made judicially. The landlord proving it to be so, the plaintiff claiming rent-free possession would be required to prove his rent-free possession (peaceably and not tainted with fraud) for sixty years before he can get a decree. MAHABEER PERSHAD *v.* OOMRAO SINGH . . . **1 Agra, 167**

**350.** ——————— *Rent-free land.* —*Benares.*—In a suit for rent of land in the province of Benares which was rent-free and recorded as such at the revision of settlement in 1840-41 and 1842, the zemindar must show that if it was lakhiraj in 1197 Fusli there has been a legal resumption and assessment by judicial award: or if mâl in 1197 Fusli, he must prove legal resumption and actual levy of rents. The burden of proving this by direct and specific evidence lies on the zemindar. MOTEE LALL *v.* JANKI ROY . . . . **3 Agra, 364**

**351.** ——————— *Suit to have certain lands declared mâl.*—Where it is admitted that the defendants hold certain lands within the plaintiff's zemindari, some at least of which are rent-paying, the defendants, if desirous of proving that any of these lands are rent-free, are bound to give some *primâ facie* evidence of the fact, before they can call upon the plaintiff, the zemindar, to prove that the whole or any part of the lands are mâl. AKBUR ALI *v.* BHYRA LAL JHA **[I. L. R., 6 Calc., 666: 7 C. L. R., 497**

**352.** ——— **Suit for rent-paying land.** —*Suit by auction-purchaser for land alleged by him to be mâl.*—In a suit by an auction-purchaser for the khas possession of land alleged to be mâl land fraudulently alienated by the former zemindar as lakhiraj, the burden of proving that it is mâl is on the plaintiff. ANDREW *v.* LYON . . **2 Hay, 362**

**353.** ——— **Suit for land alleged to be lakhiraj.**—*Proof of receipt of rent.*—In a suit to recover possession of land within plaintiff's estate, in which defendant sets up a rent-free title, all that plaintiff is required to show is that either he or his predecessor had received rent for the land at some time subsequent to the perpetual settlement, in which case the onus of proving title falls on the defendant. RAM NARAIN SINGH DEO *v.* BISTOO THAKOOR **[15 W. R., 299**

**354.** ——— **Suit for possession of resumed lands.**—*Application for and refusal of settlement.*—Where, in a suit for possession of resumed lands, the plaintiff contends that the laws under which the lands in dispute were resumed (Beng. Regulations II of 1819 and III of 1828) contemplate assessment and not ejectment, the plaintiff must prove that he had formerly applied for and been refused a settlement

ONUS PROBANDI—*continued.*

35. RESUMPTION AND ASSESSMENT —*continued.*

**Suit for possession of resumed lands**—*continued.*

of the lands. ABDOOL GUNNY *v.* COMMISSIONER OF THE SUNDERBUNS . . . **2 W. R., 239**

**355.** ——— **Suit for land as lakhiraj.** —*Dispute as to land being mâl or lakhiraj.*—In a suit in which plaintiff claimed four plots of land as belonging to his putni, and defendant alleged that they formed part of the resumed land of a jote for which he had obtained a decree in a resumption suit, and of which he had ever since been in possession, the parties went to trial on the issue whether the land was mâl as beyond the limits of the decree, or lakhiraj as included in the chittahs, according to which possession was given to the defendant in execution. On a consideration of what the latter had received under the decree, the first Court held that he was not entitled to retain the disputed land. The Appellate Court did not look beyond the plaintiff's chittahs. *Held* that the circumstances justified the first Court in deviating somewhat from the usual rule of law as regards the *onus probandi*, and that the course taken by it was most consonant with justice. DOSSEE *v.* RAM NIDHEE KOONDOO **[15 W. R., 183**

**356.** ——— **Suit to declare land liable to assessment.**—*Suit for ejectment by purchaser at sale for arrears of revenue on the ground that land is mâl.—Homestead land.*—The purchaser of an estate at a sale for arrears of revenue, after withdrawing a suit for arrears of rent sued to eject the defendant from a piece of land on which his homestead was,—*i.e.*, to declare the land liable to assessment and to obtain khas possession. *Held* that the onus lay with the plaintiff to prove that the land was mâl, and that he and his predecessors had received rent for it. BISSAMBHUR BANERJEE *v.* KOYLASH CHUNDER BOSE . . . **23 W. R., 388**

**357.** ——— **Suit for declaration of lakhiraj title.**—*Possession, Proof of.—Title, Proof of.*—Where a plaintiff comes into Court to prove a lakhiraj title, no proof of possession for years (unless it be carried beyond 1790) as apparent lakhiraj can excuse him from proving his title. RAM JEEBUN CHUCKERBUTTY *v.* PERSHAD SHAH **[7 W. R., 458**

**358.** ——— **Suit for possession of lakhiraj land.**—*Beng. Reg. XIX of 1793, s. 10.*—Suit to recover possession of land from which the plaintiff had been ousted by the defendant under section 10, Regulation XIX of 1793, on the ground that it was an invalid lakhiraj created after 1st December 1790. *Held* that the zemindar, having no right to oust the lakhirajdar, unless the lakhiraj was created after 1st December 1790, must prove that the lakhiraj was created subsequently to that date, and that it was not for the lakhirajdar to prove that the lakhiraj was created prior to that date. MUN MOHINEE DOSSEE *v.* JOYKISSEN MOOKERJEE **[W. R., F. B., 174**

ONUS PROBANDI—*continued.*

35. RESUMPTION AND ASSESSMENT —*continued.*

**Suit for possession of lakhiraj land**—*continued.*

PREM SHEWUK DOSS *v.* ISHREE PERSHAD [2 W. R., 303

TARREENEEPERSAD GHOSE *v.* KALLEECHURN GHOSE . . Marsh., 215 : 2 Hay, 90

**359.** ——— *Purchaser at sale in execution of a decree.*—The onus of proving that a tenure is lakhiraj is not obviated by the circumstance that the person alleging that it is bought the tenure as lakhiraj at a sale in execution of a decree. LALLA SHEEBLALL *v.* GHOLAM NUBEE [Marsh., 255 : 2 Hay, 23

**360.** ——— *Validity of lakhiraj tenure.*—In a suit to recover the possession of land from which the plaintiff, claiming to be a lakhirajdar, has been forcibly evicted by the landholder, the plaintiff is not entitled to a decree for possession unless he can show a *primâ facie* case of lakhiraj tenure. *Semble,*—If he show such *primâ facie* case, the Court will give a decree for possession, and leave the zemindar to dispute the existence or validity of the alleged lakhiraj tenure in a resumption suit. SEEENATH LALL *v.* JUNMEYJOY MULLICK [Marsh., 550 : 2 Hay, 649

**361.** ——— *Long possession of purchaser.*—In a suit to recover possession of lands which plaintiffs alleged to be lakhiraj, and of which they had been dispossessed by the defendants (zemindars),—*Held* that, as plaintiffs had purchased the lands as lakhiraj, and had been admittedly in possession of them as such for a very long time, it was for the zemindar, who pleaded a right to oust them summarily, under section 10, Beng. Regulation XIX of 1793, to prove that the lakhiraj title was invalid as having been created subsequent to 1790. MUNSARAM DOSS KURMOKAR *v.* GRIDHAREE RAM DOSS [10 W. R., 278

**362.** ——— *Proof of collection of rents.*—In a suit for possession of alleged lakhiraj land, if the alleged lakhirajdar proves possession as purchaser of the alleged lakhiraj land, the Court ought not to put upon him the burden of proving a title; but if the zemindar wishes that point to be tried in this or another suit, he must accept the onus of proving that the lakhiraj is held on an invalid title, by proving that he collected mâl rents from the land, and that he is not barred by limitation. GOSSAIN SHEO SUHAYE GEER v. MOHADEO SUHAYE [6 W. R., 294

**363.** ——— *Proof of previous possession rent-free.*—In a suit to recover possession of lakhiraj land on the allegation that the plaintiff has been wrongfully evicted, the plaintiff is entitled to succeed if he proves that he previously held possession of the land as lakhiraj. JOYKISHEN MOOKERJEE v. PEAREE MOHUN DUTT. 8 W. R., 160

ONUS PROBANDI—*continued.*

35. RESUMPTION AND ASSESSMENT —*continued.*

**Suit for possession of lakhiraj land**—*continued.*

**364.** ——— *Suit by ryot after dispossession for invalid lakhiraj land.*—A zemindar obtained a decree against a ryot for assessment, on the ground that the ryot held under an invalid lakhiraj, but instead of assessing turned the ryot out of possession. *Held* that a suit by the ryot for recovery of the land on the ground of anterior possession was not sustainable, and the ryot must prove his title as against the zemindar; his anterior possession under the invalid lakhiraj, the decision as to which he did not sue to set aside within the proper time, being the possession of a mere trespasser, and not that of an occupant ryot. WOOMA SOONDUREE THAKOORANEE *v.* KISHOREE MOHUN BANERJEE [8 W. R., 238

**365.** ——— **Suit for declaration of land as lakhiraj.**—*Decree for rent, Evidence of.*—Where plaintiffs sued for declaration that certain lands were lakhiraj, on the ground that defendant had obtained a decree in the Collector's Court against them for rent,—*Held* that the onus lay upon the plaintiffs to show that they were holding the land as true lakhiraj, and that the Collector's decree was wrong. HURENDUR KISHORE *v.* KEDARNATH MITTER [10 W. R., 188

**366.** ——— In a suit for confirmation of possession and declaration of lakhiraj right against purchasers at a sale for arrears of Government revenue, it is necessary for the plaintiff to prove affirmatively that the land has been held rent-free from the time of the permanent settlement. RAM CHURN LALL *v.* HATEE MAHTOON [13 W. R., 247

**367.** ——— *Proof of possession for twelve years.*—In order to lands being released from the assessment of Government revenue, they must be shown to be lakhiraj lands which were in existence at the time of the perpetual settlement; it is not sufficient to prove lakhiraj possession for twelve years. ESHAN CHUNDER SHAHA *v.* HATIMOOZZUMAH KHONDKUR . . 13 W. R., 334

**368.** ——— **Suit for confirmation of possession of lakhiraj.**—*Proof of title.*—In a suit for confirmation of possession of mokurrari and lakhiraj land, and for a declaration that the plaintiff has a lakhiraj and mokurrari title, the onus is on him. HUREE NARAIN ROY *v.* DOORGA CHURN DEGHOORIA . . . . 17 W. R., 449

*See* KHELATCHUNDER GHOSE *v.* POORNO CHUNDER ROY . . . . 2 W. R., 258

**369.** ——— **Evidence of land being lakhiraj.**—*Production of rent-free sunad.*—The production of a lakhiraj sanad is not necessary to prove that land is held rent-free. The fact may be legally established by long and uninterrupted possession without payment of rent, raising the presumption that

**ONUS PROBANDI**—*continued.*

35. RESUMPTION AND ASSESSMENT —*continued.*

**Evidence of land being lakhiraj**—*continued.*

the land had been held rent-free from the decennial settlement. DHUNPUT SINGH *v.* RUSSOMOYEE CHOWDHRAIN . . . . **10 W. R., 461**

**370.** ———— *Suit for rent.*—If no rent has ever been paid for land, this is *primâ facie* strong proof of a *de facto* exemption protected by limitation. The party claiming the rent must satisfy the Court that the remedy is not affected by lapse of time, and that the land was held for some service due and rendered to the zemindar, or otherwise by the zemindar's permission. If the holding were merely permissive it could not prejudice the zemindar's right. ALI BUX *v.* ROOP KOOER **[2 N. W., 106**

36. SALE OF GOODS.

**371.** ———— **Sale of goods by sample.**—*Proof of inequality of sample.*—In a sale of goods by sample, the onus is on the party alleging that the goods are not equal to sample. ISHERA YARN MILLS COMPANY *v.* ABDOOL KURREEM **[Bourke, O. C., 276**

37. SALE FOR ARREARS OF REVENUE.

**372.** ———— **Suit by purchaser.**—*Incumbrances.—Title.—Possession.*—In a suit by an auction-purchaser of a permanently-settled estate to recover certain julkurs, of which the defendants had been admittedly in possession for nearly fifty years, and which they claimed as incidents to a tenure which existed before the date of the permanent settlement, it was held that the onus was on the plaintiff to prove his title affirmatively. FORBES *v.* MEER MAHOMED HOSSEIN . **12 B. L. R., P. C., 210 : 20 W. R., 44**

**373.** ———— *Suit for rents and profits of uncultivated land brought into cultivation.*—Suit by purchaser of a mootah at a sale for arrears of revenue for the rents and profits of a hamlet, consisting of lands which, when uncultivated, were given by the then zemindar to the defendant (respondent). The plaintiff alleged that the lands were included in the assets upon which the permanent assessment was fixed, but being unable to prove his allegation, his suit was dismissed. VENCATA NILADRY ROW *v.* VUTCHAVOY VENCATAPUTTY RAJ **[5 W. R., P. C., 80**

**374.** ———— **Incumbrance.**—*Act XI of 1859, s. 54.*—Where the surrounding circumstances suggest the creation of a *bonâ fide* incumbrance executed in contemplation of an impending sale for arrears of revenue which would be protected by section 54 of Act XI of 1859, it is for the party setting up such incumbrance to establish its *bonâ fide* character. MONOHUR MOOKERJEE *v.* JOYKISHEN MOOKERJEE . . . . . **5 W. R., 1**

**ONUS PROBANDI**—*continued.*

37. SALE FOR ARREARS OF REVENUE —*continued.*

**375.** ———— **Claim to protection from ejectment by auction-purchaser.**—*Act XI of 1859, s. 37.*—Where a ryot claims protection from ejectment by an auction-purchaser under the proviso to section 37, Act XI of 1859, the onus is on the ryot to prove the character of his holding. DOMUN LOLL *v.* PUDMUN SINGH . **W. R., 1864, Act X, 129**

38. SALE FOR ARREARS OF RENT.

**376.** ———— **Ejectment, Suit for.**—*Avoidance of under-tenure.—Incumbrance.—Beng. Act VIII of 1869, ss. 59, 60, 66.*—In a suit by the purchaser of an under-tenure, under sections 59 and 60 of the Rent Act (Bengal Act VIII of 1869), to obtain possession of lands held by the defendant, on the ground that the holdings are incumbrances which have accrued thereon by an authorised act of the previous holder of the under-tenure, it lies upon the plaintiff to show that the defendant's holdings are such incumbrances as the plaintiff is entitled to avoid under section 66 of the Rent Act. GOBIND NATH SHAHA CHOWDHURI *v.* REILY . . **I. L. R., 13 Calc., 1**

**377.** ———— **Suit to set aside putni sale.**—*Irregularity.—Non-service of notice.—Proof of service.—Evidence Act, s. 106.*—In a suit against a zemindar to set aside the sale of a putni tenure under Regulation VIII of 1819 on the ground of nonservice of notice, the onus of proving service lies on the defendant according to the spirit of section 106 of the Evidence Act. DOORGA CHURN SURMA CHOWDHRY *v.* NAJIMOODDEEN . **21 W. R., 397**

39. SALE IN EXECUTION OF DECREE.

**378.** ———— **Suit to set aside sale.**—*Irregularity.*—When a judgment-debtor sues to set aside a sale in execution of a decree, on the ground of irregularity, the onus of proving the irregularity is on him. NUFUSA *v.* MAHOMED AKBAR GAZEE **[2 W. R., 74**

MOHESH NARAIN SINGH *v.* KISHNANUND MISSER **[Marsh., 592 : 2 Ind. Jur., O. S., 1**
**5 W. R., P. C., 7 : 9 Moore's J. A., 324**

**379.** ———— *Fraud, Proof of.—Irregularity.*—In a suit to set aside an execution sale on the ground of fraud, the *onus probandi* rests on the plaintiff to prove his allegation; mere irregularity in the issue of processes will not of itself prove fraud, even where the auction-bids were so small as to excite suspicion. KUBEERUN *v.* SUFEERUN . . . . . **24 W. R., 388**

**380.** ———— *Proof of irregularity.—Non-affixing of notices previous to sale.*—Several years after the purchase by the defendant of immoveable property at a sale in execution of a decree, the judgment-debtor sued this purchaser for the lands, on the ground, amongst others, that the notices required by Bengal Regulation XX of 1795,

ONUS PROBANDI—*continued.*

39. SALE IN EXECUTION OF DECREE —*continued.*

**Suit to set aside sale**—*continued.*

section 12, had not been affixed previous to the sale. *Held* that the onus of proving the default in affixing the notices lay upon the plaintiff, the judgment-debtor. MOHESH NARAIN SINGH *v.* KISHNANUND MISSER . **Marsh., 592: 2 Ind. Jur., O. S., 1 [5 W. R., P. C., 7: 9 Moore's I. A., 324**

**381.** ——— *Allegation of fraud.—Knowledge of fraud.*—In a suit to set aside a sale in execution of decree on the ground of fraud, where the plaintiff alleges the fraud only came to his knowledge at a certain time,—*Held* that the burden of proving such knowledge on the part of the plaintiffs, prior to the time stated by them, lay on the defendants. NATHA SINGH *v.* JODHA SINGH **[I. L. R., 6 All., 406**

**382.** ——— *Bona fides.*—In execution of a decree, the judgment-debtor's right, title, and interest in a certain property were attached. The plaintiff thereupon preferred a claim under conveyances from the judgment-debtor; but it was rejected, and the property was sold. The judgment-creditor purchased the same at the auction and sold it to the defendant, who ousted the plaintiff, who thereupon sued to recover possession under his conveyance. *Held* that the onus was not entirely on the plaintiff to prove the *bona fides* of the sale, but that the evidence adduced by the defendant should be examined also. DEBI *v.* MADAN MOHAN SINGH . . . . **2 B. L. R., A. C., 326**

**383.** ——— *Purchase by grand-daughter from grandmother.—Stranger purchasing bonâ fide.—Proof of bona fides.*—When a grand-daughter purchases from a grandmother, and attempts to oust a stranger who purchased *bonâ fide* and without notice, full and satisfactory proof of the *bona fides* of the transaction is necessary, even though no motive for fraud is proved. IMDAD HOSSEIN *v.* ALIKOONNISSA. DABEE DUTT MISSER *v.* ALIKOONNISSA . . . **W. R., F. B., 77**

**384.** ——— *Proof of want of bona fides.—Suspicion.*—In a suit to have a purchase made at an execution sale set aside on the ground that it was not *bonâ fide* but collusive, the burden of proof is upon the plaintiff, and it is not sufficient for him only to show circumstances which create a suspicion of the *bona fides* of the transaction. But in a suit for possession of land and for a declaration of plaintiff's title by virtue of purchase, it is not sufficient for him to produce a deed executed by a judgment-debtor: the plaintiff must free his case of such suspicions as may arise from his own position with reference to the vendor, and from any such circumstance as the improbability of such a purchase having been made. ROOP RAM DASS *v.* SABEERAM NATH KURMOKUR . **23 W. R., 141**

*See* GOLUCKNATH GHOSE *v.* SEEENATH BOSE **24 W. R., 209**

ONUS PROBANDI—*continued.*

40. SERVICE OF SUMMONS.

**385.** ——— **Application to set aside ex parte decree.**—*Proof of service of summons.*—Where a judgment-debtor applies to set aside an *ex parte* judgment on the ground that there was no effectual service of summons upon him, he should be called upon to give his evidence or to make out a *primâ facie* case. KHUDEERUN LALL *v.* CHUTTERDHAREE LALL . . . . **21 W. R., 242**

JHUTOO KOER *v.* LULITA KOER . **22 W. R., 423**

41. TRUST, REVOCATION OF—

**386.** ——— **Religious endowment.**—*Proof of revocation.—Limitation.*—In 1813 certain lands were dedicated by deed to the religious service of an idol, and in 1820 that dedication was confirmed in a partition-deed. The plaintiff sued to set aside alienations of the property and to have the trusts of the dedication-deeds declared. The holders of the property alleged that a subsequent partition-deed had been executed in 1845, and that the dealings of the family had shown an intention to revoke the trusts. *Held* that it lay upon the holders to prove the revocation of the trusts, and that, on failure to do so, they could not set up the law of limitation in answer to the plaintiff's suit. JUGGUTMOHEENEE DOSSEE *v.* SOKHEEMONEE DOSSEE **[10 B. L. R., 19: 17 W. R., 41 14 Moore's I. A., 289**

42. VALUATION OF SUIT.

**387.** ——— **Assertion by defendant that suit is over-valued.**—When the defendant asserts that a suit is over-valued, the onus of proving the truth of his assertion lies on him. UMA SANKAR ROY CHOWDHRY *v.* MANSUR ALI KHAN **[5 B. L. R., Ap., 6: 13 W. R., 327**

43. WITNESS.

**388.** ——— **Refusal to come into Court as witness.**—*Presumption.*—In a suit to recover possession of land claimed by virtue of a sanad from a rajah, in which plaintiff gave *primâ facie* evidence of the authenticity of the sanad and subpœnaed the rajah to prove it, it was held that the lower Court did very right in considering the plaintiff's testimony to be strengthened by defendant's (rajah's) refusal to come into Court with his own story; and that the onus lay on the rajah to rebut the plaintiff's evidence, or to prove minority or other personal disqualification. RADHA KISTO SING DEO *v.* GUDADHUR BANERJEE . . . **8 W. R., 453**

44. WRONGFUL CONVERSION.

**389.** ——— **Suit for wrongful conversion of timber.**—*Failure to prove actual or constructive possession.*—In a suit under the Civil Procedure Code, in which the plaintiffs allege that the defendants wrongfully and forcibly took away

**ONUS PROBANDI**—*continued.*

44. WRONGFUL CONVERSION—*continued.*

**Suit for wrongful conversion of timber**—*continued.*

and were detaining timber which had been in the plaintiffs' constructive possession, and to which they are entitled, and the relief asked for is the restitution of the timber with costs of suit, if it be proved that the defendants had forcibly and wrongfully taken property in the plaintiffs' actual or constructive possession, it would then be for the defendants to show that they were entitled to the timber. In the present case, the plaintiffs having failed to show their possession of the timber or the forcible or wrongful dispossession or conversion of the goods, and the defendants having made good their title to the timber,—*Held* that the judgment should have been for the defendants. SNADDEN *v.* TODD, FINDLAY, & Co. . . . . **7 W. R., 286**

45. MISCELLANEOUS CASES.

**390. ——— Suit by purchaser of tora garas huk.**—*Evidence of alienability.*—Suit by the purchaser of a certain annual payment by Government, called tora garas huk, sold in satisfaction of a decree. *Held* that the onus was on the Government to prove that there was something in the nature of this payment which made it incapable of alienation, and that the Government had failed to give such proof. SHUMBHOO LALL GIRDHUR LALL *v* COLLECTOR OF SURAT

**[4 W. R., P. C., 55: 8 Moore's I. A., 1**

**391. ——— Suit for closing new road and opening old one.**—*Title.—Trespass.*—In a suit for closing a new road opened by the defendants through the land of the plaintiff, and for opening an old road which had been closed by the defendants,—*Held* that the only question which can be tried in the suit is, whether the defendants have trespassed on the land of the plaintiff by opening a road. The onus is upon the plaintiff to prove that the land belongs to him. HIRA CHAND BANERJEE *v.* SHAMA CHARAN CHATTERJEE

**[3 B. L. R., A. C., 351: 12 W. R., 275**

**392. ——— Admission of assets by heir of deceased judgment-debtor.**—*Proof of extent of property.*—When an heir of a deceased judgment-debtor admits possession of some of the latter's property, the onus is on the heir and not on the decree-holder to prove the extent of that property. MATUNGINEE DEBEA *v.* GUGUN CHUNDER BHOOY . . . . . **2 W. R., Mis., 41**

**393. ——— Suit for share of income tax.**—*Manager, Possession as.*—Suit for share of income tax by a co-sharer who, the lower Court found, was the defendant's manager. *Held* that the mere production of a deed showing that the defendant had in it nominated other persons to collect the rents of her share, without proof of cessation of possession, did not shift the onus from the plaintiff of proving that he had ceased to hold possession of the defendant's share as her manager, or that the defendant, and not

**ONUS PROBANDI**—*continued.*

45. MISCELLANEOUS CASES—*continued.*

**Suit for share of income tax**—*continued.*

the plaintiff, had actually collected the rents. RAMNATH GHOSE *v.* AMRIT MOYEE DOSSEE

**[5 W. R., 168**

**394. ——— Suit for disturbance of kazi in his office.**—*Proof of legality of his appointment as kazi.*—Where it was shown that the plaintiff had acted as Kazi of Bombay for more than twenty years, it was held, in an action against the defendant for disturbing the plaintiff in his office and thereby depriving him of his fees, that the onus was on the defendant to show that the plaintiff had been illegally appointed; and on the defendant failing to show that, that the plaintiff was entitled to succeed. MUHAMMAD YUSSUB *v.* SAYAD AHMED

**[1 Bom., Ap., 10**

**395. ——— Suit for share of joint property under family arrangement.**—*Proof of cause of action.*—A plaintiff suing for a share of joint property which she claimed under a family arrangement said to have been reduced to writing as an ikrarnamah, and upon the happening of the necessary conditions, it was held that the rules, with regard to the onus of proof which are applicable to a suit for a share of joint family property were not directly applicable, and the plaintiff was bound to give some *primâ facie* proof of her cause of action. RAM CHUNDER MITTER *v.* KISTOO KAMINEE DOSSEE

**[10 W. R., 194**

**396. ——— Suit for share of zerait land under ticca pottah granted by co-sharers.**—*Effect of decision without jurisdiction.*—Where, under a ticca pottah granted to him by several shareholders, plaintiff claimed the share of rent said to be due to him by the defendant (another shareholder) in respect of the occupation of a certain quantity of the zerait land which constituted the holding of the combined shareholders, and the defendant objected that the plaintiff's share was less than what he stated it to be,—*Held* that the burden of proving the extent of his share lay on the plaintiff. In such a case even a ryot resisting the claim of a shareholder to rent would be entitled, if he had good reason to do so, to make the plaintiff prove the amount of his share; and the only onus on an intervenor would be to prove *bonâ fide* possession. A decision set aside by a superior Court as made without jurisdiction cannot have any probative force whatever between the parties. SOOKRAM MISSER *v.* CROWDY . . . . . **19 W. R., 285**

**OPINIONS OF JUDGES, MEMORANDA OF—**

*See* JUDGMENT — CIVIL CASES — WHAT AMOUNTS TO—

**[B. L. R., Sup. Vol., 774**

**OPIUM, ILLEGAL POSSESSION OF—**

*See* ACT XIII OF 1867, s. 20.

**[8 B. L. R., Ap., 7**

**OPIUM, ILLEGAL POSSESSION OF—** *continued.*

1. ——— **Bom. Reg. XXI of 1827, s. 4.**—*Keeping smuggled opium.—Sentence on conviction.*—Where more than one person is convicted under section 4, Regulation XXI of 1827 (Bombay), of keeping smuggled opium, each of the convicts is liable to the whole penalty therein imposed,—*viz.*, the forfeiture of double the value of the opium and double the amount of the duty leviable thereon. REG. *v.* VAKHATCHAND . . . **1 Bom., 50**

But this was overruled by the following case, which approved of the case of *Reg.* v. *Rajgur Vesegur, 3 Moore's Fouz. Rep., 673*, and held that where several persons knowingly harbour, keep, or conceal a parcel of smuggled opium, one penalty of double the value of such opium and of double the amount of duty leviable upon it only is recoverable, under Regulation XXI of 1827, section 4. REG. *v.* SHOWDAR GHENAR . . . . **7 Bom., Cr., 39**

2. ——— **Act XXI of 1856, s. 53.**—*Possession by servant.*—Where opium was found in the possession of a person who was a servant of the accused, and who alleged that he obtained it from the wife of the accused, and that the wife had purchased it from an opium cultivator, it was held that the accused could not be convicted under section 53, Act XXI of 1856, as it had not been shown that the purchase by his wife was authorised by the accused, and therefore her possession of the opium or that of the servant could not be considered the possession of the accused. QUEEN *v.* GUNESH MANA **[20 W. R., Cr., 54**

**OPIUM, ILLEGAL SALE OF—**

*See* ACT XXI OF 1856, s. 38. **[16 W. R., Cr., 69**

2. ——— **Liability of master for act of servant.**—*Act I of 1878, s. 9.*—Contrary to the conditions of his master's opium license, the servant sold a preparation of opium between sunset and sunrise. The master was not present, and there was no evidence to show that he had directly or otherwise authorised the illegal sale. *Held* that the master was not liable to a penalty under section 9 of Act I of 1878. IN THE MATTER OF BHOOBUN CHUNDER SHAW . . . . . **11 C. L. R., 464**

**OPIUM ACT, I OF 1878.**

——— *Breach of license under.—Beng. Act IV of 1866, ss. 36, 37, 39, 40.—Beng. Act II of 1876.—Beng. Excise Act, VII of 1878.—Liability of master for servant's breach of license.—A.*, who held a certificate under Act VII of 1878 (The Excise Act) from the Deputy Commissioner of Police that he was entitled to a license from the Collector to sell muddut upon the conditions set forth therein, obtained such a license from the Collector under Act I of 1878 (The Opium Act) upon the conditions mentioned. No license was granted by the Deputy Commissioner of Police, it not being usual for licenses to be granted by the police where a license had been issued by the Collector upon a certificate from the Deputy

**OPIUM ACT, I OF 1878—***continued.*

Commissioner. *A.* was charged under section 40 of Act IV of 1866 [as amended by Bengal Act II of 1876] with a breach of the conditions, not of the license, but of the certificate, the act complained of having been committed by *A.'s* servant. *Held* that the sale of muddut is regulated by Act I of 1878, and therefore no license from the Commissioner of Police for the sale of muddut was requisite under sections 36 and 37 of Act IV of 1866. *Held*, further, that section 39 of Act IV of 1866 applied to the case, and that under that section a license from the Deputy Commissioner of Police was necessary for the sale of muddut, and accordingly that *A.*, although he had obtained a certificate from the Deputy Commissioner of Police entitling him to a license under Act I of 1878, was liable to punishment by reason of his not having, under section 39 of Act IV of 1866, also obtained a certificate from the Deputy Commissioner. See *In re Bhoobun Chunder Shaw, 11 C. L. R., 464.* DAVIS *v.* KOYLASH CHUNDER GHOSE . **13 C. L. R., 336**

**ORAL EVIDENCE.**

*See* CASES UNDER EVIDENCE—PAROL EVIDENCE.

*See* CASES UNDER WITNESS.

**ORDER ALLOWING COMMISSION TO ADMINISTRATOR GENERAL.**

*See* LETTERS PATENT, HIGH COURT, CL. 15. **[I. L. R., 1 Mad., 148**

**ORDER AS TO MESNE PROFITS AND COSTS OF EXECUTION.**

*See* APPEAL—EXECUTION OF DECREE—QUESTION IN EXECUTION. **[I. L. R., 2 Bom., 553**
**I. L. R., 5 Calc., 50**

**ORDER FIXING AMOUNT OF COURT FEE CHARGEABLE ON PLAINT.**

*See* APPEAL — ACTS — COURT FEES ACT, 1870 . **I. L. R., 2 Bom., 145, 219**

**ORDER IN CONFORMITY WITH AGREEMENT OF PARTIES.**

*See* ESTOPPEL—ESTOPPEL BY DEEDS AND OTHER DOCUMENTS. **[I. L. R., 5 Calc., 27**

**ORDER IN EXECUTION OF DECREE.**

*See* CASES UNDER APPEAL—EXECUTION OF DECREES.

*See* CIVIL PROCEDURE CODE, 1877-1882, s. 2 . . **I. L. R., 3 Calc., 662**

*See* CASES UNDER RES JUDICATA—ORDERS IN EXECUTION OF DECREE.

**ORDER IN EXECUTION OF DECREE** —*continued.*

*See* SPECIAL APPEAL—ORDERS SUBJECT TO APPEAL . B. L. R., Sup. Vol., Ap., 1
[1 Ind. Jur., O. S., 50, 68
6 Bom., A. C., 205
4 Mad., 32
I. L. R., 1 Mad., 401
I. L. R., 11 Calc., 169

*See* SPECIAL APPEAL—SMALL CAUSE COURT SUITS . . . 12 B L. R., 261
[I. L. R., 2 All., 112
8 W. R., 112
12 W. R., 86

**ORDER "MADE ON APPEAL."**

*See* APPEAL TO PRIVY COUNCIL—CASES IN WHICH APPEAL LIES—APPEALABLE ORDERS . . . 13 B. L. R., 103
[1 B. L. R., F. B., 1

**ORDER OF CRIMINAL COURT OBTAINED ON A MISSTATEMENT OF FACTS.**

*See* REVIEW—CRIMINAL CASES.
[9 B. L. R., 342

**ORDER OF EXECUTIVE NATURE.**

*See* SUPERINTENDENCE OF HIGH COURT—CHARTER ACT, S. 15—CRIMINAL CASES.
[10 B. L. R., Ap., 4

**ORDER OF MAGISTRATE DISMISSING MINISTERIAL OFFICER.**

*See* APPEAL—ORDERS.
[3 B. L. R., A. C., 370

**ORDER OF MAGISTRATE IN RESPECT OF NUISANCE.**

*See* DECLARATORY DECREE, SUIT FOR—ORDERS OF CRIMINAL COURT.
[6 B. L. R., 643

*See* CASES UNDER JURISDICTION OF CIVIL COURT—MAGISTRATE'S ORDERS, INTERFERENCE WITH—

*See* CASES UNDER NUISANCE.

**ORDER OF MAGISTRATE IN RESPECT OF POSSESSION.**

*See* CASES UNDER POSSESSION, ORDER OF CRIMINAL COURT AS TO—

**ORDER REFUSING ATTACHMENT IN EXECUTION OF DECREE.**

*See* APPEAL—RIGHT OF APPEAL, EFFECT OF REPEAL ON . I. L. R., 1 All., 668

**ORDER REFUSING TO ADMIT SPECIAL APPEAL.**

*See* REVIEW—ORDERS SUBJECT TO REVIEW . 10 B. L. R., 155, 156, note

**ORDER REJECTING APPLICATION FOR EXECUTION OF DECREE ON GROUND OF LIMITATION.**

*See* RES JUDICATA—ORDERS IN EXECUTION OF DECREE . I. L. R., 3 Calc., 47

**ORDER REJECTING APPLICATION FOR REGISTRATION.**

*See* REGISTRATION ACT, 1877, s 77 (1871, s. 76) . I. L. R., 2 Calc., 131

*See* REVIEW—ORDERS SUBJECT TO REVIEW.
[I. L. R., 2 Calc., 131

**ORDER REJECTING APPLICATION TO BE DECLARED AN INSOLVENT.**

*See* APPEAL—ORDERS.
[I. L. R., 4 Calc., 888
I. L. R., 5 Calc, 719
I. L. R., 6 Calc., 168
I. L. R., 2 Mad., 219

**ORDER REJECTING APPLICATION TO SET ASIDE EX PARTE DECREE.**

*See* CASES UNDER APPEAL — EX PARTE CASES.

**ORDER REMANDING CASE FOR RETRIAL.**

*See* APPEAL TO PRIVY COUNCIL—CASES IN WHICH APPEAL LIES—APPEALABLE ORDERS . . I. L. R., 1 All., 726

**ORDER SUBSTITUTING ONE JUDGMENT-DEBTOR FOR ANOTHER.**

*See* INJUNCTION—SPECIAL CASES—EXECUTION OF DECREE . I. L. R., 5 Calc., 86

*See* LIMITATION ACT, 1877, ART. 13 (1871, ART. 15) . I. L. R., 5 Calc., 86

**ORDER AND DISPOSITION.**

*See* CASES UNDER INSOLVENCY—ORDER AND DISPOSITION.

**ORDERS.**

*See* CASES UNDER APPEAL—ORDERS.

**ORDERS IN EXECUTION OF DECREE OF PRIVY COUNCIL.**

*See* APPEAL TO PRIVY COUNCIL—CASES IN WHICH APPEAL LIES—VALUATION OF APPEAL . B. L. R., Sup. Vol., 747
[5 B. L. R., 605

**ORIGINAL SIDE OF HIGH COURT, CRIMINAL.**

*See* SUPERINTENDENCE OF HIGH COURT—CHARTER ACT, S. 15—CRIMINAL CASES.
[7 B. L. R., 244, note; 250, note

**ORIGINAL SIDE OF HIGH COURT, POWERS OF JUDGE SITTING ON—**

*See* CERTIFICATE OF ADMINISTRATION—CANCELMENT OR RECALL OF CERTIFICATE . . 5 B. L. R., Ap., 21

**ORIGINAL SIDE OF HIGH COURT, RIGHT TO PLEAD IN—**

*See* RULES OF HIGH COURT, MADRAS. [I. L. R., 1 Mad., 24

**OUDH CIVIL COURTS ACT, XIII OF 1870, s. 27.**

*See* DIVORCE ACT, s. 3. [I. L. R., 4 All., 306

**OUDH ESTATES ACT, I OF 1869.**

*See* WILL—CONSTRUCTION. [I. L. R., 10 Calc., 482

1. ——— *Limitation.—Suit for redemption of mortgage.*—Under Act I of 1869 a suit for redemption is not barred where the instrument of mortgage fixes a term within which the mortgage might be redeemed, and such term did not expire before 13th February 1856. KISHEN DUTT RAM PANDAY *v.* NARENDAR BAHADOOR SINGH [L. R., 3 I. A., 85

2. ——— **Interest of registered talookdar.**—*Trustee.*—An Oudh talook standing in the name of *J. S.* as kabuliatdar, having been confiscated under Lord Canning's proclamation of March 1858, was summarily settled with *J. S.* on the 24th April following. A talookdari sanad was granted to *J. S.*, and he was subsequently registered as talookdar under the provisions of Act I of 1869. In a suit against *J. S.* by persons alleging themselves to be joint in family and estate with him, to have their interest in the talook declared, held by the Commissioner of Sestapore, in Oudh, confirming the decision of the settlement officer, that, under Act I of 1869, the defendant was protected by his sanad against any claim of the plaintiffs in respect of the talook. *Held* by the Privy Council, on appeal, that as a person who has been registered as a talookdar under Act I of 1869, and has thereby acquired a talookdari right in the whole property, may, nevertheless, have made himself a trustee of a portion of the beneficial interest in lands comprised within the talook for another, and be liable to account accordingly, the suit must be remanded for trial as to whether the defendant had agreed, or become bound, to hold the villages comprised in the summary settlement and sanad, or the rents and profits thereof, in trust for the plaintiffs. HARDEO BUX *v.* JAWAHIR SINGH [I. L. R., 3 Calc., 522: L. R., 4 I. A., 178

*Held* by the Privy Council after remand, that Act I of 1869, which was passed before the suit was decided by the Court of first instance, did not operate so as to change the relative conditions of the parties, and to put an end to the trust upon which the defendant had previously held the estate. The estate in his hands remained thereafter subject to the trust, and there can be no difference in this respect between

**OUDH ESTATES ACT, I OF 1869.—Interest of registered talookdar—*continued.***

an express trust and a trust implied or presumed from a fair and reasonable interpretation of the acts and declarations of the defendant. HARDEO BUX *v.* JAWAHIR SINGH . . L. R., 6 I. A., 161

3. ——— **Title under sanad from Government.**—*Trustee.*—Although a sanad granted by the Government of India subsequent to the proclamation of March 1858, of an estate in Oudh, confers an absolute legal title on the grantee, such grantee may, nevertheless, by an express declaration of trust, or by an agreement to hold in trust, constitute himself a trustee of the estate for a third party. SHERE BAHADUR SINGH *v.* DURJAO KUAR [I. L. R., 3 Calc., 645

4. ——— **Mortgage.**—*Birt zemindari.—Settlement.—Under-proprietary rights.—Sub-settlement.—Malikana.—Act XXVI of 1866.*—An estate in Oudh, which had been confiscated under Lord Canning's proclamation of the 15th March 1858, was granted to *B.* as talookdar. *G. S.*, who at the date of the proclamation was in possession of the estate as mortgagee "with birt zemindari rights," under a conditional deed of sale from the former owner, was thereupon dispossessed, and *B.* put into possession. Failing in other attempts to recover possession, *G. S.* brought a claim, in which he asserted proprietary right as mortgagee, and prayed that the regular settlement might be made with him. The claim was dismissed by the settlement officer as being for a direct settlement of a superior proprietary right, and as such barred by the Oudh Estates Act, No. I of 1869. On appeal to the Commissioner the claim was modified into one for a sub-settlement of an under-proprietary right, and a decree was made declaring the plaintiff's under-proprietary zemindari title, and awarding him possession under the terms of the deed of conditional sale, till such time as the mortgage should be redeemed or the title perfected by foreclosure. On appeal to the Judicial Commissioner, this decree was reversed and the claim dismissed, on the ground that the effect of the mortgage-deed was to convey to the plaintiff, on the mortgage becoming absolute, the full proprietary title, and not merely a subordinate one. *Held* by the Judicial Committee of the Privy Council, that the "birt zemindari rights," which the mortgage purported to convey, implied a merely subordinate zemindari interest, and that the claim of the plaintiff to a sub-settlement was valid. *Quære,*—Whether, even if the interest intended to be conveyed by the mortgage was not in strictness sub-proprietary, a sub-settlement might not have been supported. *Quære,*—Whether, under Act XXVI of 1866, *B.* as talookdar was entitled to malikana. GOURI SUNKER *v.* MAHARAJA OF BULRAMPORE . . I. L. R., 4 Calc., 839 [L. R., 6 I. A., 1

——— **ss. 2 and 16-19.** — *Summary settlement with member of Joint Hindu family governed by Mitakshara law.—Right of alienation.—Will.—Custom as to partition.*—By the 8th paragraph of the Oudh proclamation of March 1858, it was declared that *C. L.* (at that time deceased)

**OUDH ESTATES ACT, I OF 1869, ss. 2 and 16-19**—*continued.*

zemindar of Mourawan, and others, were thenceforward the sole hereditary proprietors of the lands which they held when Oudh came under British rule, and which form part of the subject of these suits. Summary settlements of the said lands were subsequently made with *G. S.* (one of the sons of *C. L.*) by the Government between the 1st April 1858 and the 10th October 1859; a talookdari sanad was granted to him before the passing of Act I of 1869; and he entered into a kabuliat for the same. His name was not entered in the second schedule annexed to the Act, but *C. L.'s* was. By a document dated 7th February 1860, relating to property in the district of Oonao, and by other documents similar in effect relating to property in other districts, *G. S.* directed as follows: "I have been requested by Government to submit an application on the subject of primogeniture, with a view that the talooka may not be split into pieces as I would wish. Now the custom that has been followed in my family for generations past is this: that the eldest member of the family continues to be the head, while the others remain obedient to him; but every one possesses a share in the talooka. Under the custom of the family the other brothers are at liberty to have their shares separated should they wish it. The head has no power under the old custom to alienate the estate without consulting every sharer. I therefore wish that the old custom of maintaining the share of each shareholder be preserved, in opposition to the one in accordance with which one member of the family is allowed to succeed." In suits for partition amongst the descendants of *C. L.*, and of his brother, who together constituted a Hindu joint family governed by the Mitakshara law, all the property the subject of the suits having been found to be the joint property of the said family, it was contended on behalf of the appellants in the first appeal that all the estates included in the sanad to their father *G. S.*, and summary settlements, whether previously joint property of the family or not, became the separate self-acquired property of *G. S.*; that he was the sole malgoozar thereof; and that he and his sons were the sole beneficial owners of it, and that he had no power to transfer it by will or by alienation *inter vivos*. *Held* that the sanad and summary settlements were a mere grant by the Government to one member of the family of property which belonged to the family jointly, and were not intended to enure to the sole benefit of the grantee, and did not affect the rights of the family. As regards such property granted to *G. S.* (if any) which was not previously part of the family estates, it was granted for services presumably rendered with the use of the joint family funds, and could not therefore be separate self-acquired property within the meaning of the Hindu law. *Held*, also, that assuming any portion of such property to have been self-acquired by *G. S.*, he must, in consequence of Act I of 1869, be deemed to have acquired therein a permanent heritable and transferable right, and had power by will, or alienation *inter vivos*, to transfer the same. *Held*, further, that the document of the 7th February 1860 and other similar documents, so far as they related to the property in Oudh, amounted

**OUDH ESTATES ACT, I OF 1869, ss. 2 and 16-19**—*continued.*

to a will within the definition of Act I of 1869, section 2. Taken in conjunction with other documents, and having regard to the acts of different members of the family under it, the same amounted to evidence of an alienation *inter vivos* which in *G. S.'s* lifetime transferred the property to the family to be held as joint family property. Sections 16-19 of Act I of 1869 have no retrospective effect. HURPURSHAD *v.* SHEO DYAL. RAM SAHOY *v.* SHEO DYAL. BALMOKUND *v.* SHEO DYAL. RAM SAHOY *v.* BALMOKUND

**[L. R., 3 I. A., 259: 26 W. R., 55**

**——— ss. 3, 4, 8, & 22.**

*See* SANAD.

**[L. R., 5 I. A., 1: 1 C. L. R., 318**

1. ——— **s. 8.**—*Talookdar in the second list.—Estate descending to single heir.—Primogeniture.*—In the Oudh Estates Act, I of 1869, rules were laid down as to the title of talookdars whose estates the Government had created, and as to the mode of succession thereto. On a question whether or not a talook, to which the Act was applicable, descended according to the rules of lineal primogeniture,—*Held* that where a talookdar's name was entered in the second, but not in the third, of the lists maintained under the above Act, the estate, although it was to descend to a single heir, was not to be considered as passing according to the rules of lineal primogeniture. ACHAL RAM *v.* UDAI PARTAB ADDIYA DAT SINGH

**[I. L. R., 10 Calc., 511: L. R., 11 I. A., 51**

2. ——— **and ss. 9 & 10.**—*Recognition of trust.*—Notwithstanding the confiscation of land in Oudh, followed by its restoration under the Government order of 11th March 1858, affirming the absolute title of those with whom summary settlements had been made, and the granting of sanads to the latter persons, with full power of alienation, confirmed by the Oudh Estates Act, 1869, the legal owner may, either by express agreement or by his conduct, constitute himself a trustee for others as to the whole or part of the beneficial interest in the land, the subject of such restoration, settlement, and sanad. RAMANAND KUAR *v.* RAGHUNATH KUAR. ANANT BAHADUR SINGH *v.* RAGHUNATH KUAR . **I. L. R., 8 Calc., 769: 11 C. L. R., 149**

3. ——— **and ss. 11 & 19.**—*Will of a talookdar.—Customary rule of succession in a family to impartible estate.—Primogeniture.*—However true it may be that, if there is absolutely nothing to guide to any other conclusion, impartible estate will descend in a family according to the rule of primogeniture, evidence may establish the usage in a family to be that, of several sons, one son, selected without reference to primogeniture, succeeds to the impartible estate. The eldest of three brothers had succeeded to an impartible family estate, and to a talook, also impartible, which had been, during the lifetime of their father, entered in the first and second, but not in the third, of the lists prepared in conformity

**OUDH ESTATES ACT, I OF 1869, s. 8 and ss. 11 & 19**—*continued.*

with section 8 of the Oudh Estates Act, I of 1869. Before his death his eldest brother made an instrument registered as a will, but using the word "tamlik," and stamped as a deed whereby he gave the talook to the third brother, reserving an interest in the whole for his own life, and in half for any son that might be born to him, with maintenance to his wife on her becoming a widow. *Held*, with reference to the *indicia* of a testamentary character, there being provisions for contingencies which might not be ascertained till the death of the maker of the instrument, as compared with the technical matters attending it, that this instrument was not a transfer *inter vivos*, but was a will, and within the above Act. *Held*, also, on the objection that a will or declaration made by the father had fixed a mode of descent which could not be altered by his successor, that section 11 of the above Act, giving to every heir and legatee of a talookdar power to transfer or to bequeath his estate, is not controlled by the proviso in section 19, declaring that nothing in that section shall affect wills made before the passing of the Act. The impartible family property other than the talook descending, like the latter, to a single successor, one of these brothers, the question as to which of them that one should be, depended on the custom of the family. On the evidence adduced as to the custom in this respect, the plaintiff, who was out of possession, and on whom, in order to make out his title, was the burden of proving that the rule of primogeniture prevailed, failed to do so. ISHRI SINGH *v.* BALDEO SINGH

[I. L. R., 10 Calc., 792: L. R., 11 I. A., 135

——— **s. 10.**—*Joint family under Mitakshara law.—Grant to member of talookdari.—Declaration of trust.*—In a suit by an adopted son against his father for a declaration of right with consequential relief in a share of a certain estate, the defendant pleaded that he was absolute owner thereof, and in regard to two of the talooks named was entered in the talookdar's list prepared under Act I of 1869. It appeared that under a number of family transactions the property in suit had been given to the defendant for such interest and with such right of succession to the plaintiff as by virtue of the law of the Mitakshara attaches to ancestral immoveable estate as between father and son. *Held* that the plaintiff was entitled to a declaration to that effect, and that section 10 was no bar to his assertion of the interest declared to be vested in him. SETH JAIDIAL *v.* SETH SITA RAM . . . . . L. R., 8 I. A., 215

——— **s. 13.**—*Will of talookdar.—Compulsory registration of will devising talook.—Deposit of will distinct from registration under Act VIII of 1871.*—A will devising a talook to a sister's son of a talookdar in the lifetime of the talookdar's brother is not excepted from the necessity of being registered under section 13 of the Oudh Estates Act, I of 1869, such sister's son not being one of those who, in the event of the talookdar having died intestate, would have succeeded to an interest in his estate, within the meaning of the exceptions made in section 13, sub-section 1 of that Act. It may be doubted whether

**OUDH ESTATES ACT, I OF 1869, s. 13**—*continued.*

the mere title to maintenance would be such an "interest" as would come within the meaning of the exceptions. The deposit of a will under Part IX of Act VIII of 1871 does not amount to the registration required by the above section of Act I of 1869. ABDUL RAZZAK *v.* AMIR HAIDAR

[I. L. R., 10 Calc., 976: L. R., 11 I. A., 121

——— **s. 22, cl. 4.**—*Conduct of talookdar as indicating his successor.—Daughter's son.*—Where an Oudh talookdar, not having male issue, is shown to have so exceptionally treated the son of a daughter as to give him in the family the place, consequence, and pre-eminence which would naturally belong to a son of his own if one existed, and would not ordinarily be conceded to a daughter's son, and has thus indicated an intention that the person so treated shall be his successor, such person will be brought within the enactment of the 4th clause of section 22, Act I of 1869. Circumstances affording evidence of such an intention considered. PERTAB NARAIN SINGH *v.* SUBHAO KOOER

[I. L. R., 3 Calc., 626: 1 C. L. R., 113
L. R., 4 I. A., 228

**OUDH SUB-SETTLEMENT ACT (XXVI OF 1866).**

1. ——— *Right to sub-settlement.—Under-tenures held under contract.*—Under-tenures held under contract, or under any arrangements from which a contract may be inferred, are within the definition of sub-proprietary rights given in the rules annexed to Act XXVI of 1866, and their holders are entitled to a sub-settlement. MAHARAJAH OF BULRAMPORE *v.* UMAN PAL SINGH

[L. R., 5 I. A., 225

2. ——— **Under-proprietary right in Oudh.**—*Settlement.—Circular Order, 29th January 1861.—Birt sankalp and khushust sankalp tenures.*—A provision in the Chief Commissioner's Circular Order of 29th January 1861 in effect declares that, to found a claim to a birt tenure in Oudh, possession must be shown to have existed in 1855, the year before annexation. This was assumed, for the purposes of this decision, to have had the force of law at the time when the Financial Commissioner ruled, in Circular Orders 5 and 6 of 5th June 1868, that "a claimant who cannot prove possession of his sankalp holding in 1262-63 Fasli (1854-55) has no *locus standi* in Court." Whether rightly treated by the Oudh Courts as an enactment of limitation, or rather to be considered as a disability affecting title, this provision was repealed by the effect of Acts XVI of 1865, section 5, and XIII of 1866, section 1, the suit of a birtiah becoming thereupon cognisable, notwithstanding that he might not have been in possession in 1855. The words of limitation in the Circular Order apply to all birt tenures, including those that are termed "sankalp," when the latter are in the nature of birts. Rules I and II in the schedule of the Oudh Sub-Settlement Act, XXVI of 1866, held not to exclude the plaintiff, he having shown that he, and those through whom he claimed, did not, in the

**OUDH SUB-SETTLEMENT ACT (XXVI OF 1866).—Under-proprietary right in Oudh—*continued.***

words of those rules, hold the land, "through privilege, or by favour of 'the talookdar,' but held by an under-proprietary right, under contract 'pucka,' with some degree of continuousness, since the village came into the talooka." DRIG BIJAI SING *v.* GOPAL DAT PANDAY . I. L. R., 6 Calc., 218 : 6 C. L. R., 146 [L. R., 7 I. A., 17

3. ——— **Right of tenant under talookdari settlement.**—*Tenancy-at-will.—Right of resumption.—Absence of under-proprietary right.*—At the confiscation and restoration of Oudh lands in 1858, it was intended to settle and restore, under regulation, to the talookdars, with certain exceptions, the talookdars' rights, and also to protect as far as was necessary, by sub-settlement or otherwise, the existing rights of the occupiers; but there is nothing to show any intention to advance beyond what the rights were at the time. Where the relation of talookdar and tenant at a rent of land within a talook has been shown to have existed at that date, and since the tenant cannot defeat the talookdar's right of resumption on due notice, notwithstanding a lengthened duration of tenancy, he is entitled to an under-proprietary right, either on the ground that, by reason of this state of things having brought him within the meaning of paragraph 2 of the schedule to Act XXVI of 1866, or on the ground that time and undisturbed enjoyment have ripened his holding into a species of ownership. The issues between the parties raising only the question of some form of proprietary right, still, if the tenant had shown any right whatever to remain undisturbed by the talookdar such right would have been considered on this appeal, and would have received effect. The allegation of a grant in perpetuity in 1826 at a rent to be varied according to the amount of revenue payable by the talookdar, not having been proved, but the existence and origin of a tenancy having been shown at a rent, paid down to the commencement of the suit,—*Held* that length of enjoyment, coupled with such payment of rent, could give no greater force to the tenant's right than it originally possessed. ROHAN SINGH *v.* SURAT SINGH

[I. L. R., 11 Calc., 318 : L. R., 12 I. A., 25

**OUDE TALOOKDARS' RELIEF ACT (XXIV OF 1870).**

——— s. 3.—*Hypothecation of lands under management.*—A talookdar, the management of whose talook at the time was vested in an officer appointed under section 3 of Act XXIV of 1870, made an instrument purporting to hypothecate the talook to secure payment of money borrowed by him. *Held* that, as the document contained no personal contract to pay out of personal estate, or any estate other than the talook, it was unnecessary to consider whether a talookdar, whilst his talook is under management in pursuance of the provisions of the above Act, is competent to make a personal contract, this being only an hypothecation of the property falling within section 4, clause 3 of the Act, and invalid within its meaning. NAROTAM DASS *v.* SHEO PARSASH SINGH

[I. L. R., 10 Calc., 740 : L. R., 11 I. A., 83

**OUDH TALOOKDARS' RELIEF ACT (XXIV OF 1870)—*continued.***

——— s. 10.—*Appeal.—Appeal allowed though presented after time.*—Case in which, having regard to exceptional circumstances and exceptional legislation, an appeal to the Commissioner of Division against a decision of a manager appointed under the Oudh Talookdars' Relief Act was held to have been rightly allowed, although preferred long after the period of six weeks prescribed by section 10. It appeared that the appellant in the Court below was a minor and incapable of exercising his right to appeal except through the manager, who himself made the order appealed from, and that the respondents (present appellants), had, after the expiration of the said six weeks, themselves prayed for a judicial determination of substantially the same questions as were raised by the present appeal. RAMJISDAS *v.* BHAGWAN BAX . . L. R., 5 I. A., 197

——— s. 25.—*Manager not made party to suit.—Effect on decree.*—Where a manager of the estate had been appointed under the provisions of Act XXIV of 1870 (The Oudh Talookdars' Relief Act), but had not been made a party to a suit relating to the right to succeed to the talookdari,—*Held* that the omission did not, under section 25, affect the validity of the decree between the parties. PERTAB NARAIN SINGH *v.* TRILOKINATH SINGH

[I. L. R., 11 Calc., 186 : L. R., 11 I. A., 197

**OWNERS AND OCCUPIERS, FINE IMPOSED ON—**

*See* BENGAL MUNICIPAL ACT, III OF 1864, s. 67 . . . 8 B. L. R., Ap., 9

**OWNERSHIP, INTENTION AS TO JOINT—OR SEVERAL—**

*See* HINDU LAW—PARTITION—REQUISITES FOR PARTITION.

[I. L. R., 4 Calc., 425, 434

**OWNERSHIP, PRESUMPTION OF—**

*See* BOUNDARY . . 9 W. R., 426

*See* ROAD, OWNERSHIP OF—

I. L. R., 4 Calc., 206

1. ——— **Ownership of tanks.**—*Possession sufficient to bring suit.*—In a suit to recover possession of the beds of tanks which, though gradually reclaimed and made fit for cultivation by defendants, were situate within plaintiff's mal estate, and had been measured and recorded in the zemindari chittahs as the khas khamar and unfit for cultivation,—*Held* that plaintiffs being unable from the nature of the ground to show any direct acts of ownership, the presumption was that until the act of defendant dispossessing them they were sufficiently in possession to enable them to maintain their right of suit. RUFAUTOOLLAH CHOWDHRY *v.* SHUSHEE SHIKHUR BANERJEE . . 14 W. R., 57

2. ——— **Enjoyment of fruit on trees.**—*Disputed right to possession.*—Where the question as to possession was doubtful, a Civil Court was held

**OWNERSHIP, PRESUMPTION OF.—Enjoyment of fruit on trees—*continued.***

to have committed no error of law in presuming ownership from the fact of enjoyment of the fruits of trees growing on the disputed land. DOLE GOBIND GOOPTO *v.* BATOO *alias* KISTO CHUNDER CHUCKERBUTTY . . . . . **22 W. R., 405**

3. ——— **Uncultivated lands.**—*Possession.—Title.*—Lands which have never been occupied for cultivation, and which are of such a nature and description as that no one can be said to be in possession, may be presumed rightfully to belong to the parties with whom the title rests. MOOCHEE RAM MAJHEE *v.* BISSAMBHUR ROY CHOWDHRY **[24 W. R., 410**

*See* SUNNUD ALI *v.* KURIMOONISSA **[9 W. R., 124**

LEELANUND SINGH *v.* BASHEEROONISSA **[16 W. R., 102**

4. ——— **Act of ownership.**—*Suit for possession.—Disputed possession.*—In a suit for possession, where it was found not only that all the land in dispute was comprised within boundaries specified in documents admitted by both parties, but also that plaintiff had for a long time stored bamboos and wood on one portion and grazed his cattle on another,—*Held* that these acts of ownership, taken in conjunction with the specification of boundaries, left no doubt that the lands concerned were the property of the plaintiff. RAM NARAIN ROY *v.* NILMONEE ADHIKAREE . . . . . **24 W. R., 144**

5. ——— *Measurement and mapping by Ameen.*—Where an Ameen measured and mapped land, and altered his map on objection made, the proceedings, as being merely upon paper, and not interrupting the actual possession or occupation of the land, were held not to amount to an act of ownership by either of the parties concerned, or to affect the question of possession. JANOKEE NATH CHOWDHRY *v.* BROJENDRO COOMAR ROY CHOWDHRY **[25 W. R., 65**

6. ——— **Adjoining buildings.**—*Walls of adjoining buildings on same foundation.*—Where the external walls of two adjoining houses which now belong to different owners, but which at one time were the property of the same person, have been erected wholly or partly on the same foundation wall, and there is an entire absence of evidence on either side as to the dates of the several purchases, or of the terms on which they were made, the presumption is that the line of demarcation of the two properties is that indicated by the superincumbent walls. RADHA MOHUN ROY *v.* RAJ CHUNDER DASS **[2 C. L. R., 377**

**OWNERSHIP, PRESUMPTION OF.—Adjoining buildings—*continued.***

7. ——— **Diversion of road.**—*Right of owners of land adjoining old road.—Public road.*—There is a presumption that a highway, or waste land adjoining thereto, belongs to the owners of the soil of the adjoining land. NIHAL CHAND *v.* AZMAT ALI KHAN . . . **I. L. R., 7 All., 362**

8. ——— **Forest lands in Malabar.**—*Hindu law.—Property in the soil.—Right of Sovereign.*—In the district of Malabar and the tracts administered as part of it, there is no presumption that forest lands are the property of the Crown. According to the Hindu law, a right to the possession of land is acquired by the first person who makes a beneficial use of the soil, the right of the Sovereign being to assess the occupier to revenue. SECRETARY OF STATE FOR INDIA *v.* VIRA RAYAN **[I. L. R., 9 Mad., 175**

9. ——— **Forest lands.**—*Acts of ownership—Property in the soil.*—In a suit to recover forest land from Government, the plaintiff having proved that he and his ancestors had cut wood, pastured cattle, and gathered forest produce in certain forests for fifty years, the lower Court held that such acts of enjoyment were only evidence of an easement and not of adverse possession. *Held* that these acts, as they had been done under the belief and assertion that the said tracts formed portion of the zemindari, and that the plaintiff and his ancestors were owners of the said tracts, were evidence of adverse possession. In principle, an act done is one of ownership or evidence of an easement according as the person doing it asserts general ownership or a particular right in another property. The enjoyment of any right of ownership over the soil is *primâ facie* proof of ownership of the soil. Where, therefore, the lower Court found such an enjoyment of a forest as proved title to the profits thereof, and such enjoyment was accompanied with an assertion of ownership of the soil,—*Held* that the Court was bound to find a title to the soil established. SIVASUBRAMANAYA *v.* SECRETARY OF STATE FOR INIDA . . **I. L. R., 9 Mad., 285**

**OWNERSHIP, TRANSFER OF—**

*See* CONTRACT ACT, s. 78. **[I. L. R., 4 Calc., 801**

*See* CASES UNDER VENDOR AND PURCHASER.

**OWNERSHIP IN THE SOIL.**

*See* PENSIONS ACT, 1871, s. 3. **[I. L. R., 1 Bom., 523**